

BEFORE THE
GOVERNING BOARD
OF THE
RIALTO UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Employment Status of:

All Certificated Employees of the Rialto Unified School District Who Received Preliminary Layoff Notices for the 2008-2009 School Year,

Respondents.

OAH No. 2008020556

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Etiwanda, California, on April 22, 2008.

Mark W. Thompson and William Diedrich, Attorneys at Law, represented the Rialto Unified School District.

Glen Rothner and Robert Lindquist, Attorneys at Law, represented the certificated teachers employed by the Rialto Unified School District who received preliminary layoff notices for the 2008-2009 school year.

The matter was submitted on April 22, 2008.

FACTUAL FINDINGS

The Rialto Unified School District

1. The Rialto Unified School District (the District) is located in Rialto, between the cities of Fontana and San Bernardino. It serves the community of Rialto and other communities and unincorporated areas within the area.

The District is the 35th largest school district in California. The District serves the educational needs of about 28,000 students from Kindergarten through 12th Grade at 17 elementary schools, five middle schools, three comprehensive high schools, an adult

continuation school and an independent studies program. The student body is approximately 75 percent Hispanic, 16 percent African-American, with the remainder Anglo-American. Approximately 25 percent of the students are English language learners.

The District employs approximately 2,800 persons, about 1,400 of whom are certificated employees providing direct services and supports to students. The District has an annual budget of approximately \$240 million.

2. The District is governed by an elected five-member Board of Education (the Board).

Edna E. Davis-Herring (Superintendent Herring) is the Superintendent of Schools and the Board's Chief Executive Officer. Anna Maria Rodriguez (Assistant Superintendent Rodriguez) is an Assistant Superintendent of Schools and serves as the District's Personnel Officer. Rhonda D. Kramer (Ms. Kramer) is the District's Coordinator of Personnel Services.

The Fiscal Crisis – Economic Layoffs

3. Proposition 13 limited the imposition of local property taxes and reduced a major source of assured revenue for funding public education in California. Since the passage of Proposition 13, public school districts have looked primarily to the State of California and to other governmental entities for funding.

A school district must maintain a balanced budget. A school district cannot determine the level of state funding it will receive until the state budget is chaptered, an event usually occurring in late June. Before then, a school district's governing board must take steps to make certain that ends meet if the worst-case financial scenario develops. California's current economic crisis has made budgeting problems far more complicated than before.

A school board's obligation to balance its budget often requires that some teachers, administrators and/or other certificated employees be given preliminary layoff notices, warning them that their services will not be required for the next school year. Under Education Code section 44949, these preliminary layoff notices must be given no later than March 15.

The economic layoff statutes found in the Education Code generally require the retention of senior employees over more junior employees and the retention of permanent employees over probationary employees and other employees with less seniority. A public school district may deviate from the general rule requiring termination in reverse order of seniority only if it can demonstrate that identifiable junior employees possess a credential, special training or experience necessary to teach a course of study or to provide services which more senior employees do not possess.

The District's Response

4. In early 2008, the District's administration (as well as the administrators of most other school districts) became aware of the State of California's massive economic problems and the Governor's proposed budget in response to it. As a result of the financial crisis, the District projected a budget deficit of about \$20 million for the 2008-2009 school year. The District was required to look into ways to deal with its projected budget shortfall.

Under the direction of Superintendent Herring, Assistant Superintendent Rodriguez and the District's administrative staff considered methods to meet the budgetary problems. On February 13, 2008, Superintendent Herring recommended to the Board that the District reduce or eliminate 305 Full Time Equivalent (FTE) positions for the 2008-2009 school year.

5. On February 13, 2008, the Board passed Resolution No. 07-08-39 (Reduction of Particular Kinds of Services). That resolution stated:

WHEREAS, the Board of Education of the Rialto Unified School District has determined that the particular kinds of services set forth herein must be reduced or discontinued; and

WHEREAS, it is the opinion of the Board that because of the aforementioned reason, it is in the best interest of the District that the number of regular certificated employees of the District must be reduced; and

WHEREAS, this Board does not desire to reduce the services of regular certificated employees based upon reduction of average daily attendance during the past two years; and

WHEREAS, this Board has determined that due to a significant population of English language learners with specialized educational needs, a specific and compelling need exists to employ and retain certificated employees who have authorization to teach English Learner ("EL") students, as determined by the California Commission on Teacher Credentialing, and the special training and experience that comes therewith; and

