

BEFORE THE
GOVERNING BOARD
OF THE
DEL PASO HEIGHTS SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of:

HOUA LEE, JAQUETTA REDD,
VANMANY SOUTHIVILAY,
YIA THAO, and CYNTHIA TORREZ,

Respondents.

OAH No: N2006030600

PROPOSED DECISION

This matter came on regularly for hearing before Jaime René Román, Administrative Law Judge, Office of Administrative Hearings, in Sacramento, California, on April 25, 2006.

Larry M. Buchanan, Ed.D., Superintendent of the Del Paso Heights School District, Sacramento County, State of California, was represented by Littler Mendelson, Attorneys at Law, by Aam J. Fiss, Esq.

Respondents Houa Lee, Jaquetta Redd, Vanmany Southivilay, Yia Thao, and Cynthia Torrez appeared and were represented by Beeson, Tayer & Bodine, Attorneys at Law, by Jason Rabinowitz, Esq.

Evidence and argument were received and the matter submitted on April 25, 2006.

FACTUAL FINDINGS

1. Larry Buchanan, Ed.D., Superintendent of the Del Paso Heights School District (District), made and filed in his official capacity an Accusation against respondents Houa Lee, Jaquetta Redd, Vanmany Southivilay, Yia Thao, and Cynthia Torrez (respondents).

2. Respondents are each permit teachers in the District's Head Start program at Morey Avenue Preschool.

3. As a result of a \$444,444 shortfall in the District's Head Start program, due, in part, to under-enrollment, and advised of a federally mandated one percent reduction in Head Start funding for School Year 2006 – 2007; the District Governing Board, on February 28, 2006, adopted Resolution 2005-2006-18 reducing or discontinuing services in the District's Head Start program for the 2006 – 2007 school year; and, concomitantly, decreasing the number of District permit teachers in the Head Start program to the equivalent of 8.0 full-time equivalent (FTE) positions. The Board further directed the Superintendent or his designee to send appropriate notices to affected District employees.

4. The services rendered at the District's Morey Avenue Preschool are particular kinds of services that can be reduced or discontinued within the meaning of Education Code section 44955. The Governing Board's decision to reduce or discontinue these particular kinds of services was neither arbitrary nor capricious, but constituted a proper exercise of discretion and was related to the welfare of the District and its pupils. Accordingly, it was necessary to decrease the number of District permit employees as determined by the Board.

5. Prior to March 15, 2006, a Notice of Reduction in Force was delivered to eight District Head Start program permit teachers, including respondents, by registered mail. The District has diligently sought to reduce the impact of its Governing Board's reductions on its Head Start program permit personnel. Subsequent events have reduced the number of Head Start teachers affected by this action to the five respondents (5.0 FTE). The notice provided to each respondent set forth that each respondent's services will not be required for the ensuing school year and stating the reasons for the recommendations, pursuant to Education Code sections 8366,¹ 44949, and 44955. Each notice set forth that the District's action was not related to each respondent's performance as a teacher. The notice also advised each respondent of her right to a hearing, that each respondent had to deliver her request for a hearing in writing by March 23, 2006, and that the failure to request a hearing would constitute the waiver of a right to a hearing.

6. Each respondent requested a hearing to determine if there was cause for not reemploying her for the ensuing school year. One respondent, Houa Lee, claimed that her notice from the District did not arrive until "two weeks later." Ms. Lee's notice was addressed to 155 Bell Street, Sacramento, CA 95838. Ms. Lee resides at 155 Bell Avenue, Sacramento, CA 95838. Although she did not receive the notice until March 27, 2006, upon receiving Ms. Lee's request for a hearing, the District properly provided her a hearing.

7. Aware that this reduction in force might require the application of tie-breaker criteria between or among permit employees who first rendered paid service to the District on the same date, the Governing Board set forth criteria to meet the needs of the District and its students. To that end, the Board directed: "The Superintendent or his designee shall determine the order of termination or reappointment solely on the basis of the needs of the District and the students considering one of [sic] more of the following criteria: 1. Bilingual competency; 2.

¹ Education Code section 8366 provides, in pertinent part: "A district may lay off an employee required to have such a permit at any time during the school year for lack of work or lack of funds."

