

BEFORE THE
GOVERNING BOARD OF THE
MANHATTAN BEACH UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In The Matter Of The Employment Status
of:

SHAHER BATROUKH, ERIN
COPENBARGER, ERICA GUBSER, AL
HALFERTY, KAREN HARNIS, DINA
MOLL, SHAUNA MORRISON, and MIKE
NEILY,

Respondents.

OAH No. L2004030554

PROPOSED DECISION

Mark T. Roohk, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 14 and 15, 2004, in Manhattan Beach, California.

Howard Friedman, Esq., Lozano Smith, represented the Manhattan Beach Unified School District.

Lawrence B. Trygstad, Esq., represented all named Respondents. For reasons set forth herein below, only Respondents Erin Copenbarger and Mike Neily were present during the hearing.

The matter was submitted on April 15, 2004.

SUMMARY OF PROPOSED DECISION

The Board of Education of the Manhattan Beach Unified School District determined to reduce or discontinue particular kinds of services provided by teachers and other certificated employees for budgetary reasons. The decision was not related to the competency and dedication of the individuals whose services are proposed to be reduced or eliminated.

FACTUAL FINDINGS

1. Gwen Gross is the Superintendent of the Manhattan Beach Unified School District ("District"). She caused accusatory pleadings and accompanying documents to be filed and served upon Respondents, while acting solely in her official capacity and not otherwise.

2. The parties stipulated that, prior to the hearing, the District withdrew the accusation as to Respondents Shaker Batroukh, Al Halferty, and Shauna Morrison, none of whom appeared at the hearing. The parties further stipulated that Respondents Erica Gubser, Karen Harns, and Dina Moll, none of whom appeared at the hearing, had withdrawn their Notices of Defense to the accusation. The parties further stipulated that Respondents Erin Copenbarger and Mike Neily, both of whom did appear at the hearing, timely requested in writing a hearing to determine if there is cause for not reemploying them for the ensuing school year, and as such are they are the only individuals whose employment is at issue in this matter.

3. On or before March 15, 2004, the District personally served on each Respondent a written notice that it had been recommended that notice be given to Respondents pursuant to Education Code sections 44949 and 44955 that their services would not be required for the next school year, and giving the reasons therefor.

4. The Superintendent made and filed Accusations against each of the certificated employees who requested a hearing. The Accusations with required accompanying documents and blank Notices of Defense were timely served on those certificated employees.

5. Notices of Defense were timely filed by Respondents herein, both of whom are permanent or probationary certificated employees of the District.

6. On March 11, 2004, the District's Board of Education was given notice of the Superintendent's recommendation that certain employees be given notice that their services would not be required for the next school year. The reasons for that recommendation were that the District needed to reduce or discontinue particular kinds of services at the close of the 2003-04 school year.

7. Board Resolution No. 2004-5, adopted on February 18, 2004, proposed a termination of 23.26 Full-Time Equivalent (FTE)¹ certificated employees. Specifically, Board Resolution No. 2004-5 provided for the reduction of the following particular kinds of services:

Career Counselor, Secondary – 1.0 FTE
English, Secondary – 3.0 FTE

¹ The acronym "FTE" refers to positions, and not to individuals per se. Accordingly, the number of actual individuals who are proposed for termination could be greater or smaller than the number of FTE.

Social Science, Secondary – 2.0 FTE
Foreign Language (Spanish/French), Secondary – 1.0 FTE
Science, Secondary – 1.0 FTE
Math, Secondary – 2.0 FTE
Industrial Technology, Secondary – .17 FTE
Drama, Secondary – .17 FTE
Classroom Music, Elementary – 2.0 FTE
Physical Education, Elementary – 2.5 FTE
Elementary Support Specialists – 1.75 FTE
Art, Elementary – 1.0 FTE
Director of Curriculum – 1.0 FTE
Educational Advisor (Counselor), Secondary – 1.0 FTE
Specialist Teachers, Elementary – 2.67 FTE
ASB Advisor, Secondary – .60 FTE
Technology Support, Secondary – .40 FTE

8. Board Resolution No. 2004-6, also adopted on February 18, 2004, established tie-breaker criteria for determining the relative seniority of certificated employees who first rendered paid service on the same date. It provided that the order of termination shall be based on the needs of the District and its students, in accordance with the following criteria:

“The following rating system shall be applied in determining the order of termination of certificated employees:

- A. Multiple and single subject credentials. Rating: +1 for preliminary credential, +2 for clear credential;
- B. Credentials and experience to teach in a special categorical program (e.g. special education, bilingual). Rating: +1 for preliminary credential, +2 for clear credential, +1 per year of experience;
- C. Earned CLAD or equivalent specialization. Rating: +1 per certificate/authorization;
- D. Supplemental Authorization. Rating: +1 per authorization;
- E. Earned degrees beyond the BA/BS level. Rating: +1 per degree;
- F. Years of experience previous to current employment as a full time, credentialed teacher in a probationary/permanent, K-12 teaching situation in a public school. Rating: +1 per year.

