

**BEFORE THE GOVERNING BOARD OF THE
LOS ANGELES UNIFIED SCHOOL DISTRICT**

In the Matter of the Accusation Against:

JOYCE PAUL,

Respondent.

OAH No. L2004040053

PROPOSED DECISION

This matter came on regularly for hearing on April 26, 2004 in Los Angeles, California, before H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, State of California.

Mary L. Dowell, Attorney at Law, represented the Los Angeles Unified School District.

Lawrence B. Trygstad, Attorney at Law, represented Respondent, Joyce Paul.

The hearing was not completed on April 26, 2004 and was continued to May 6 and 7, 2004, a total of eleven days. The matter was submitted on May 7, 2004. Pursuant to Education Code section 44949(e), the due dates for this Proposed Decision and for Board action were also extended by eleven days. This Proposed Decision is due May 18, 2004. The Board must act on it by the close of business on May 26, 2004.

FACTUAL FINDINGS

1. Deborah Hirsh made and filed the Accusation in her official capacity as Chief Human Resources Officer, Los Angeles Unified School District ("District").
2. Respondent is a permanent certificated District employee.
3. On March 8, 2004, pursuant to Education Code sections 44949 and 44955, the District's Superintendent gave to the District's Board of Education written notice of his recommendation that notice be given to Respondent that affected employees' services will not be required for the ensuing school year.

4. On or before March 15, 2003, the District served on Respondent, by certified mail, a written notice that it had been recommended that notice be given to respondent pursuant to Education Code sections 44949 and 44955 that her services would not be required for the next school year. The written notice set forth the reasons for the recommendation.

5. Respondent timely submitted a written request for a hearing to determine if there is cause for not reemploying her for the ensuing school year.

6. The Superintendent, by and through the District's Chief Human Resources Officer, made and filed an Accusation against Respondent who requested a hearing. The Accusation, with required accompanying documents and blank Notice of Defense, were timely served on Respondent.

7. Respondent timely filed a Notice of Defense.

8. All prehearing jurisdictional requirements were met.

9. The Board took action to reduce or discontinue the following particular kinds of services for the 2004-2005 school year:

<u>Particular Kind of Service</u>	<u>Full-Time Equivalent</u>
Psychiatric Social Worker	40.00
Staff Counsel	2.00
PSA	69.00
Nurse	60.00
Total Net Full-Time Equivalent Reduction	171.00
TOTAL NET FULL-TIME EQUIVALENT REDUCTIONS	171.00

10. This case involves the positions of Staff Counsel only. The reduction or discontinuation of that particular kind of services related to the welfare of the District and its pupils. The reduction or discontinuation of that particular kind of services was necessary to decrease the number of certificated employees of the District as determined by the Board.

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11. The Board considered all known attrition, resignations, retirements and requests for transfer in determining the actual number of necessary layoff notices to be delivered to its employees.

12. No certificated employee junior to Respondent was retained to perform any services which Respondent was certificated and competent to render.

13. Respondent is an attorney. She began her career as a school lawyer in 1990, and has been employed by the District since July of 1999. Since that time, she has held a certificated position known as Staff Counsel. She is assigned to the Special Education Legal Team of the Office of General Counsel.

14. At the time of Respondent's hire, all attorneys hired by the District were certificated employees who became permanent employees upon successful passage of a two-year probationary period.

15. Between 2001 and 2003, the Office of General Counsel underwent a reorganization that resulted in the creation of new class of classified attorneys known as Assistant General Counsel and Associate General Counsel. In addition to Staff Counsel being certificated and Assistant General Counsel being classified, Staff Counsel and Assistant General Counsel were distinguished by other specific differences. For example, unlike Staff Counsel which required no experience as an attorney for an entry level position, Assistant General Counsel required three years of attorney experience. Assistant General Counsel belonged to the Public Employees' Retirement System ("PERS"). Staff Counsel belonged to the State Teachers' Retirement System ("STRS"). The two groups were subject to different rules regarding vacations, disciplinary matters, etc. Originally, the salary for an Assistant General Counsel well exceeded that of Staff counsel. The two groups' salaries have since equalized. The two groups were also subject to different rules relating to layoff procedures. For example, notice to Staff Counsel had to be provided by March 15 and generally, the entire layoff procedure had to be completed by May 15. Notice to Assistants General Counsel had to be provided no later than 45 days before the end of the fiscal year (June 30).