Possession of a Bachelor of Arts degree; 3. Amount of earned Early Childhood Education (ECE) units; 4. Prior long-term substitute or temporary teaching experience within the Del Paso Heights School District; and 5. Evaluations.” The Board also expressly provided: “The Superintendent or his designee has the discretion to determine which criteria is most relevant to the service needs of the District and students in each tie-breaker situation.”

8. Associate Superintendent Patricia H. Hogan-Newsome undertook, at the direction of the Superintendent, a determination of which criteria to apply in ascertaining the District and its students’ needs. To that end, she balanced the District and its students’ needs in favor of teachers who possessed a baccalaureate degree, earned ECE units, and had prior long-term substitute or temporary teaching experience within the Del Paso Heights School District, and discarded bilingual capacity and evaluations. Applying its criteria, the District arrived at the following pertinent seniority list:

Teacher	District Date of Seniority ²
Sheila D. Kennedy	9-10-1997
Kalyshia Conway	4-13-2000
Edith Black	5-25-2000
Rala Dayal	7-24-2000
Vanmany Southivilay	7-24-2000
Yia Thao	12-11-2000
Houa Lee	12-15-2000
Jaquetta Redd	12-15-2000
Cynthia Torrez	1-30-2002

9. The District employs teachers senior by date of hire to respondents who are both certificated or permitted and competent to render the particular kinds of services provided by junior certificated or permitted employees, including respondents. By virtue of that seniority, such employees have the right to “bump” these junior employees, including respondents, and retain their District employment.³

10. Respondents, disputing the District’s seniority list, largely addressed themselves to the tie-breaker criteria employed by the District and contest that seniority list as follows:

Teacher	District Date of Seniority	Claimed Date of Hire
Sheila D. Kennedy	9-10-1997	
Kalyshia Conway	4-13-2000	
Edith Black	5-25-2000	

² Prior to the evidentiary presentation of its case, the District withdrew its Accusations against Kalyshia Conway, Edith Black, and Rala Dayal.

³ *Santa Clara Federation of Teachers v. Governing Board of Santa Clara Unified School District* (1981) 16 Cal.App.3d 831, 847.

Rala Dayal	7-24-2000	
Vanmany Southivilay	7-24-2000	9-27-1999
Yia Thao	12-11-2000	9-10-1997
Houa Lee	12-15-2000	7-24-2000
Jaquetta Redd	12-15-2000	7-24-2000
Cynthia Torrez	1-30-2002	7-24-2000

11. Regardless of when a permit employee "first rendered paid service,"⁴ the District assigns an employee date of seniority consistent with her California Commission on Teacher Credentialing (CTC) permit's date of issuance. The District readily acknowledges:

- A. Ms. Thao first commenced employment with the District as a temporary pre-school employee on September 10, 1997.
- B. Ms. Lee first commenced employment with the District as a temporary pre-school employee on July 24, 1997.
- C. Ms. Redd first commenced employment with the District as a temporary pre-school employee on July 24, 1997.
- D. Ms. Torrez first commenced employment with the District as a temporary pre-school employee on July 24, 1997.

However, the District did not assign a date of seniority to these respondents until their acquisition of a CTC permit. Accordingly, upon receipt of Ms. Thao's CTC permit with an issuance date of December 11, 2000, a District date of seniority of December 11, 2000 followed. Similarly, with Ms. Lee, Ms. Redd, and Ms. Torrez, the District followed the same practice.

12. Respondents, claiming that their seniority should be based on date of District hire—not receipt of CTC permit, submit that the District's Seniority List should read as follows:

Teacher	Date of Seniority
Sheila D. Kennedy	9-10-1997
Yia Thao	9-10-1997
Vanmany Southivilay	9-27-1999
Kalyshia Conway	4-13-2000
Edith Black	5-25-2000
Rala Dayal	7-24-2000
Cynthia Torrez	7-24-2000
Houa Lee	7-24-2000
Jaquetta Redd	7-24-2000

⁴ See Education Code section 44845.