“In the event that common day hires have equal qualifications based on application of the above criteria, the District will then break ties by utilizing the following tie-breaker criteria listed in order of priority and to be applied in the order listed:

- A. Special Education Credential
- B. CLAD
- C. National Board Certification
- D. Single Subject [Credential] Science

- E. Single Subject [Credential] Math
- F. Single Subject [Credential] Foreign Language
- G. Single Subject [Credential] English
- H. Single Subject [Credential] Social Science
- I. Single Subject – Other Areas (Music, Physical Education, Business, etc.)
- J. Multiple Subject and a Supplementary Authorization
- K. Multiple Subject
- L. Clear Credential
- M. Degree Past BA
- N. Previous job with [the District]

“In the event that common day hires have equal qualifications based on application of the above criteria, the District will then break ties by utilizing a lottery.”

9. In essence, the District's tie-breaker system is applied as follows: If two or more employees have the same first date of service, the District considers the first group of criteria **in total**, awards each employee points as per the list, and the employee with the most points is given greater seniority. If two or more employees are awarded the same number of points and thereby remain tied, the District considers the second group of criteria **individually**, and proceeds through the list until the tie is broken. If two or more employees are still tied, a lottery is held as the final tie-breaker.

Respondents argue that the use of a lottery to break ties is arbitrary and does not comply with the requirements of Education Code section 44955(b), which states in pertinent part that, “[a]s 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.” While the Education Code was amended in 1977 to eliminate a lottery as the **sole** means of determining seniority as between two or more employees who first rendered services to a district on the same date, the law does not preclude a district from using a lottery as a kind of “last resort” should the application of other empirical criteria fail to break a tie. The District's use of other empirical criteria as set forth above is extensive enough to satisfy the requirements of the Education Code, and accordingly the District is permitted to use a lottery as the final tie-breaker in this case.

10. The District maintains a Seniority List that contains employees' seniority dates (first date of paid service), current assignments and locations, advanced degrees, credentials, and authorizations. Credential and authorization data are obtained from the records of the County Office of Education, at which certificated employees must register such documents.

11. The District used the Seniority List to develop a proposed layoff and “bumping” list of the least senior employees currently assigned in the various services being reduced. The District then determined whether the least senior employees held credentials in another area and were entitled to “bump” other employees. In determining who would be laid off for each kind of service reduced the District counted the number of reductions not covered by the known vacancies, and determined the impact on incumbent staff in inverse

order of seniority. The District then checked the credentials of affected individuals and whether they could "bump" other employees.

12. Respondent Neily teaches Physical Education ("P.E.") at the District's high school. He holds a Standard Secondary credential in P.E. and Psychology, as well as a Clear Supplemental Authorization to teach History in grades 7-9. He was originally hired by the District as the varsity baseball coach at the high school in early 2002. At that time, he had been teaching for almost thirty (30) years in another District at both the high school and middle school level. During that time, he taught P.E., history, health, and economics classes. He remained as a teacher in the other District during the 2002 baseball season. However, at the start of the 2002-03 school year, he was offered a teaching position by the District, which he eventually accepted after some discussions regarding seniority credit. His first date of paid service is November 11, 2002. He is the only District employee with that date.

13. Respondent Copenbarger teaches Social Science at the District's high school. She is a probationary employee who holds a Single Subject credential in Social Science. She also has a Master's degree in medieval history. Her seniority date is September 2, 2003, a date shared with several other District employees.

14. Respondent Neily received a layoff notice because, while secondary Physical Education was not affected by the layoff resolution, elementary Physical Education was, and the individuals teaching P.E. in the elementary schools who would otherwise have received notices all have credentials permitting them to teach P.E. at the secondary school level, and all have more seniority than does Respondent Neily, who is the junior P.E. teacher in the District. In essence, Respondent Neily was "bumped" out of his position by those other teachers.

