

BEFORE THE GOVERNING BOARD OF THE
SANTA ANA UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Layoff/Accusation
Against:

OAH NO. L2005030487

22 CERTIFICATED EMPLOYEES,

Respondents.

PROPOSED DECISION

This matter came on regularly for hearing before Roy W. Hewitt, Administrative Law Judge (ALJ), Office of Administrative Hearings, at Santa Ana, California on April 18, 2005.

Keith V. Breon, Esq. of the Law Offices of Breon, Scaeffler & Bryant represented the Santa Ana Unified School District (the district).

Paul Crost, Esq. of Reich, Adell, Crost & Cvitan represented the 22 certificated employees (respondents). The following three represented respondents were not physically present at the hearing: Alice DeLeon; Robin Post; and, Carrie Lynn Dozal Carnie. The three respondents were properly noticed of the date, time and place of hearing and were deemed to have voluntarily elected to absent themselves from the proceedings.

Oral and documentary evidence was received and the record was left open until closing arguments/briefs (post-hearing briefs) could be submitted by the parties. The parties had until 5:00 p.m. on April 29, 2005 to file their post-hearing briefs. The post-hearing briefs were received, read and considered and this matter was deemed submitted on April 30, 2005.

FACTUAL FINDINGS

The ALJ makes the following Factual Findings:

1. On March 8, 2005, the Board of Education of the District (the Board) adopted a resolution recommending a reduction in particular kinds of services provided by the district for the 2005-2006 school year due to a decline in the average daily attendance in the district. (Exhibit 5.) The resolution called for a reduction in services equaling 70 Full-Time Equivalent (FTE) positions. The resolution called for

the following reductions in particular kinds of services: "The following particular kinds of services K-5 elementary classes -70 FTE currently being provided by the District shall be reduced or discontinued due to declining student enrollment..." (Exhibit 5.)

The parties do not dispute the fact that the services listed above are particular kinds of services, which may be reduced or discontinued within the meaning of Education Code section 44955.

2. The district's and the Board's decisions to reduce or discontinue the services listed in Finding 1, above, is neither arbitrary nor capricious; rather, it is due to the decline in average daily attendance; and, is; therefore, a proper exercise of the district's and the Board's discretion.

3. The reduction and discontinuation of services is related to the welfare of the District and its pupils, and it has become necessary to decrease the number of certificated employees as determined by the Board.

4. All respondents affected by the layoffs received written notice, on or before March 15, 2005, notifying them that the Superintendent of the district had recommended they not be re-employed in the upcoming, 2005-2006, school year.

5. Each respondent submitted a timely request for a hearing to determine if cause exists for not re-employing them for the ensuing year.

6. On March 14, 2005 the district's Superintendent, on behalf of the district, timely notified the respondents, pursuant to California Education Code sections 44949 and 44955, of the district's intent not to reemploy them for the upcoming school year. That same date, March 14, 2005, respondents were also served with a copy of the Board's resolution, resolution number 04/05-2600, a blank "Request for Hearing", the accusation, and other related materials.

7. Each respondent timely submitted a Notice of Defense.

8. All prehearing jurisdictional requirements have been met.

9. As of the date of hearing the number of certificated employees affected by the layoffs was reduced to 22, due to attrition (retirements, etc.). The following respondents remain:

1. Leslie Murillo
2. Matthew Simon
3. Alice DeLeon
4. Anthony Heard

5. Tammy Tourgeman
6. Carrie Dozal Carnie
7. Ken Ishimaru
8. Myriam Diaz-Tinajero
9. Danielle Thomure
10. Robin Post
11. Rafael Aberin
12. Holly Vetterli
13. Susanne Shier
14. Maria Rubio
15. Elizabeth Drouillard
16. Geraldine Jacome
17. Jose Brito
18. Patricia Chavez
19. Patricia Kemp
20. Tony Espinoza
21. Charles Burton
22. Kathleen Clinton

The total number of FTEs is now 22.0.

10. The respondents identified in Finding 9 have been selected for notice of layoff pursuant to a seniority list based on the first day of paid service of each respondent. The respondents were ranked for layoff in the inverse order of their date of employment. As to respondents who have the same date of hire/employment, the district used appropriate, written, tie-breaking criteria to rank these employees.