13. In support of their contention that the District Seniority List should be modified, respondents relied on a March 11, 2003 Temporary Pre-Schools Chart which depicted the dates of hire for the District's 2002 – 2003 Morey Avenue Preschool program. Respondents selectively employed various dates of hire as it pertained to them, without equally observing how that list, which includes the names of other teachers, would apply to the District's present Seniority List. Applying the same criteria, the following emerges:

Sheila D. Kennedy	9-10-1997
Yia Thao	9-10-1997
Kalyshia Conway	9-10-1997
Vanmany Southivilay	9-27-1999
Edith Black	12-29-1999
Rala Dayal	7-24-2000
Houa Lee	7-24-2000
Jaquetta Redd	7-24-2000
Cynthia Torrez	7-24-2000

14. Ms. Southivilay, in contrast to the other respondents, submits that her date of seniority should be adjusted for substitute teaching which commenced as early as September 27, 1999. Ms. Southivilay errs. Her substitute teaching during the 1999 – 2000 was intermittent and spread among various absent teachers. It is clear that substitute services for which no expectation of exclusive District employment was demonstrated or met 75 percent District rendered services does not function to modify the District's date of seniority for Ms. Southivilay. Ms. Southivilay's claim is summarily dismissed.⁵

15. Ms. Southivilay was affected by the Governing Board's tie-breaker criteria and the manner in which select criteria were applied, in large part, by Ms. Newsome. Ms. Dayal "bumped" Ms. Southivilay. Ms. Newsome, in conducting her analysis of both women, observed the following:

	Ms. Dayal	Ms. Southivilay
Bachelor's Degree	Yes	No
Long Term Sub/Temp	N/A	N/A
ECE Units	32 units	18 units

16. Ms. Southivilay argues that Ms. Newsome failed to abide by the Governing Board's criteria by not considering language skills or evaluations. Ms. Southivilay neglects to observe that discretion in terms of which criteria were to be employed was entrusted to the Superintendent or his designee, in this case, Ms. Newsome. Regardless, in addressing Ms.

⁵ Education Code sections 44914 and 44918; *San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627, 631 and 642; *Ham v. Los Angeles City High School Dist.* (1946) 74 Cal.App.2d 773; and *Wood v. Los Angeles City School Dist.* (1935) 6 Cal.App.2d 400.

Southivilay's objections, Ms. Newsome candidly indicated she gave no weight to evaluations because they were not that particularly different. While Ms. Southivilay counters that her overall evaluations were higher than Ms. Dayal, the undersigned concurs with Ms. Newsome's analysis. Having reviewed the various evaluations, the differences, while marginally favoring Ms. Southivilay, are insufficiently dispositive. While Ms. Southivilay possesses English – Laotian language skills, she admits that it impacts five to six students. Ms. Newsome observed that Hmong, Spanish, and Russian were language skills of more import to the District. A language ability that is limited to a few students, combined with marginally more favorable evaluations, does not offset the District's need for teaching competency as reflected by a focus on additional ECE credits and a bachelor's degree.⁶ Ms. Southivilay's challenge to the District's tie-breaker criteria as it applied to her fails. Accordingly, applying the criteria submitted by respondents to all pertinent parties, the following seniority list emerges:

Teacher	Date of Seniority
Sandy Holley	3-24-1997
Sheila D. Kennedy	9-10-1997
Yia Thao	9-10-1997
Kalyshia Conway	9-10-1997
Edith Black	12-29-1999
Rala Dayal	7-24-2000
Cynthia Torrez	7-24-2000 ⁷
Houa Lee	7-24-2000
Jaquetta Redd	7-24-2000
Vanmany Southivilay	7-24-2000

17. The District employs some permitted employees who have been hired after some of the respondents. The District, particularly including its Twilight Preschool Program, demonstrated a specific and immediate need for personnel to provide services authorized by a services permit or credential that the respondents, although having more seniority, did not possess.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists pursuant to Education Code sections 8366, 44949, and 44955, and as set forth in Findings 1 through 6.

2. A school district may consider its financial circumstances in deciding whether to reduce or discontinue a particular kind of service. *San Jose, supra*, 144 Cal.App.3d at p.639.

⁶ No evidence was presented whether Ms. Dayal does or does not possess bilingual language skills.