15. According to the District, Respondent Copenbarger received a layoff notice for essentially precautionary reasons: the District anticipated that it might be determined that Respondent Neily's Supplemental Authorization to teach 9th grade history will be sufficient to allow him to teach Social Science at the high school, and if so, Respondent Copenbarger would have to be laid off, as she is junior to Respondent Neily, and is the most junior of the remaining secondary Social Science teachers.

As noted, Respondent Copenbarger shares a seniority date with approximately fifty (50) other District employees, and so was subject to extensive tie-breaking procedures. After applying all of the criteria, she was placed 31st among employees with her seniority date, just behind Wayne Knutson, another social science teacher at the high school. Although the required reduction in services in regard to secondary Social Science was accomplished by laying off two teachers who placed behind Respondent Copenbarger in the tie-breaking process, she was nevertheless sent a layoff notice because of the situation with Respondent Neily.

The layoff notice itself was sent to Respondent Copenbarger in a timely fashion, prior to March 15, 2004. Mr. Knutson was not sent a layoff notice. Thereafter, **subsequent to**

March 15, 2004, the District discovered that it had failed to credit Respondent Copenbarger with her master's degree as part of the tie-breaking process. After so doing, it was determined that Respondent Copenbarger was now tied with Mr. Knutson on the seniority list. As all other tie-breaking criteria had been exhausted, the District resorted to a lottery, which was held on March 30, 2004. In attendance were District employees, including Director of Human Resources Janet Schwabe, as well as the District's legal counsel in this action. Respondent Copenbarger was not present, nor was she notified that the lottery was occurring. Respondent Copenbarger lost the lottery, and as a result was again placed behind Mr. Knutson on the seniority list.

16. Respondent Neily offered several arguments in support of his retention. First, he maintains that, since the proposed reduction in services is occurring in Elementary rather than Secondary P.E., the layoff notices should have been sent to those employees teaching P.E. for the District at the elementary school level. This argument is without merit. Those teachers all hold credentials that entitle them to teach P.E. at any level in the K-12 system, and all have more seniority in the District than does Respondent Neily. Pursuant to the Education Code, the District is required to give them priority. (Education Code section 44955.)

17. Respondent Neily also argues that, in the current school year, the District high school is offering five (5) classes which his credential entitles him to teach: two 9th Grade Geography classes, two 9th Grade Model United Nations ("MUN") classes, and one upper level Psychology class. The District concedes that Respondent Neily's credentials entitle him to teach any one of those classes.

The Psychology class in question is being taught by an employee who has a seniority date of September 22, 1988, and who holds a Standard Secondary credential in Speech and Political Science. This employee is also teaching Government classes, which are not offered to 9th grade students, in the Social Studies Department. The MUN classes in question are being taught by an employee who also has a seniority date of September 22, 1988, and who holds a Single Subject Social Science credential. This employee is also teaching Government classes in the Social Studies Department. The Geography classes in question are being taught by an employee, Cassidy Olson, who has a seniority date of September 2, 2003, but who is ahead of Respondent Copenbarger in the seniority list due to his Clear Single Subject Social Science credential. Mr. Olson is also teaching U.S. History classes, which are not offered to 9th grade students, in the Social Studies Department.

18. The District argues A) that the Geography and Psychology classes are elective in nature, not required to be offered, and there is no assurance that the school will be offering those classes in the coming year; and B) that the Psychology and MUN classes are taught by senior employees, and that Respondent Neily should not be entitled to displace these employees by "inverse bumping". "Inverse bumping" is a process that allows for the reassignment of a senior employee to a position held by a junior employee, in order to accommodate another employee who would otherwise be subject to layoff. A District is not required by the Education Code to engage in this process; rather, its obligation to make

reassignments is limited to attempting to place an employee who otherwise would be terminated in a position being held by a less senior employee. *Duax v. Kern Community College District* (1987) 196 Cal.App.3d 555, 569.