11. Certain respondents identified in Finding 9 question the dates used by the Board and the district as their "Seniority Date". One respondent, Anthony Heard, was employed under an emergency permit/credential; two respondents, Myriam Deaz-Tinajero and Jose Brito, were employed as Interns; and two respondents, Tammy Tourgemen and Carrie Dozal Carnie, were employed as temporary contract teachers. Each of these respondents received non-reelection notices advising them that their services would not be needed during the 2004/2005 school year. Subsequently, in October – November of 2004, the teachers were rehired and given seniority dates based on their rehire dates in October/November of 2004. Respondents, however, assert that they should have received credit for the time they worked under an emergency credential, as Interns, and/or as temporary contract teachers.

12. The respondents listed in Finding 11 did not receive any credit for the time they worked under their emergency credentials, as Pre-Interns, or as temporary contract teachers because the district takes the position that since the respondents received notices of non-reelection, their services were "dismissed" and their seniority dates became the dates they were re-hired in October/November of 2004.

13. Four of the respondents, Rafael Aberin, Patricia Kemp, Charles Burton, and Kathleen Clinton, were working as secondary teachers not in K-5; however, the district noticed them because they have multiple subject credentials and teachers with multiple subject credentials may teach K-5; therefore, they had to be considered in the overall mix for layoff.

Respondents highlight the fact that they were subjected to layoff because other secondary teachers with multiple subject credentials and other teaching authorizations exercised their bumping rights to "bump" them. Respondents argue that they have been bumped out of positions teaching in secondary school that are not in the K-5 category of positions subject to the board resolution.

The district argues that since 70 FTE in the K-5 category were being eliminated it acted properly by considering all teachers in the district who were qualified to teach K-5 and eliminating the least senior of those teachers.

Respondents counter the district's argument by pointing to the fact that if the district's position is adopted by the fact finder, then any teacher on the layoff list who is senior to the least senior respondent who was retained by "bumping" another respondent (i.e. Joseph Pooler who has a seniority date of 11/15/04), must be retained and the accusation dismissed as to them. According to the seniority list the following respondents are affected if respondents' position is correct:

<u>Respondent</u>	<u>Seniority date</u>
Maria Rubio	11/10/04
Susanne Shier	11/05/05
Holly Vetterli	11/01/04
Rafael Aberin	10/15/04
Robin Post	10/14/04
Danielle Thomure	10/12/04
Myriam Diaz-Tinajero	10/11/04
Ken Ishimaru	10/04/04
Carrie Dozal Carnie	10/04/04
Tammy Tourgeman	10/04/04
Anthony Heard	10/04/04
Alice DeLeon	10/04/04
Matthew Simon	9/20/04
Leslie Murillo	9/08/04

///
///
///
///
///

LEGAL CONCLUSIONS

1. Jurisdiction for the instant proceedings exists pursuant to Education Code sections 44949 and 44955, and all notices and other requirements of those sections have been provided, as required.
2. The services listed in Factual Finding 1 are each determined to be a particular kind of service within the meaning of Education Code section 44955.
3. Based on the Factual Findings, considered in their entirety, cause exists to reduce the number of certified employees of the District by 22 full-time equivalent positions, due to the decline in average daily attendance. (Findings 2 & 9.)
4. Cause to reduce or discontinue services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949. (Finding 3)
5. Education Code (Code) section 44848 addresses the issue of "breaks in service" raised by respondents in Factual Findings 11 and 12. Code section 44848 provides, in relevant part:

"When an employee's services are terminated for lack of enrollment or discontinuance of service or are otherwise interrupted in a manner declared by law not to constitute a break in service, his original order of employment shall stand. (Emphasis Added.)"

The language highlighted in the above quoted excerpt from Code section 44848 referring to "otherwise interrupted in a manner declared by law not to constitute a break in service" does not include releasing or non-reelecting temporary teachers, interns, or emergency permit teachers. There is no language in Code sections 44920 (temporary teacher), 44911 (emergency permit teacher) or 44450-44468 and 44830.3 (Interns) providing that non-reelection or release is not a break in service for seniority purposes. Additionally, there are no other code sections or case law providing or holding that non-reelection or release from service is not a break in service for seniority purposes. Accordingly, the seniority dates were properly established by the district for all respondents who were non-reelected teachers holding emergency permits, or who were temporary, or who were interns.