WHEREAS, Education Code section 44955(d) authorizes this Board to deviate from terminating certificated employees in order of seniority for the above reason, if necessary; and

WHEREAS, State law mandates that each failure to staff a classroom containing one or more EL students with a certificated employee possessing an appropriate EL authorization is a "misassignment" subject to sanction by the County Superintendent of Schools; and

WHEREAS, compliance with the provisions of the No Child Left Behind Act and the Williams Settlement require that EL students be served by certificated employees with appropriate EL authorizations; and

WHEREAS, the needs of the District and the students thereof should not and cannot be adequately served by concentrating EL students in particular classrooms in such a manner as to lessen the need for certificated employees with EL authorizations.

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the Rialto Unified School District as follows:

A. That the particular kinds of services set forth below be reduced or eliminated commencing in the 2008-2009 school year:

AB1802 Counselors	9	F.T.E.
Anger Management/Crisis Intervention Counselor	1	F.T.E.
Behavior Specialist	1	F.T.E.
BTSA Support Providers	7	F.T.E.
EL Intervention Teacher	1	F.T.E.
Elementary Music Teachers	4	F.T.E.
Elementary Teachers	200	F.T.E.
Elementary VAPA Teacher	1	F.T.E.
English Intervention Teacher	1	F.T.E.
High Priority Schools Grant Teacher	1	F.T.E.
High Priority Schools Grant Coach	1	F.T.E.
High School SED Teacher	1	F.T.E.
Literacy Coaches	8	F.T.E.
Math Coaches	12	F.T.E.
Math Intervention Teachers	2	F.T.E.
Middle School Communicative Handicapped Teacher	1	F.T.E.
Middle School Librarians	3	F.T.E.
Middle School SED Teacher	1	F.T.E.
Preschool Teachers	3	F.T.E.
QEIA Grant Teachers	3	F.T.E.
Reading First Coaches	13	F.T.E.
SLC Coordinator	1	F.T.E.
Special Education Instruction Specialists	2	F.T.E.
Technology Coach	1	F.T.E.
Title I/Title II Reading Support Teachers	2	F.T.E.
Teachers on Special Assignments	4	F.T.E.
Teachers on Special Assignments-EL Support	21	F.T.E.
TOTAL CERTIFICATED POSITIONS	305	F.T.E.

B. That due to the reduction or elimination of particular kinds of services, a corresponding number of certificated employees of the District shall be terminated pursuant to Education Code section 44955.

C. That the reduction of certificated staff be achieved by the termination of regular employees and not by terminating temporary or substitute employees.

D. That "competency" as described in Education Code sections 44955(b), 44956, and 44957, for the purposes of bumping and rehire rights, shall necessarily include possession of a valid credential and compliance and/or Highly Qualified status under NCLB in the relevant subject matter area, and an appropriate EL authorization.

E. That, as between certificated employees with the same seniority date, the order of termination shall be determined solely by Board-adopted criteria.

F. That the District Superintendent or designee is directed to initiate layoff procedures and give appropriate notice pursuant to Education Code sections 44955 and 44949.

PASSED AND ADOPTED this 13th day of February, 2008, in the County of San Bernardino, California.

/Signed/

President, Board of Education.

I, Edna E. Davis-Herring, Superintendent of Rialto Unified School District of San Bernardino County, California, do hereby certify that the foregoing is a full, true and correct copy of a Resolution adopted by the District's Board of Education at a duly scheduled meeting thereof.

Dated February 13, 2008

/Signed/

Edna E. Davis-Herring, Superintendent

6. The resolution called for the reduction or elimination of 305 FTEs, which was necessary to meet the budget shortfall. The resolution also defined "competency" for the purposes of bumping¹ rights to necessarily include possession of a valid credential and compliance and/or Highly Qualified status under NCLB in the relevant subject matter area, and an appropriate EL authorization. Assistant Superintendent Rodriguez established that the District's failure to retain employees falling within the Board's definition of "competency" might result in the loss of state or federal funding or the imposition of other sanctions. On this basis, the reduction in particular kinds of services related to the welfare of the schools and the pupils.

7. The resolution called for the reduction of 200 FTEs for "Elementary Teachers," by far the largest category of certificated employees scheduled for layoff.