16. The Office of General Counsel was, and is, divided into seven teams. (Special Education is one such team.) Both Staff Counsel and Assistant General Counsel may, have, and do serve on all seven teams. Staff counsel and Assistant General Counsel perform the same duties on their respective teams although some of them brought individual expertise in certain areas to the job. Staff Counsel and Assistant General Counsel are commonly transferred between and amongst the teams.

17. Since she had already worked for the District a number of years before the reorganization, Respondent has more years in service than any of the Assistants General Counsel, and she has served as a mentor for some of the newer members of that group.

18. After the creation of the Assistant General Counsel position, some Staff Counsel were offered the opportunity to transfer to Assistant General Counsel positions in order to earn the higher salaries paid to Assistants General Counsel. The transfer required a one-year probationary period during which they were deemed "on leave" from their Staff Counsel positions. Some took advantage of the opportunity. Of those who did, at least some chose to return to their Staff Counsel positions before the end of the probationary period in order to protect their seniority rights pursuant to Education Code section 45271.

19. Shortly before September 8, 2003, Respondent was offered the opportunity to transfer to an Assistant General Counsel position. She informed District's General Counsel she would do so if she could take her seniority date with her for purposes of determining the order of layoffs, if any. The General Counsel informed her he could not permit her to do so. Respondent then opted to remain on as Staff Counsel.

20. Although she did not know it at the time, Respondent was faced with a Hobson's Choice. Pursuant to Education Code section 45271, she could not transfer her seniority from Staff Counsel to Assistant General Counsel to bolster her protection against a layoff. Instead, if she chose to become an Assistant General Counsel, her seniority for that purpose would begin again and she would be junior to the other attorneys even though she had served the District years longer than they had. On the other hand, if she remained Staff Counsel, her seniority would apply only as to other certificated attorneys (not Assistants General Counsel), and she would be subject to the layoff procedure at an earlier date than Assistants General Counsel. Thus, the end result in either case would be that she could be laid off while other attorneys with fewer years in District service, who were performing the identical work, remained employed.

21. Respondent is certificated and competent to serve on any of the seven teams in the Office of General Counsel.

22. Facing a \$500,000,000.00 deficit for the 2004-2005 school year, the District timely sent layoff notices to two Staff Counsel (including Respondent). The Staff Counsel less senior to Respondent found employment elsewhere and left the District.

23. District also targeted two probationary Assistants General Counsel and one Associate General Counsel for layoffs for the 2004-2005 school year. As stated above, notices of those layoffs are to be sent no later than 45 days before the end of the fiscal year. (That date is May 16, 2004 which falls on a Sunday.) No evidence was offered to show that, as of the final day of the hearing (May 7, 2004), a notice had been sent to any of the classified attorneys.

24. Respondent contends: (1) The District should be equitably estopped from enforcing the pending layoff because the elements of equitable estoppel were met at the time the District offered employment to Respondent, and (2) the District failed to comply with Education Code section 44955(b) in that the term "employee with less seniority" means any employee, whether or not certificated. Therefore, all Assistants General Counsel were subject to layoffs before Respondent or, put another way, Respondent was entitled to "bump" less senior Assistants General Counsel.

25. Respondent's equitable estoppel argument is rejected for the following reason:

"Equitable estoppel arises from the declarations or conduct of the party estopped and has five elements: '(a) a representation or concealment of material facts (b) made with knowledge, actual or virtual, of the facts (c) to a party ignorant, actually and permissibly, of the truth (d) with the intention, actual or virtual, that the latter act upon it; and (e) the party must have been induced to act upon it.' (Citations.)"

Branson v. Sun-Diamond Growers (1994) 24 Cal.App.4th 327, 348.

Stated another way:

"The requirements for application of the doctrine of equitable estoppel are: '(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.' (Citations.)"

