

BEFORE THE
GOVERNING BOARD OF THE
LOS ANGELES UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against: DAWN MARIE BRANNON, et. al. Respondents.	OAH No. L2004030075
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PROPOSED DECISION

Timothy S. Thomas, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 23, 2004 at Los Angeles, California.

Kathleen E. Collins and Albert C. Nicholson, Assistant General Counsel, represented the Los Angeles Unified School District (hereinafter the District).

Lawrence B. Trygstad, Attorney at Law, represented all respondents.¹

The matter was submitted on April 22, 2003.

FACTUAL FINDINGS

1. Deborah Hirsh, Chief Human Resources Officer for the District, filed the Accusation in her official capacity.

2. On or about March 8, 2004 Roy Romer, Superintendent of Schools, recommended to the Governing Board that the District reduce or discontinue particular kinds of services provided by teachers and other certificated employees. The decision was not related to the competency or dedication of the individuals whose services are proposed to be reduced or eliminated. Rather, the State of California has indicated to the District that funding for the 2004-2005 school year will be significantly less than a balanced budget would require to maintain the current year's services and class size. The Board passed Resolution No. 233-03/04 on April 8, 2004, adopting Superintendent Romer's recommendation calling for the reduction of 40 full-time equivalent (FTE) positions in the classification of psychiatric social workers. The basis for the proposed layoffs was the reduction or discontinuation of

¹ A list of the 17 employees designated for layoff is attached hereto as Exhibit A. All were in attendance at the hearing except respondents Dickerson, Green, Lewis, Merrill and Raphael.

particular kinds of services (PKS). Of the 40 positions recommended for termination, 22 were thought to be filled by non-permanent, or probationary employees, and 18 by permanent employees. Under the applicable collective bargaining agreement, probationary psychiatric social workers are subject to different procedures and timelines than permanent workers and are not parties to this action brought pursuant to Education Code sections 44949 and 44955.

3. On March 12, 2004, the District served upon the 18 affected employees, by certified mail, written notice that their services will not be required effective June 30, 2004. Each written notice indicated that the reason for the recommendation of dismissal was that certain services will be reduced or discontinued due to necessary budget reductions and/or the reallocation of funds. All respondents timely requested in writing a hearing to determine if there is cause for not reemploying them for the ensuing school year.

4. Subsequent to the adoption of Board Resolution No. 233-03/04, it was discovered that one of the psychiatric social workers thought to be permanent was actually a probationary employee. Therefore, on April 14, 2004 the District notified that employee, Tali Mariko Sperber, that she was being terminated pursuant to the collective bargaining agreement's procedural mechanism. On the same date, Tami Lee Kitchen, the most senior permanent psychiatric social worker who had been notified of an impending layoff, was advised that the notice as to her was rescinded. Thus, the number of permanent affected employees was reduced to 17.

5. The Superintendent's designee, Deborah Hirsh, Chief Human Resources Officer, made and filed an Accusation against the employees who requested a hearing. The Accusation with required accompanying documents and blank Notices of Defense were timely served on those certificated employees.

6. All respondents filed Notices of Defense in a timely fashion.

7. Respondents in this proceeding are permanent certificated employees of the District. All pre-hearing and jurisdictional requirements have been satisfied by the District.

8. The services set forth in Board Resolution No. 233 – 03/04 are particular kinds of services that may be reduced within the meaning of Education Code section 44955. The decision to reduce the services set forth above is neither arbitrary nor capricious. Cause for terminating each of the respondents relates solely to the welfare of the school and the pupils thereof.

9. The District compiled seniority lists that contain employees' seniority dates (first date of paid service), current assignments and locations, advanced degrees, credentials, and authorizations. The data was derived from the employees' personnel files and from databases maintained by the State of California and the County of Los Angeles. In addition, the District sent each teacher to be laid off a letter asking for confirmation of the information

gathered. The evidence established the accuracy of the District's seniority list and information.

10. The District determined from its seniority list whether any less senior employees held credentials or other indicia of competence entitling them to "skip" over more senior employees, and, conversely, whether any more senior employee was credentialed and competent to fill a position being held by a junior employee being retained. By this process the respondents were identified for layoff. No less senior employee within the PKS targeted for reduction is being retained to perform services that respondents are credentialed or competent to render.

11. However, the list and credential information also enabled the District to determine that 11 of the 17 affected employees have "reassignment rights" to another classification within the District, that of Child Welfare/Attendance, which is essentially a position that deals with the problem of truancy.²

12. The District adopted a system to break ties in the event that an employee designated for layoff shares a seniority date with an individual not scheduled for layoff that is entirely random.³ As no employee scheduled for layoff shares an employment starting date with any employee being retained, it is not necessary to decide the legal sufficiency of the tie-breaking system.