¹ "Bumping" is a term used to describe the right of a senior employee whose position has been discontinued to transfer to a continuing position which the senior employee is certificated and competent to fill. In doing so, the senior employee displaces or "bumps" a junior employee who holds that position.

Assistant Superintendent Rodriguez testified that the resolution did not provide a more particular description of the services provided by elementary school teachers. No evidence established that any employee, including any elementary school teacher, who was served with a preliminary notice was unaware of the probability that his or her services might not be required for the ensuing year to the extent that he or she was prevented from looking elsewhere for employment.

8. Ms. Kramer, the District's Coordinator of Personnel Services, prepared a District-wide certificated seniority list. The seniority list contained the names of all certificated employees, descending from the most senior employee to the most junior, the hire date of each employee (first date of paid service in a probationary capacity), the school site where each employee provided services, each employee's school site assignment, each employee's tenured status (tenured, probationary 1, or probationary 2), and each employee's service credential(s) and certification(s). Temporary and substitute teachers were not included in the certificated seniority list.

A separate list was prepared for pre-school teachers, since the pre-school program required different credentials and had to be handled differently by the District.

The seniority list was circulated throughout the District, and certificated employees were invited to make any corrections or changes to their hire dates and to their credential(s) and certification(s) status. The corrected lists were returned to the District office and appropriate revisions were made.

9. For persons hired on the same date, Ms. Kramer applied the Board's tie-breaking criteria, a procedure authorized under Education Code section 44955. The tie-breaking procedure was based on the basis of needs of the schools and the students thereof. Ms. Kramer applied the following criteria in order, one step at a time, to resolve ties in seniority between credentialed employees:

“1. No Child Left Behind (NCLB) compliant (i.e., highly qualified in the subject areas the person is presently teaching);

2. Possession of Commission on Teacher Credentialing authorization to teach English Language Learners (i.e., BCLAD, CLAD, etc.);

3. Possession of additional NCLB compliant credentials or authorizations to teach additional subject areas;

4. Possession of a Master's Degree in subject area being taught (earliest degree prevails);

5. Possession of a University Certificate in teaching GATE students;

6. Current assignment includes GATE classes or Advanced Placement classes.

7. Prior full time teaching experience outside the district (not substitute teaching) as verified by documents on file with the Personnel office (highest number of verified years prevails); and

8. Teaching experience in different grades or subject areas.”

10. Some certificated employees held positions which did not require NCLB compliance. There were 14 separate categories of particular kinds of services listed within the Board's resolution which did not require an employee to be NCLB compliant. For example, administrators, teachers on special assignment (TOSA), and literary coaches held positions that did not provide or require NCLB compliance. But, an employee's failure to hold a position requiring NCLB compliance or the employee's failure to be NCLB compliant came into play in the layoff only if the employee fell within a particular kind of service that was being eliminated and was involved in a tie-breaking process with another employee hired the same date after bumping. It was not established that the actual application of the tie-breaking criteria operated unfairly for any specific employee although that possibility was argued.

11. Using all the documents in the District's possession, including the updated seniority list and the District's tie-breaking criteria, Ms. Kramer carefully prepared a "certificated layoff-bump analysis" to determine which employees should receive preliminary layoff notices. The concept of "detail-oriented" understates the manner and extent to which the certificated layoff-bump analysis was prepared.

In determining how many preliminary layoff notices needed to be served, Ms. Kramer considered positive attrition including retirements, resignations, and non-renewals. Her goal in creating the layoff-bump analysis was to ensure that no junior employee was retained to render services which a more senior employee was qualified and competent to provide. That goal was met.

12. On and before March 15, 2008, the District sent preliminary layoff notices to the 273 certificated employees whose positions were impacted by the Board's resolution, based on the layoff-bump analysis. In the process, the District failed to send a preliminary layoff notice to Shari Yoshimitsu, who should have received such a notice but did not. Of those who were served with preliminary layoff notices, 252 certificated employees requested a hearing.

13. On or before March 15, 2008, each certificated employee who is a party to this proceeding (i.e., a respondent) was given notice that the Superintendent had recommended that his or her services with the District be terminated at the conclusion of the current school year and that his or her services would not be needed by the District for the upcoming 2008-2009 school year. Each employee was notified of the right to a hearing. Numerous employees filed timely requests for a hearing. The accusation and other required jurisdictional documents were timely served on those employees, most of whom filed a notice of defense thereafter. All jurisdictional requirements were met.