⁷ Ms. Torrez has a bachelor's degree and bilingual capacity in Spanish, a language common to a number of District pupils in its Head Start program. Applying the District's criteria vis-à-vis Ms. Lee, Ms. Redd, and Ms. Southivilay, and in the absence of other evidence, Ms. Torrez emerges as more qualified for seniority determination.

3. Under the statutory scheme, junior teachers may be given retention priority over more senior teachers when the junior teachers possess superior skills or capabilities which their more senior counterparts lack.⁸ In addition, under the same statutory scheme, a senior employee whose position is discontinued has the right to transfer to a continuing position he or she is certificated and competent to fill, and in so doing may displace or "bump" a junior employee.⁹

4. The District Governing Board must determine the order of termination solely on the basis of needs of the District and its pupils.¹⁰ However, "a school district cannot target for reduction the services of a particular employee in disregard of his or her seniority rights."¹¹ Admittedly, an administrative proceeding need not "be conducted according to technical rules relating to evidence and witnesses."¹² In balancing the parties' respective evidence, the undersigned applied, in part, criteria set forth at Evidence Code sections 412,¹³ 413,¹⁴ 500,¹⁵ 780,¹⁶ 786,¹⁷ 790¹⁸ and 791¹⁹ in ascertaining the relative convincing force of evidence.

⁸ *Poppers v. Tamalpais Union High School District* (1986) 184 Cal. App.3d 399, 405.

⁹ *Ibid.*

¹⁰ *Santa Clara*, *supra* 116 Cal.App.3d at p. 844.

¹¹ *Marshall v. Russo* (1987) 197 Cal. App.3d 124.

¹² Government Code section 11512, subdivision (c).

¹³ Evidence Code section 412 provides, "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust."

¹⁴ Evidence Code section 413 provides, "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case."

¹⁵ Evidence Code section 500 provides, "A party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."

¹⁶ Evidence Code section 780 provides, in pertinent part: "Except as otherwise provided by statute, the court may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following: (a) His demeanor while testifying and the manner in which he testifies. (b) The character of his testimony. (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies. (d) The extent of his opportunity to perceive any matter about which he testifies. (e) His character for honesty or veracity or their opposites. (f) The existence or nonexistence of a bias, interest, or other motive. (g) A statement previously made by him that is consistent with his testimony at the hearing. (h) A statement made by him that is inconsistent with any part of his testimony at the hearing. (i) The existence or nonexistence of any fact testified to by him. (j) His attitude toward the action in which he testifies or toward the giving of testimony. (k) His admission of untruthfulness."

¹⁷ Evidence Code section 786: "Evidence of traits of his character other than honesty or veracity, or their opposites, is inadmissible to attack or support the credibility of a witness."

¹⁸ Evidence Code section 790: "Evidence of the good character of a witness is inadmissible to support his credibility unless evidence of his bad character has been admitted for the purpose of attacking his credibility."

¹⁹ Evidence Code section 791: "Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after: (a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen."

- A. Houa Lee claims that the late receipt of her notice from the District should invalidate its applicability to her. She errs. Although the District received Ms. Lee's request for a hearing late, the District properly provided her a hearing.²⁰ Indeed, Education Code section 44949, subdivision (c)(3) states, in pertinent part: "Nonsubstantive procedural errors committed by the school district or governing board of the school district shall not constitute cause for dismissing the charges unless the errors are prejudicial errors." It cannot be said that Ms. Lee has suffered prejudicial error.²¹ Ms. Lee's claim is dismissed.
- B. It is undisputed that respondents' dates of hire are distinctly at variance with their respective seniority dates. Respondents, unsurprisingly, argue that their seniority should be based on their respective dates of hire. The District, in contrast, responds that the services rendered by respondents between their respective dates of hire and dates on which a CTC permit issued were effected under a provisional permit and, citing Education Code section 8364, argues each respondent's service "shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee of a child development program." In other words, although hired, these District employees may not receive the benefit of Education Code section 44845 because of a purported limitation imposed by section 8364.
- (1) Education Code section 8360, subdivision (a)(1) provides, in pertinent part: "Child development programs shall include a career ladder program for classroom staff. Persons who are 18 years of age and older may be employed as aides and may be eligible for salary increases upon the completion of additional semester units in early childhood education or child development."
 - (2) The District originally employed each of the respondents, either as a substitute teacher (Ms. Southivilay) or as temporary teachers (Ms. Thao, Ms. Lee, Ms. Redd, and Ms. Torrez). Their presence in the classroom, and capacity to render services to District pupils, was based on a "provisional permit"²² or a "temporary certificate."²³ The District, mindful that each respondent lacked a CTC permit at the time of her original employment, considered their employment as "temporary."
 - (3) To qualify and be employed as an ECE teacher, a person must possess a CTC permit.²⁴