As both the Psychology and MUN teachers have seniority over Respondent Neily, the District is clearly not required to re-assign them to other classes in order to accommodate his continued employment. On the other hand, Mr. Olson is junior to Respondent Neily, and based simply on that fact a re-assignment might be possible. However, Mr. Olson's credential permits him to teach not just Geography, but any Social Science class at the high school level, and in fact he has been teaching three periods of U.S. History this school year in addition to the Geography classes. There is no evidence in the record as to why Mr. Olson, rather than one of the other teachers in the Department, is the one teaching Geography this year, but there is certainly no guarantee that he will be teaching it again next year. Further, the District is correct in pointing out that Geography is an elective course, and so it may not even be offered this coming year, and therefore should not be used as a basis for determining employment. At the same time, U.S. History is a required course for a grade level beyond the scope of Respondent Neily's credential. Junior teachers may be given retention priority over senior teachers if the junior teachers possess superior skills or capabilities that their more senior colleagues lack. *Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399, 405; *Santa Clara Federation of Teachers, Local 2393 v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831, 842. A credential to teach all high school Social Science classes, rather than one limited to 9th grade classes, may be one such skill or capability.

LEGAL CONCLUSIONS

1. All jurisdictional requirements set forth in Education Code sections 44949 and 44955 were met, as set forth in Factual Findings 1 through 7.

2. All notice requirements as set forth in Education Code sections 44949 and 44955 were met as to Respondent Neily, as set forth in Factual Findings 1 through 7. However, all notice requirements were not met as to Respondent Copenbarger. Section 44949 states in pertinent part that **"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 . . . that it has been recommended that the notice be given to the employee, and stating the reasons therefor."** (Emphasis added.)

Although Respondent Copenbarger did receive written notice that her services would not be required for the ensuing year prior to March 15, 2004, that notice was sent in error, based on a faulty application of the District's tie-breaking process. In fact, as of March 15, 2004, the District had yet to properly and definitively determine whether Respondent Copenbarger or Mr. Knutson should be the one to receive the notice. The District did not know this at the time, because it did not discover the tie-breaking error until several days later. Once the error was

discovered, the District was forced to resort to a lottery to break the tie between Respondent Copenbarger and Mr. Knutson. The results of the lottery fortuitously concurred with what the District had already done. However, should the lottery have turned out the other way, the District would have been forced to at the very least rescind Respondent Copenbarger's layoff notice, and then decide what it would do about Mr. Knutson, who would now be the most junior secondary Social Science teacher in the District, and who would otherwise be in line to receive the precautionary layoff notice, except for the fact that March 15, 2004, had already passed.

The District maintains that what occurred was an honest mistake. There is little doubt that this is true, but it is also a fatal one for purposes of this case. Section 44955(c) provides in pertinent part that "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." Had the lottery turned out the other way, the District would certainly have been prohibited from attempting to terminate Mr. Knutson's services, as it would have failed to have timely provided him with a layoff notice. The District should not be entitled to benefit from the fact that the lottery happened to turn out in accordance with its original action.² Accordingly, cause does not exist to give notice to Respondent Copenbarger, as set forth in Factual Findings 13 and 15.

3. The services identified in Board Resolution No. 2004-5 are particular kinds of services that could be reduced or discontinued under Education Code section 44955. The Board's decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion. Cause for the reduction or discontinuation of services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949.

4. Cause exists to reduce the number of certificated employees of the District due to the reduction and discontinuation of particular kinds of services. The District identified the certificated employees providing the particular kinds of services that the Board directed be reduced or discontinued.

5. Cause exists because of the reduction or discontinuance of particular kinds of services pursuant to Education Code section 44955 to give notice to Respondent Neily, as set forth in Factual Findings 16, 17, and 18. Although Respondent Neily's Supplemental Authorization to teach 9th grade History renders him competent to teach a class that is currently being taught by a teacher with less seniority, that teacher's credential is a superior capability that renders him competent to teach not only that class, but also several other Social Science classes that are required by the state. This permits the District to retain that teacher, as well as others in the Social Science Department who hold similar credentials, including Respondent Copenbarger, despite Respondent Neily's seniority.³

² Accordingly, the problem was not in the District's use of a lottery to break a tie, but in the timing of that use.

³ The District represented several times during the hearing that Respondent Neily was "at the top of" a re-hire list, and that should additional Geography or other 9th grade elective Social Science courses be included in the 2004-05 schedule, he would be in line for re-hire to teach those classes.

ORDER

1. Notice may be given to Respondent Mike Neily that his services will not be required for the 2004-2005 School Year because of the reduction and discontinuance of particular kinds of services.

2. The Accusation is dismissed as to Respondent Erin Copenbarger.

Dated: _____

MARK T. ROOHK
Administrative Law Judge
Office of Administrative Hearings