The Administrative Hearing

14. On April 22, 2008, the record in the administrative hearing was opened. The parties stipulated that the caption could be amended. The District gave an opening statement and filed a pre-hearing brief. Jurisdictional documents were presented, sworn testimony and documentary evidence was received, closing arguments were given, the record was closed and the matter was submitted.

Documentary Evidence

15. The District provided numerous exhibits including the Superintendent's recommendation for the reduction of particular kinds of service under Education Code sections 44949 and 44950, a recommendation that 305 FTE services would not be required, Board Resolution No. 07-08-39, a non-exclusive delegation of authority authorizing Assistant Superintendent Rodriguez to act on the Superintendent's behalf during the layoff proceeding, the accusation packet (notice of recommendation, notice of accusation, accusation, blank notices of defense, relevant code sections), proof of service of those documents, notices of defense and requests for hearing, the notice of hearing and proof of service of the notice of hearing, the certificated seniority list, the tie-breaking criteria, the 2007 certificated layoff-bump analysis, and the final layoff list (proposed).

Stipulation

16. It was stipulated that the District failed to send a preliminary layoff notice to Shari Yoshimitsu, who should have received such a notice, but properly served all other respondents. Ms. Yoshimitsu did not testify, although it was represented that she was present at the hearing.

Testimony

17. Assistant Superintendent Rodriguez and Ms. Kramer testified in the District's case in chief. Each was a highly credible witness.

18. Stephen White, an assistant to Assistant Superintendent Rodriguez, testified that the District recently experienced some declining enrollment, with the student body dropping from approximately 31,000 students to 28,500 students within the past year or so. He met with some teachers on at least one occasion to discuss this matter. White testified that Assistant Superintendent Rodriguez was more familiar than he with the layoff procedure, and that Ms. Kramer was far more familiar than he with the preparation of the seniority list and the layoff-bump analysis. Respondents' offer of proof that White could establish the Board's actual motivation in initiating the layoff proceedings was due, in whole or in part, to a decline in average daily attendance was rejected as being irrelevant and immaterial.

19. While respondents argued that the decline in average daily attendance, rather than the budget deficit, was the real motivation for the Board's decision to layoff certificated employees, the decline in the size of the student body was ultimately irrelevant and was not material to these proceedings since the Board specifically chose to reduce particular kinds of services (see Legal Conclusion 5). Further, the argument about the Board's "real" motivation was particularly suspect given the massive nature of the projected budget shortfall compared to the relatively minor reduction in the student population.

The Board's reduction in services was reasonable and was not based on fraudulent, arbitrary or capricious action.

20. Ann Snavely began working for the District in 1996. She taught at Trapp Elementary School and was one of the 200 elementary school teacher given a preliminary layoff notice for the 2008-2009 school year. Ms. Snavely credibly testified that she began her career at Trapp in 1996, and then transferred to another elementary school within the District. She worked at the other school for several years. Ms. Snavely wanted to return to Trapp, and she let her wishes be known to (then) Assistant Superintendent Joe Davis (Assistant Superintendent Davis), who asked Trapp to submit a resignation so he could fill her position at the school site where she was currently teaching.

Ms. Snavely was led to believe that if she were to resign, she would receive a teaching assignment at Trapp in short order, and that Assistant Superintendent Davis needed her resignation.

Ms. Snavely specifically asked Assistant Superintendent Davis, "So what difference will this [submitting a resignation] make to me?"

Assistant Superintendent Davis told Ms. Snavely, "You'll pick up right where you left off."²

On June 25, 2002, Ms. Snavely signed a resignation from employment with the District. Assistant Superintendent Davis's stamped signature is on that document.

On July 21, 2002, Ms. Snavely was rehired and was assigned to teach at Trapp. Ms. Kramer was present when the new employment contract was signed. Ms. Kramer did not testify about the circumstances under which Ms. Snavely continued her employment. Ms. Snavely did not miss teaching a single day of school. She had no idea that she had severed her employment relationship with the District, much less given up her seniority date. Had she known that, she would not have signed the resignation.

Assistant Superintendent Davis did not testify. Ms. Snavely's testimony was clear, consistent, uncontroverted, and credible.