²⁰ Our law does not respect form over substance. Civil Code section 3528; *Lencioni v. Fidelity Trust & Sav. Bank* (1928) 95 Cal. App. 490.

²¹ See also *San Jose, supra*, 144 Cal. App 3d 8364 at p. 634.

²² Education Code section.

²³ Education Code section 8365.

²⁴ Education Code section 8360, subdivision (a)(2).

- (a) Respondent Yia Thao, originally employed by the District on September 10, 1997, did not obtain a CTC permit until December 11, 2000.
 - (b) Respondent Vanmany Southivilay, originally employed by the District on September 27, 1999, as an intermittent substitute, did not obtain a CTC permit until July 24, 2000.
 - (c) Respondent Cynthia Torrez, originally employed by the District on July 24, 2000, did not obtain a CTC permit until January 30, 2002.
 - (d) Respondents Houa Lee and Jaquetta Redd, originally employed by the District on July 24, 2000, did not obtain their CTC permits until December 15, 2000.
- (4) Respondents' lack of a CTC permit does not provide a sufficient basis pursuant to Education Code sections 8360, 8364, 8365, and 8365 to compel deference to their argument that their original dates of hire should supplant the District assigned seniority dates.
- (5) Respondents next seek to characterize their provisional or temporary status as "probationary" pursuant to Education Code section 44845. Education Code section 44845 specifically sets forth: "Every probationary or permanent employee employed after June 30, 1947, shall be deemed to have been employed on the date upon which he first rendered paid service in a probationary position." Respondents have failed to demonstrate that this provision is applicable to ECE teachers on a provisional, temporary, or permit status.²⁵ Mindful that there are only four possible teacher classifications: "permanent, probationary, substitute and temporary"²⁶ and that "the Education Code does not refer to or classify teachers as 'provisional,'" it appears evident that each respondent, while serving under her "provisional permit" or "temporary certificate," was entitled to classification as a probationary or even temporary employee, but not for purposes of attaining tenure.²⁷
- (6) Allowing employees teaching under a temporary credential or provisional permit to accrue seniority could lead to the absurd result of such employees being retained in a layoff situation over fully-credentialed teachers with less school District service.²⁸

²⁵ *Summerfield v. Windsor Unified School Dist.* (2002) 95 Cal.App.4th 1026.

²⁶ *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916.

²⁷ *Fine v. Los Angeles Unified School Dist.* (2004) 116 Cal. App. 4th 1070, 1077, fn. 6.

²⁸ *Summerfield, supra*, 95 Cal.App.4th at p. 1035; *California Teachers' Association v. Governing Board of the Golden Valley Unified School District* (2002) 98 Cal.App.4th 369.

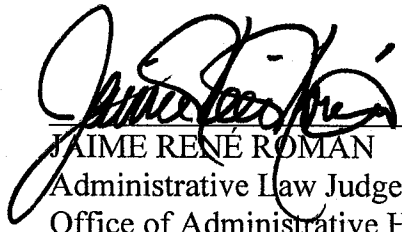
5. Cause exists because of reductions in particular kinds of services pursuant to Education Code sections 8366 and 44955 to give notice to respondents in 5.0 full-time equivalent positions as set forth in Findings 1 through 17. The cause relates solely to the welfare of the District and its pupils within the meaning of Education Code sections 8366 and 44949.

ORDER

1. Notice shall be given to respondents that their services will not be required for the 2006 – 2007 School Year because of the reduction or discontinuance of particular kinds of services.

2. Notices shall be given to respondents in inverse order of seniority.

Dated: May 4, 2006


JAIME RENÉ ROMAN
Administrative Law Judge
Office of Administrative Hearings