Fontana Paving, Inc. v. Hedley Brothers, Inc. (1995) 38 Cal.App.4th 146, 156-157.

26. Respondent claims the District had virtual knowledge of the true facts (i.e., the two-track system and its effects on seniority of certificated attorneys) when she was hired. That is not the case. Respondent was hired in 1999. The reorganization that gave rise to the new classification occurred between 2001 and 2003, and there was no evidence offered to show that, in 1999, the District had knowledge that the reorganization would occur or what its results would be. Further, the reorganization did not necessarily contemplate a two-track system. That apparently came about when some Staff Counsel retained their original positions rather than become permanent classified employees. Accordingly, the first element of equitable estoppel is not met and the analysis need go no further.

27. Respondent's argument regarding the language in Education Code section 44955(b) is also rejected. The language to which Respondent refers is as follows:

"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."
(Emphasis added.)

28. The resolution of the question as to whether "any other employee" refers to both certificated and non-certificated employees is resolved by way of reason and logic. If a less senior employee were to be retained to render a service a more senior employee was "certificated and competent to render" it stands to reason that, if the more senior employee had to be certificated to render the service, the same would be true of the less senior employee. Since the only "service" referred to in section 44955(b) is a service for which one must be certificated to render, the expression, "any other employee" must necessarily refer only to a certificated employee.

29. Respondent also contends the District acted arbitrarily and capriciously by notifying her of its intent to lay her off while keeping in its employ other attorneys with less time in District service who are performing services Respondent is certificated and competent to render, and justifying its action on the specious basis of maintaining two separate but functionally identical classes of attorneys with disparate layoff procedures.

30. The District argues that (1) layoffs are proper because legal services will be provided in a different manner in the upcoming school year, (2) the Administrative Law Judge is without jurisdiction to determine the propriety of the classified attorneys' positions at the time of the reorganization of the General Counsel's Office, and (3) the reason there now exist two separate tracks of attorneys are that certain Staff Counsel, including Respondent, chose to remain Staff Counsel instead of becoming Assistant General Counsel. The District is correct on all three counts. However, the question to be determined is whether the District's decision to lay off Respondent was arbitrary and capricious in light of the circumstances.

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31. An Agency's decision will be overturned if it is determined to be arbitrary and capricious. (Sequoia Union High School District v. Aurora Charter High School (2003) 112 Cal.App.4th 185, 195; Jefferson v. Compton Unified School District (1993) 14 Cal.App.4th 32, 37.)

"In determining whether the decision of a school board is reasonable as distinguished from fraudulent, arbitrary or capricious, its action is measured by the standard set by reason and reasonable people, bearing in mind that such a standard may permit a difference of opinion on the same subject. (Citations.)"

Arthur v. Oceanside-Carlsbad Junior College District (1963) 216 Cal.App.2d 656, 663.

"A finding that governmental conduct is arbitrary and capricious is essentially one of fact' (Midstate Theatres, Inc. v. Board of Supervisors, 46 Cal.App.3d 204, 212 [119 Cal.Rptr. 894]; Madonna v. County of San Luis Obispo, 39 Cal.App.3d 57, 62 [113 Cal.Rptr. 916]) and will be sustained on appeal unless an abuse of discretion is shown. The District claims that the court's finding cannot be sustained because there is no evidence or finding that the District's action 'was based upon ulterior or improper motives.' No such finding is necessary. As was explained in Madonna, id. at pages 61-62: 'The phrase "arbitrary and capricious" has no precise meaning, and the code does not undertake to define it. However, conduct not supported by a fair or substantial reason may be categorized as arbitrary and capricious. (Citation.) The courts often characterize unsubstantiated determinations as arbitrary. (Citations.)' Similarly, the court in Midstate, supra, 46 Cal.App.3d at page 211, pointed out that '[h]owever well intended, stubborn insistence on following an unauthorized course of action could well be found to be arbitrary and capricious.'"

A.B.C. Federation of Teachers v. A.B.C. Unified School District (1977) 75 Cal.App.3d 332, 343, 142 Cal.Rptr. 111.