21. Employee 1066 testified that she began working for the District in the 1998-1999 school year and that she received a preliminary layoff notice before March 15, 2003. Employee 1066 testified that her services were terminated as a result of the 2003 layoff proceeding, but that she was rehired by the District about six months after her services were

² The District asserted this statement was hearsay. It was not. Assistant Superintendent Davis's statement was not offered to prove the truth of the matter stated, but instead was offered to show the basis on which Ms. Snavely reasonably submitted a resignation.

terminated, on January 26, 2004. At the time Employee 1066 held a pre-intern credential. Employee 1066 claimed that her 2003 termination was the result of a reduction in force, that her rights were formally adjudicated in the layoff proceeding that followed, and that as a certificated employee who had been laid off, the District was required to rehire her in January 2004.

Employee 1066 claimed her seniority date related back to 1998, and that her seniority date was not January 26, 2004, as was set forth in the District's seniority list. On cross-examination, it was established that in addition to receiving a preliminary layoff notice in 2003, Employee 1066 also received from the District a notice of non-renewal of her probationary employment, a notice that automatically terminated employment without the necessity of the District showing any cause and an event independent of the 2003 layoff proceeding.

It was not established that the District rehired Employee 1066 because she had previously been laid off, as argued. Further, no documentation was offered to establish that her "rights were formally adjudicated" in a layoff proceeding occurring in 2003. Employee 1066 did not contest her seniority date when the District's seniority list was circulated in 2004, which set forth the District's position that she had a seniority date of January 26, 2004, when she was rehired.

Employee 1066 was a credible witness, but she did not have sufficient expertise to establish her right to an earlier seniority date. No documentation was offered to support her claim that she was rehired because she was laid off. The documentary evidence – the District's certified employee seniority list – was to the contrary. Both Assistant Superintendent Rodriguez and Ms. Kramer were present and could have been examined on this issue, but they were not.

The preponderance of the evidence established that the District elected not to renew Employee 1066's contract, that Employee 1066 was rehired by the District in the middle of the 2003-2004 school year, and that her proper seniority date was January 26, 2004.

22. Employee 1240 was hired on September 6, 2005. In the 2007-2008 school year, Employee 1204 served as a Coach in the Reading First Program in Kindergarten through third grades. Employee 1240 helped other teachers and many students to develop reading effective strategies. Employee 1240 held a multiple subject clear credential, a supplemental authorization in introduction to Music, and a CLAD certification. As a Coach, Employee 1240 did not hold a position for which NCLB compliance was possible, and she claimed her inability to be NCLB compliant in her current position resulted in the deprivation of her right to retain employment because in any tie-breaking situation she would almost always lose because the first criteria is "No Child Left Behind (NCLB) compliant (i.e., highly qualified in the subject areas the person is presently teaching)."

Employee 1240 did not establish how she was prejudiced specifically. She did not show that a more junior employee was being retained by the District to provide services which she was qualified and competent to provide.

23. No employee testified that his or her right to a fair hearing was prejudiced by the District's failure to properly serve Ms. Yoshimitsu with required jurisdictional documents.

24. Leona Whitley established that she was entitled to participate in the layoff proceeding as a result of having been served with all required jurisdictional documents and having requested a hearing in a timely fashion. Leona Whitley is a proper party to this action and she should be given notice of termination.

LEGAL CONCLUSIONS

Statutory Authority

1. Education Code section 44944 provides in part:

"No later than March 15 and before an employee is given notice by the governing board that his or her services will not be required for the ensuing year for the reasons specified in Section 44955, the governing board and the employee shall be given written notice by the superintendent of the district or his or her designee, or in the case of a district which has no superintendent by the clerk or secretary of the governing board, that it has been recommended that the notice be given to the employee, and stating the reasons therefor . . .

(b) The employee may request a hearing to determine if there is cause for not reemploying him or her for the ensuing year . . . If an employee fails to request a hearing on or before the date specified, his or her failure to do so shall constitute his or her waiver of his or her right to a hearing . . .

(c) In the event a hearing is requested by the employee, the proceeding shall be conducted and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code and the governing board shall have all the power granted to an agency therein, except that all of the following shall apply:

(1) The respondent shall file his or her notice of defense, if any, within five days after service upon him or her of the accusation and he or she shall be notified of this five-day period for filing in the accusation.