13. Subsequent to the passage of Board Resolution No. 233 – 03/04 a psychiatric social worker senior to those being laid off retired. The District's Director of Employee Relations testified that the number of layoffs was calculated taking into account actual attrition prior to March 15, 2004, and historical data used to predict attrition between March 15 and May 15, and the number of employees in the involved PKS who would return to their jobs for the 2004-05 school year, so that the single retirement experienced after March 15 has already been taken into account. If more retirements or other forms of attrition render the predictions moot in favor of respondents, the District representative testified that a corresponding number of respondents will be retained.

14. There are numerous senior psychiatric social workers, not subject to layoff, who possess credentials, certificates and/or special authorities to serve as teachers in elementary grades, to teach English, French, physical education or speech, or to serve as a school nurse. The District has approximately 700 vacancies in the elementary school teaching ranks, although the evidence did not establish that there will be openings in one or more of the other disciplines mentioned. However, none of the 17 respondents has a credential, certificate or

² The 11 respondents to be reassigned are: Tom, Williams, Vaquero, Quezada, Mizuno, Dickerson, Green, Lewis, Finazzo, Horowitz and Merrill. The remaining six employees who have no skipping, bumping or reassignment rights are respondents Cho, Villaverde, Garcia, Raphael, Dollinger and Brannon.

³ The system establishes a "District Seniority Number" for each employee, beginning with the first date of probationary employment, followed by a five digit random number using the last four digits of the employee's social security number, reversed, and the sum of the two preceding numbers of the social security number.

other indicia of competence to be considered for transfer to another classification other than Child Welfare/Attendance.

LEGAL CONCLUSIONS

1. Respondents argue that the most senior psychiatric social worker subject to layoff ought to be retained due to the resignation since the enabling Board resolution was passed of a more senior psychiatric social worker. In Moreland Teachers Association v. Davis, 109 Cal. App. 3d 648 (1980), the appellate court reviewed a decision of the school district to calculate the number of layoffs based upon actual attrition known as of March 15, its deadline to notify employees subject to layoff. That district experienced two additional resignations between March 15 and May 15 that it did not subtract from the number of teachers given final notice as of May 15. The court held that the district should have taken all "positively assured attrition" into account when issuing final notices. However, the precedent is distinguishable from the instant matter in that in Moreland there was no indication that the district had based its calculation on historical data that served as predictors of attrition. In other words, the Moreland court logically concluded that there was no reason not to subtract for known attrition as of May 15 just because it was not known on March 15, whereas LAUSD will not be able until May 15 to compare its projections against actual attrition. Should its projections prove overly pessimistic, then the District should, and indicates it will, adjust by retaining additional employee(s) otherwise subject to layoff.

2. Next respondents assert that because more senior psychiatric social workers, not subject to layoff because of their seniority, possess qualifications to teach or occupy positions where there are vacancies, the District should be required to reassign those employees, thus freeing up positions for the respondents. The Education Code contains no directive to a school district that it must reassign a senior employee not subject to layoff to a position he or she may not want to hold, whether that other position contains a vacancy or a less senior employee would be "bumped." Respondents cite Education Code section 44955 as requiring assignments and reassignments "in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render." The section certainly does not authorize, and respondents do not urge, bumping rights over more senior psychiatric social workers. Nor does the section, on its face, authorize the forced and likely unwanted reassignment of a senior employee, not subject to layoff, in order to accommodate a junior employee who is faced with termination.

In Duax v. Kern Community College District, 196 Cal. App. 3d 555 (1987), a similar argument was made by a teacher about to be terminated. But the Duax court rejected the suggestion that the teacher had "inverse bumping rights." "What Duax proposes is the reassignment of a senior employee, employee A, to a position held by a junior employee, employee B, to open up a position for Duax ... [The district's] obligation to make assignments and reassignments as provided in [the Education Code] is limited to attempting to place an employee who would otherwise be terminated in a position being held by another employee with less seniority." (Duax, supra, at page 568 - 569.)

3. District requests an order that the eleven respondents who are to be reassigned (see Finding 11) are nevertheless legally subject to layoff pursuant to the Board resolution. This Decision declines to provide such an order, but does direct that they be reassigned pursuant to Education Code section 44955.

4. Cause exists to reduce the number of certificated employees of the District due to the reduction and discontinuation of particular kinds of services, to wit, the reduction by 17 FTE of the number of psychiatric social workers.

ORDER

1. Notice shall be given to respondents Cho, Villaverde, Garcia, Raphael, Dollinger and Brannon that their services will not be required for the 2003-2004 school year because of the reduction and discontinuance of particular kinds of services.

2. Respondents Tom, Williams, Vaquero, Quezada, Mizuno, Dickerson, Green, Lewis, Finazzo, Horowitz and Merrill shall be reassigned to positions in the Child Welfare/Attendance category.

3. In the event that actual attrition known prior to May 15, 2004 exceeds the number predicted by historical analysis, the District shall retain and/or reassign a number of respondents listed in Order No. 1, above, that corresponds to the number of positions vacated by the attrition experienced over and above the attrition predicted.

DATED: April 27, 2004

TIMOTHY S. THOMAS
Administrative Law Judge
Office of Administrative Hearings