32. The reason the District chose to create a separate track for classified attorneys was not disclosed by the evidence. What was disclosed is that both Staff Counsel and Assistant General Counsel do the same work, handle the same files, are interchangeable between and amongst teams, serve as mentors for each other and are, in every material way except for their designations as certificated or classified, the same.

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33. The District argues that the two groups of attorneys are not the same and that their respective positions are distinguishable in that (1) the position of Assistant General Counsel requires three years experience as an attorney as opposed to no experience for Staff Counsel¹, (2) Assistant General Counsel are members of PERS while Staff Counsel are members of STRS², and (3) the two tracks are subject to different rules relating to vacations, disciplinary matters, layoffs, etc. For purposes of deciding this case, the District's arguments constitute a distinction without a difference. Respondent had well in excess of three years of attorney experience at all relevant times, and the other differences between the two tracks are analogous to wearing different uniforms or badges to designate classifications, rather than a substantive difference in the type of services the attorneys are competent to, and do render.

34. Regardless of how the two-track system came about, by creating a group of classified attorneys who work side-by-side with certificated attorneys performing the same work, the District created a system in which these two virtually identical groups are inherently in competition for seniority. Albeit unlikely that it was the intended result, an unfortunate bi-product of the new group's creation was the deterioration and minification of the tenured employees' seniority.

35. In light of the above, the Board's action with respect to its determination of Respondent's seniority for purposes of establishing an order for layoffs, is deemed arbitrary and capricious. It is not the District's decision to create a new group of classified attorneys that was arbitrary and capricious, but rather, the end result of that decision, specifically, the layoff selection process by which the District chose to lay off Respondent, who is certificated and competent to perform any task performed by Staff Counsel or Assistant General Counsel, while leaving employed other attorneys, far junior to Respondent in years of District service, who are identical in function to Respondent but who are designated as non-certificated.

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¹ That requirement is apparently not strongly enforced. At least one attorney was mistakenly given a position as Assistant General Counsel without the requisite three years experience. She was permitted to keep the position after the mistake was discovered.

² That is not always the case. At least one witness who transferred from Staff Counsel to Assistant General Counsel retained her STRS membership after the transfer.

36. Further, the District's interpretation of the relevant statutory scheme in such a way as to permit Respondent's layoff under the extant circumstances yields an absurd result, specifically, the dismissal of a long-employed, highly experienced attorney while the District retains less senior attorneys performing the same work. The law does not favor such a result. In Torres v. Parkhouse Tire Service, Inc. (2001) 26 Cal.4th 995, 1003; 111 Cal.Rptr.2d 564, the Court stated:

"In interpreting a statute where the language is clear, courts must follow its plain meaning. (Droeger v. Friedman, Sloan & Ross (1991) 54 Cal.3d 26, 38 [283 Cal.Rptr. 584, 812 P.2d 931].) However, if the statutory language permits more than one reasonable interpretation, courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute. (Wilcox v. Birtwhistle (1999) 21 Cal.4th 973, 977 [90 Cal.Rptr.2d 260, 987 P.2d 727].) In the end, we " 'must 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.' [Citation.]" (Id. at pp. 977-978.)"

37. The District argues that it is improper to combine certificated and classified groups to arrive at a seniority list, and that it is also improper to "cross-bump." No such steps are necessary to decide this case. This case concerns Respondent only and the Proposed Decision is addressed to her alone.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied.

2. Cause exists under Education Code section 44949 and 44955 for the Los Angeles Unified School District to reduce or discontinue particular kinds of services. The cause for the reduction or discontinuation of particular kinds of services related solely to the welfare of the schools and the pupils thereof.

3. However, a preponderance of the evidence did not sustain the charges set forth in the Accusation as to Respondent, whose services could not be terminated because of the arbitrary and capricious manner by which the layoff selection process was determined.

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ORDER

The Accusation served on Respondent, Joyce Paul, is not sustained and the Accusation related to Respondent is dismissed.

DATED: May 11, 2004

H. STUART WAXMAN
Administrative Law Judge
Office of Administrative Hearings