(3) The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof. The proposed decision shall be prepared for the

governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition. None of the findings, recommendations, or determinations contained in the proposed decision prepared by the administrative law judge shall be binding on the governing board. 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. Copies of the proposed decision shall be submitted to the governing board and to the employee on or before May 7 of the year in which the proceeding is commenced. All expenses of the hearing, including the cost of the administrative law judge, shall be paid by the governing board from the district funds.

...

(d) Any notice or request shall be deemed sufficient when it is delivered in person to the employee to whom it is directed, or when it is deposited in the United States registered mail, postage prepaid and addressed to the last known address of the employee . . ."

2. Education Code section 44955 provides in part:

"(a) No permanent employee shall be deprived of his or her position for causes other than those specified in Sections 44907 and 44923, and Sections 44932 to 44947, inclusive, and no probationary employee shall be deprived of his or her position for cause other than as specified in Sections 44948 to 44949, inclusive.

(b) Whenever in any school year the average daily attendance in all of the schools of a district for the first six months in which school is in session shall have declined below the corresponding period of either of the previous two school years, whenever the governing board determines that attendance in a district will decline in the following year as a result of the termination of an interdistrict tuition agreement as defined in Section 46304, whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, or whenever the amendment of state law requires the modification of curriculum, and when in the opinion of the governing board of the district it shall have become necessary by reason of any of these conditions to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.

...

As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof. Upon the request of any employee whose order of termination is so determined, the governing board shall furnish in writing no later than five days prior to the commencement of the hearing held in accordance with Section 44949, a statement of the specific criteria used in determining the order of termination and the application of the criteria in ranking each employee relative to the other employees in the group. This requirement that the governing board provide, on request, a written statement of reasons for determining the order of termination shall not be interpreted to give affected employees any legal right or interest that would not exist without such a requirement.

(c) Notice of such termination of services shall be given before the 15th of May in the manner prescribed in Section 44949, and services of such employees shall be terminated in the inverse of the order in which they were employed, as determined by the board in accordance with the provisions of Sections 44844 and 44845. In the event that a permanent or probationary employee is not given the notices and a right to a hearing as provided for in Section 44949, he or she shall be deemed reemployed for the ensuing school year.

The governing board shall make assignments and reassessments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render. However, prior to assigning or reassigning any certificated employee to teach a subject which he or she has not previously taught, and for which he or she does not have a teaching credential or which is not within the employee's major area of postsecondary study or the equivalent thereof, the governing board shall require the employee to pass a subject matter competency test in the appropriate subject.

(d) Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons:

(1) The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess.

(2) For purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws."

Jurisdiction

3. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied as to all respondent employees identified in the seniority lists, except as to respondent Shari Yoshimitsu.

This conclusion is based on Factual Findings 1-19 and on Legal Conclusions 1 and 2.

The Reduction of Particular Kinds of Services

4. Respondents argued that the District's proposed reduction of approximately 24 percent of its present certificated staff was arbitrary and capricious, particularly in light of the asserted ten percent budget shortfall. Respondents argued that the resolution and notice describing the reduction in force of 200 "Elementary Teachers" was insufficient because the actual services that were being reduced were not described with more specificity, merely the position that was being eliminated. Further, respondents argued that the Board's real motivation for the termination (a reduction in attendance and/or the elimination of the class size reduction program) was not included in the resolution or notice and that it should have been. Finally, respondents argued that the statutory formula required to calculate a corresponding reduction in employees should have been used but was not. For these and other reasons, respondents argued the proposed terminations were illegal.

5. The purpose of the initial termination notice provision is to notify an employee of the probability that his or her services will not be required for the ensuing year so that he or she may consider looking elsewhere for employment. Nothing in the statute relating to the termination of teachers due to a reduction in daily average attendance or, in the alternative, a reduction of services (Ed. Code, § 44955) prohibits the statement of more than one ground in putting employees on notice that their jobs are in jeopardy. (*Moreland Teachers Association v. Kurze* (1980) 109 Cal.App.3d 648, 653.) However, where just one statutory ground is raised, a school district cannot introduce evidence at a hearing to support termination on another statutory ground that was not originally raised. (*Karbach v. Board of Education* (1974) 39 Cal.App.3d 355, 363.)