The respondents who were in the category described in this legal conclusion also argue that the district improperly used the non-reelection notices to circumvent their right to a hearing. Their argument, which is based on *Cousins v. Weaverville Elementary School Dist.* (1994) 24 Cal.App.4th 1846, is as follows: A district ordinarily may elect not to retain a probationary employee and it need not

assert a reason, but where it is undisputed that termination was prompted by economic conditions described in Code section 44955, the district must provide notice and a right to a hearing as prescribed by Code section 44949. Thus, it is impermissible to use a notice of non-reelection as a means of effecting an economic layoff.

Though novel, respondents' contention fails for the following reasons:

- 1) The notices of non-reelection occurred at the end of the 2003/2004 school year. The notices informed the teachers that their services would not be needed during the 2004/2005 school year; however, due to need, they were, in fact re-hired in October and November of 2004. Those events occurred a year ago and respondents' current objection to those notices of non-reelection is not timely;
- 2) The *Cousins* case concerns probationary employees, not temporary employees, employees with emergency permits, or interns; and,
- 3) No evidence was presented that the non-reelection notices were prompted by economic conditions.

6. As noted in Factual Finding 13, four respondents, Rafael Aberin, Patricia Kemp, Charles Burton, and Kathleen Clinton, were working as secondary teachers not in K-5; however, the district noticed them because they have multiple subject credentials and teachers with multiple subject credentials may teach K-5; therefore, they had to be considered in the overall mix for layoff.

Respondents highlight the fact that they were subjected to layoff because other secondary teachers with multiple subject credentials and other teaching authorizations exercised their bumping rights to "bump" them. Respondents argue that they have been bumped out of positions teaching in secondary school that are not in the K-5 category of positions subject to the board resolution.

There is nothing wrong with the fact the district considered all teachers qualified to teach K-5 to create its layoff list based on seniority. Since 70 FTE in the K-5 category were being eliminated the district acted properly by considering all teachers in the district who were qualified to teach K-5 and eliminating the least senior of those teachers. However, once the district made its decision to create a seniority layoff list based on all teachers qualified to teach K-5 it should have then eliminated the 70 least senior of those teachers. A comparison of the overall seniority list (Exhibit 4) with the "list of 22" noticed employees (Exhibit 14) reveals that the district did not comply with its own policy determination. Specifically, Exhibit 4

indicates that Joseph Pooler (employee no. 2767) is a probationary teacher with a seniority date of 11/15/04. Pooler was allowed to "bump" Kathleen Clinton (employee no. 2786). Accordingly, Pooler was not slated for layoff even though respondents with more seniority were. Those respondents and their seniority dates are as follows:

<u>Respondent</u>	<u>Seniority date</u>
Maria Rubio	11/10/04
Susanne Shier	11/05/05
Holly Vetterli	11/01/04
Rafael Aberin	10/15/04
Robin Post	10/14/04
Danielle Thomure	10/12/04
Myriam Diaz-Tinajero	10/11/04
Ken Ishimaru	10/04/04
Carrie Dozal Carnie	10/04/04
Tammy Tourgeman	10/04/04
Anthony Heard	10/04/04
Alice DeLeon	10/04/04
Matthew Simon	9/20/04
Leslie Murillo	9/08/04

Consequently, what is commonly referred to as the "Domino effect" shall apply and all employees on the "list of 22" as senior, or more senior, than the least senior teacher (Pooler) who "bumped" into the classroom (seniority dates on or before 11/15/04) shall be deemed reemployed. The accusation is dismissed as to those respondents.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

1. The Accusation is sustained, in part. The district may notify the following eight (8) respondents that their services will not be needed during the 2005-2006 school year due to reduction or discontinuance of particular kinds of services:

1. Elizabeth Drouillard
2. Geraldine Jacome
3. Jose Brito
4. Patricia Chavez
5. Patricia Kemp
6. Tony Espinoza

///

7. Charles Burton
8. Kathleen Clinton

2. The Accusation is dismissed as to the following fourteen (14) respondents, and the district may not notify those respondents that their services will not be needed during the 2005-2006 school year:

1. Maria Rubio
2. Susanne Shier
3. Holly Vetterli
4. Rafael Aberin
5. Robin Post
6. Danielle Thomure
7. Myriam Diaz-Tinajero
8. Ken Ishimaru
9. Carrie Dozal Carnie
10. Tammy Tourgeman
11. Anthony Heard
12. Alice DeLeon
13. Matthew Simon
14. Leslie Murillo

Dated: May____, 2005.

Santa Ana Unified School District