A service which can be reduced but not eliminated is a particular kind of service as long as the service is not reduced below a level required by law. The Legislature intended that the term "particular kind of service" refer to a kind of service a school district may discontinue as well as reduce. To this end, *Campbell Elementary Teachers Association, Inc. v. Abbott* (1978) 76 Cal.App.3d 796, 811 found the following were particular kinds of services which could be eliminated: "Reading specialists, consultants, nurses, counselors, instrumental music teachers, master teachers, traveling librarians, learning assistance teachers, psychologists, speech therapists and title I specialists."

Since high school offerings, such as mathematics, science, history and art, are particular kinds of service, logically elementary grade classes which teach the same offerings, although with a single teacher, are also particular kinds of service. Neither the statute nor case law dictate that elementary school districts should be precluded from reducing services on an equal basis as high school districts merely because the former organize their curriculum in a multidisciplinary manner. A school board may reduce services by making fewer employees available to deal with the pupils involved. A reduction of 11 kindergarten through sixth grade classes was a reduction of a particular kind of service, and the termination of the teachers who provided those services was permitted under Education Code section 44955. (*California Teachers Association v. Board of Trustees (Goleta)* (1982) 132 Cal.App.3d 32, 34-37.)

At the elementary school level, reduction of classroom teaching can be a reduction of a particular kind of service. A school district may consider its financial circumstances in deciding whether to reduce or discontinue a particular kind of service. (*San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627, 631.)

6. The services identified by the Board — AB 1802 Counselors, Anger Management/Crisis Intervention Counselor, Behavior Specialist, BTSA Support Providers, EL Intervention Teacher, Elementary Music Teachers, Elementary Teachers, Elementary VAPA Teacher, English Intervention Teacher, High Priority Schools Grant Teacher, High Priority Schools Grant Coach, High School SED Teacher, Literacy Coaches, Math Coaches, Math Intervention Teachers, Middle School Communicative Handicapped Teacher, Middle School Librarians, Middle School SED Teacher, Preschool Teachers, QEIA Grant Teachers, Reading First Coaches, SLC Coordinator, Special Education Instruction Specialists, Technology Coach, Title I/Title II Reading Support Teachers, Teachers on Special Assignments, and Teachers on Special Assignments-EL Support—were “particular kinds of service” within the meaning of Education Code section 44955, subdivision (b).

The Board’s resolution delineated these services and the District provided a chart tracing the layoffs to the services, establishing that seniority was used to determine which competent and qualified personnel should be retained. The District was facing a budget deficit, and it established that the programs cut were those least likely to hurt the District while complying with the Education Code. The reduction was not based on fraudulent, arbitrary, or capricious motivation. Indeed, the District was not permitted to point to decline in attendance as a basis for the reduction of particular kinds of services, so that was not an issue and was irrelevant. There was no evidence that any certificated employee was unable to determine if his or her job was in jeopardy by reason of the Board’s use of “Elementary Teachers” in the resolution and notices.

This conclusion is based on Factual Findings 1-19 and on Legal Conclusions 1, 2 and 5.

Shari Yoshimitsu

7. On or before March 15 of the year preceding dismissal of a certificated school district employee, the employee must be notified of the district's decision. The employee is then entitled to a hearing before an administrative law judge, who prepares a proposed decision that may or may not be accepted by the board. If the employee is not given the notice and right to a hearing as required by statute, the employee is deemed reemployed for the following school year. (Ed. Code, §§ 44955, 44949; *Campbell Elementary Teachers Association v. Abbott* (1978) 76 Cal.App.3d 796, 803.)

8. It was stipulated that Shari Yoshimitsu, a certificated employee, did not receive the March 15 notice required by statute. Under those circumstances, Ms. Yoshimitsu must be deemed reemployed for the ensuing school year.

This conclusion is based Factual Findings 1-19and on Legal Conclusions 1, 2 and 7.

The Domino Theory

9. Respondents argued that because Ms. Yoshimitsu must be retained, the clear language of Education Code section 44955, subdivision (b) required that all employees senior to Ms. Yoshimitsu be retained as well because "Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while . . . any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render."

Respondents' argument is frequently made in these kinds of proceedings and is known as "the domino theory."

10. The layoff statutes authorize a reduction in force when, in the opinion of the governing board, it becomes "necessary by reason of any of these conditions to decrease the number of permanent employees in the district . . ." (Ed. Code, § 44955, subd. (b).)

The fundamental task in construing a statute is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. Courts begin by examining the statutory language, giving the words their usual and ordinary meaning. If there is no ambiguity, then courts presume the lawmakers meant what they said, and the plain meaning of the language governs. If, however, the statutory terms are ambiguous, then courts resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history. In such circumstances, courts select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences. (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.)

11. Here, the District's reason for the reduction in force was the probable reduction in funding from the State of California, most likely in a substantial amount. It would make no sense to conclude that the District's inadvertent failure to serve Ms.

Yoshimitsu with required process thereby insulated all senior employees who were properly served with such notice from being laid off and prevented the District from being able to lay off these employees. Reaching such a conclusion would defeat the very purpose of the layoff statutes, which is to permit a school district to terminate the services of employees when economically necessary.

This conclusion is based on Factual Findings 1-19 and on Legal Conclusions 1-3 and 7-10.

Ann Snavely's Seniority Date

12. Promissory estoppel applies whenever a promise induces action that would result in an injustice if the promise were not enforced. The required elements are: (1) A promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) the promisee's reliance must be both reasonable and foreseeable; and (4) the promisee must be injured by his or her reliance. (*Lange v. TIG Insurance Co.* (1998) 68 Cal.App.4th 1179, 1185.)

13. The District is estopped from asserting that Ann Snavely's seniority date is any date other than when she was first employed by the District on a probationary basis in 1996. Ms. Snavely reasonably relied on what (then) Assistant Superintendent Davis told her would and would not occur if she were to resign as he requested. To allow Ms. Snavely to be laid off on the basis of a July 25, 2002, seniority date would be unjust.

This conclusion is based on Factual Findings 1-20 and on Legal Conclusion 12.

Leona Whitley

14. Respondent Leona Whitley was properly served with all notices in this proceeding and she responded to them in a timely fashion by requesting a hearing. A default cannot be taken against Ms. Whitley.

However, Ms. Whitley's proper participation in this proceeding did not result in a different seniority date, and as a junior employee, she must be given notice that her services will not be required for the 2008-2009 school year.

This conclusion is based on Factual Finding 24.

Employee 1066

15. Employee 1066 did not establish that her seniority date related back to her 1998 employment, or that her seniority date was not January 26, 2004, as set forth in the District's seniority list. The preponderance of the evidence established that the District elected not to renew Employee 1066's contract, and that Employee 1066 was rehired by the District in the middle of the 2003-2004 school year, and that her proper seniority date was January 26, 2004.

This conclusion is based on Factual Finding 21.

Employee 1240

16. Employee 1240 was hired on September 6, 2005. She did not hold a position for which NCLB compliance was possible, such that the application of the tie-breaker was unfair. Employee 1240 did not establish actual prejudice with regard to the application of the tie-breaker. More specifically, she did not show that a more junior employee was being retained by the District to provide services which she was qualified and competent to provide.

This conclusion is based on Factual Findings 9, 10, 11, and 22.

The District's Tie-Breaker

17. Respondents argued that the District's adoption of the tie-breaker and its application in this proceeding established the arbitrary and capricious nature of the District's reduction in force proceeding. Respondents argued that the District's use of a criterion that was not available to all credentialed employees (i.e., that the employee be NCLB compliant in the current position, when that was not always possible) was unfair and improper. Respondents did not offer a specific example of how the use of the District's tie-breaker resulted in an improper layoff of any employee or the improper retention of a junior employee over a more senior employee. No specific remedy was proposed.

Respondents expressed a legitimate concern. The Board should review the tie-breaker criteria to make certain that its actual application will not unfairly affect any individual whose current position does not require that the employee be NCLB compliant when considering the retention of another employee hired on the same date.

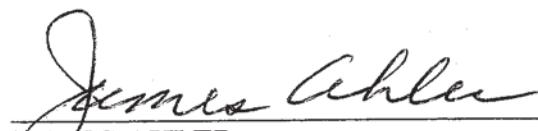
RECOMMENDATION

It is recommended that the Board review the tie-breaker criteria and make appropriate modifications to it to make certain that its application will not unfairly discriminate against any individual whose current position does not require that employee be NCLB compliant.

It is recommended that the Board dismiss the accusation against Ann Snavely.

It is recommended that the Board give notice to all respondents previously served with a preliminary layoff notice that their employment will be terminated at the close of the current school year and that their services will not be needed for the 2008-2009 school year, except as recommended otherwise.

DATED: April 30, 2008.


JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings