

BEFORE THE GOVERNING BOARD
OF THE VAL VERDE UNIFIED SCHOOL DISTRICT
COUNTY OF RIVERSIDE, STATE OF CALIFORNIA

In the Matter of the Certificated Layoff
Hearing of:

OAH No. L2008030625

KATHLEEN LENNING
MYCHELLE BLANDIN
RAMON GONZALEZ
KARA BRENNAN
LARISSA BARRICKMAN
KATHERINE BURNS
MICHAEL GREGORY, JR.
JANICE HOAG,

Respondents.

PROPOSED DECISION

This case came on regularly for hearing on April 29, 2008, before Janis S. Rovner, Administrative Law Judge of the Office of Administrative Hearings, State of California, in Perris, California.

Parker and Covert, LLP, by Spencer Covert, Attorney at Law, represented the Val Verde Unified School District (District).

Reich, Adell & Cvitan, by Marianne Reinhold, Attorney at Law, represented Kathleen Lenning, Mychelle Blandin, Larissa Barrickman, Katherine Burns, Michael Gregory, Jr., and Janice Hoag (Respondents), all of whom were present during the hearing. Ramon Gonzalez and Kara Brennan represented themselves at the hearing.

The District has decided to reduce or discontinue certain educational services and has given Respondents and other certificated employees of the District notice of its intent not to reemploy them for the 2008-2009 school year. Respondents requested a hearing for a determination of whether cause exists for not reemploying them for the 2008-2009 school year.

The record was left open for written closing arguments which were submitted on May 1, 2008. Respondents' closing argument is identified as Exhibit E and the District's closing argument is identified as Exhibit 15.

Oral and documentary evidence, and evidence by way of stipulation, was presented and received. The case was submitted for decision on May 1, 2008. The Administrative Law Judge makes the following factual findings, legal conclusions and order:

FACTUAL FINDINGS

1. On or before March 15, 2008, the District's Superintendent or his designee gave written notice to the District's Governing Board (Board) recommending that certificated employees of the District be given notice that their services would not be required for the 2008-2009 school year based on the Board's decision to reduce particular kinds of services.

2. On March 13, 2008, the Board adopted Resolution No. 07-08-26, in which it determined to reduce or discontinue the following particular kinds of services for the 2008-2009 school year: Thirty (30) full-time equivalent (FTE) elementary classroom teachers (kindergarten through 5th grade (K-5)). In the resolution, the Board also directed the Superintendent's designee to serve notice of layoff on certificated employees in accordance with the provisions of Education Code sections 44949 and 44955, as a result of the resolution to reduce particular kinds of service.

3. The District established that the need to reduce particular kinds of services was based on the uncertainties caused by the State's proposed budget cuts to education funding and a decline in enrollment in the District.

4. On or before March 15, 2008, the District Superintendent's designee, acting in his official capacity, caused to be personally served on each of 15 certificated employees of the District, written notice recommending that notice be given to them that their services would not be required for the 2008-2009 school year (March 15th notice). The written notice informed the employees that the Board had passed a resolution to reduce particular kinds of services for the 2008-2009 school year.

5. The Board and the District took into account assured attrition when it served March 15th notices on only 15 teachers, notwithstanding the reduction of 30 FTEs in grades K-5. Before the District served the March 15th notices, it had received notice that 15 elementary teachers intended to resign or retire at the end of the current school year.

6. The certificated employees who received the March 15th notice were given an opportunity to request a hearing to determine if there is cause for not reemploying them for the ensuing year. Eight of the 15 employees who received notice timely filed a written request for hearing with the District.

7. David Marshall, Deputy Superintendent of Education Services/Human Resources for the District, filed the Accusation in his official capacity. On or about April 4, 2008, the Accusation, with required accompanying documents, was properly served on each of the eight certificated employees who requested a hearing.

8. The eight certificated employees on whom the Accusation was served each filed a notice of defense and they are the Respondents in this proceeding.

9. Board Resolution No. 07-08-31, adopted April 8, 2008 established a priority list for determining the relative seniority of certificated employees who first rendered paid service to the District on the same date. The resolution applies by its terms to the "priority ranking" of certificated employees who share seniority dates. The resolution also provides that it is to be applied to those certificated employees with the same seniority date who received a notice of layoff for the 2008-2009 school year. The resolution includes the following criteria listed in order of ranking:¹

- (1) Certificated personnel whose primary assignment for the 2007-2008 school year is not being discontinued or reduced pursuant to the layoff resolution.
- (2) Credentialed teachers (not including interns).
- (3) If there is more than one certificated employee qualifying for any criteria with the same date of first paid service in a probationary position, then the order of tie-breaking shall be based upon the certificated seniority list heretofore drawn for the employee per Section 15.5 of the Val Verde Teachers Association (VVTa) Agreement.
- (4) Teachers whose primary assignment for the 2007-2008 school year is grades kindergarten through 6th grade (K-6) and who are serving as teacher interns in grades K-6.

¹ The District's criteria are referred to interchangeably throughout this decision as prioritization criteria or tie breaking criteria.

10. The VVTA Agreement is the collective bargaining agreement entered into between the Board and the VVTA (the teachers' union). The current agreement covers the period from July 1, 2005 through June 30, 2008. Section 15.5 of the agreement provides for a lottery to determine the seniority of teachers with the same first date of paid service with the District, as follows:

15.5 Development of the Certificated Seniority List

On May 1, 1992, representatives of the District and VVTA mutually participated in the development of a Certificated Seniority List to determine the order of seniority for all unit members. The order of seniority for unit members who first rendered paid service on the same date was determined by a random selection process agreed to and conducted by the parties. The certificated seniority list shall be revised annually to include new unit members and delete unit members who have been separated from district employment. During any revision, a random selection process agreed to and conducted by the parties shall be utilized to determine the order of seniority for new employees who first rendered paid service on the same date. The certificated seniority list shall be revised prior to the implementation of any lay-off.

11. Beginning in or before 1992, the Board has developed a seniority list in the fall of each year to break seniority ties using a lottery, as authorized and provided by the VVTA agreement. The "tie-breaking" seniority list based on the lottery (the lottery list) was established in November of 2007 for this layoff proceeding (Exhibit B).

12. David Marshall, Deputy Superintendent of Education Services/Human Resources for the District, was responsible for implementing the technical aspects of the layoff. In preparing the District's seniority list, less senior employees holding credentials or other indicia of competence were "skipped," and conversely, more senior employees who were credentialed and competent to fill a position being held by a junior employee were retained. By this process, the District identified Respondents for layoff.

13. The District applied the prioritization criteria in the Board Resolution No. 07-08-31 on April 18, 2008 to create its seniority list. The District gave significant weight to the lottery list in formulating the District's seniority list for purposes of the layoff.²

14. The District's seniority list ranked 77 teachers who share August 13, 2007 as their date of hire, in ranks #3 through #80. In compiling the seniority list for the 77 teachers, the District started with the lottery list. The lottery list ranked the same 77 teachers within the range of #804 to #892.

15. (a) In ranking the August 13, 2007 hires, the District gave employees teaching high school, middle school (above 6th grade), single subjects in middle school (any grade), and special education priority on the District's seniority list (Ranks #3 through #66). Their priority ranking within the seniority list was commensurate with their priority on the lottery list.

(b) Elementary school teachers and 6th grade middle school teachers teaching core subjects in a block classroom (core classroom) were grouped into rankings lower on the seniority list (Ranks #67 through #80) and their seniority list rankings were also arranged in a manner commensurate with their lottery list ranking. The District placed the 6th grade core classroom teachers in the same seniority grouping with elementary teachers in grades K-5 because their multiple subject credentials allow them to teach in grades K-5 in addition to 6th grade core classrooms.

16. Of the 77 teachers who are listed on the District's seniority list with the August 13, 2007 date of hire, the District sent March 15th notices to three teachers:³ Respondents Hoag and Gregory, who requested a hearing, and a high school teacher, who did not request a hearing.⁴ Respondents Hoag and Gregory were ranked last on the seniority list for teachers hired on August 13, 2007, at #79 and #80, respectively. Like the high school teacher, both Hoag and Gregory possess SB 2042 Preliminary Multiple Subject: General Subjects credentials. Respondent Gregory teaches in a 6th grade middle school core classroom. He has the lowest lottery list ranking of the

² Throughout this decision, lottery list refers to the list created pursuant to the lottery in November 2007. It was received into evidence as Exhibit B. Seniority list refers to the District's seniority list that was created on or about April 18, 2007 and was received into evidence as Exhibit 6.

³ Respondent Lenning also received a March 15th notice. Although her first date of paid service with the District is listed on the seniority list as August 13, 2007, the District placed her at the bottom of the seniority list based upon on her intern credential. Respondent Lenning's situation is addressed below.

⁴ The high school teacher had a rank of #63 on the District's seniority list. He is a math teacher with an SB 2042 preliminary multiple subject credential: general subjects and a limited assignment single subject credential: mathematics.

teachers who share August 13, 2007 seniority date at #892. The high school teacher and Respondent Hoag also lacked priority on the lottery list at #887 and #888, respectively. Respondents Hoag, Gregory, and the high school teacher received layoff notices by virtue of their general subject credentials and their position at the bottom of the lottery list.

17. There are at least 9 elementary school teachers on the seniority list who did not receive a March 15th notice. Those elementary school teachers are ranked between #66 and Respondent Gregory's #80. One of the elementary teachers has the same SB 2042 Preliminary Multiple Subject: General Subjects credential as the high school teacher and Respondent Gregory have. That elementary teacher was ranked #73 on the seniority list, lower than the high school teacher, but she had a better lottery number, #855, than either Respondent Gregory or the high school teacher. All nine elementary teachers on the seniority list (Exhibit 6) in the ranks between #67 and #80 were retained on the basis of their lottery list priority.

18. In breaking ties for the August 13, 2007 hires, the District applied two criteria: the type of credentials possessed by the teachers and the teachers' lottery list ranking. In doing so, the District deviated from its own tie breaking criteria with respect to Respondent Gregory. The District's tie breaking criteria was to be applied in order of its ranking according to the Board resolution. Respondent Gregory was not credited with either the first tie-breaker or the second tie breaker. As to the first tie-breaker, Respondent Gregory teaches 6th grade in middle school. He is not a K-5 teacher so he is not rendering the particular kind of service that is being reduced. As to the second tie breaker, Respondent Gregory is a "credentialed teacher" and he is not an intern. The second tie breaker does not call for the District to distinguish between types of credentials in breaking ties based on this criterion. Had the tie breaking criteria been applied appropriately, Respondent Gregory would have been given priority on the seniority list over several elementary school teachers who did not receive a layoff notice. The District did not act appropriately in giving sole weight to the third criterion, Respondent Gregory's low lottery listing, to justify sending a March 15th notice to him. Respondent Gregory must therefore be retained.

19. Respondent Hoag is an elementary school teacher. She is the most senior of eight elementary school teachers who received layoff notices. She shares the same seniority date with nine other elementary school teachers. Based on the Board's prioritization resolution, Respondent Hoag is subject to layoff solely on the basis of her low lottery listing. There are nine elementary teachers who have priority over her on the seniority list. This makes evident the lack of substance in the Board's first two prioritization criteria in determining who should be laid off as between similarly situated teachers. It is solely the lottery ranking that determined which elementary school teacher was given priority. Respondent Hoag must be retained because as applied to her, the lottery did not take into account the needs of the District and its students.

20. The District ranked Respondent Lenning last on the seniority list based upon her intern credential (Rank #97). The District acknowledges, however, that her first date of service was August 13, 2007. With an August 13, 2007 date of hire, she is entitled to accrue seniority in her position. Respondent Lenning teaches 6th grade in middle school. In applying the District's prioritization criteria, she should have been given priority using the first criterion because her primary assignment for the school year is not being discontinued or reduced. It is true that the lowest prioritization criterion applies to her because her primary assignment for the 2007-2008 school year is in grades K-6 as an intern. However, she also has priority based on her lottery list ranking, #843. In applying the priority criteria to Respondent Lenning, she must be retained.

21. Respondents Burns and Blandin have seniority dates of August 17, 2007 and December 18, 2007, respectively. Both teach in the sixth grade at middle school. Respondent Burns teaches in a core classroom and Respondent Blandin teaches reading. They received March 15th notices. They are correct in contending that they are employed in an assignment that is not one of the particular kinds of services being reduced. However, the District properly sent notice to Burns and Blandin. Senior teachers with multiple subject credentials will be able to "bump" into the positions of Respondents Burns and Blandin.

22. Consistent with the factual findings and legal conclusions regarding Respondents Hoag, Gregory and Lenning, no other permanent certificated employee with less seniority will be retained to render a service that the Respondents are certificated and competent to render.

LEGAL CONCLUSIONS

1. All notice and jurisdictional requirements set forth in Education Code sections 44944 and 44945 were met.

2. The services identified in Board Resolution No. 07-08-26 are particular kinds of services that can be reduced under Education Code section 44955. The Board's decision to reduce the identified services was neither arbitrary nor capricious; rather, it was a proper exercise of the Board's discretion.

3. Cause for the reduction of the services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949.

4. No services are being reduced or eliminated below legally mandated levels. (See, e.g., *San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627.)

5. Respondents contend that the District acted improperly in applying a random selection process or lottery as one criterion to be applied in ranking the seniority of teachers with the same first date of paid service. Education Code section 44955, subdivision (b) provides:

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.

At one time, the statute included language specifically allowing a lottery to determine relative seniority ranking. That language was replaced with the current language. (See *Alexander v. Bd. of Trustees of Delano Joint Union High School District* (1983) 139 Cal.App.3d 567, 573.) Because the criteria must be based upon "the needs of the district and the students thereof," it is improper for a district simply to use a lottery to break ties. It may be permissible to use a lottery as a final tie-breaker after applying other objective criteria that is based on the needs of the district and students,⁵ but the prioritization criteria in Resolution No. 07-08-31, lacked substance as conceived and applied. The result in applying the criteria was that relative seniority ranking was determined based upon the lottery ranking and not the needs of the district and its students.

Although the collective bargaining agreement does provide for a random selection process, the bargaining agreement cannot be applied to contravene the requirements of the Education Code. (See *Board of Education v. Round Valley Teachers Assn.* (1996) 13 Cal.4th 269.)

6. Cause does not exist to give notice to Respondents Gregory, Hoag, or Lenning based on Factual Findings 16 through 20. Respondent Lenning is entitled to seniority commensurate with her seniority date of August 13, 2007. (See *Bakersfield Elementary Teachers Assn v. Bakersfield City School Dist.* (2006) 145 Cal.App.4th 1260.)

7. Except as provided in Legal Conclusion 6, 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 Typical tie-breaking criteria have included years teaching outside of the District, type of credential, certificates, authorizations, language skills, degrees or salary steps. Some districts weigh the criteria by assigning points to each category based on importance.

8. Considering Legal Conclusion 6, no junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render.

ORDER

1. The Accusation is dismissed as to Respondents Gregory, Hoag, and Lenning.

2. The Accusation is sustained as to Respondents Burns, Barrickman, Gonzalez, Brennan, and Blandin. The District may notify the Respondents that their services will not be needed during the 2008-2009 school year because of the reduction of particular kinds of services.

Dated: May 7, 2008

Janis S. Rovner
Administrative Law Judge
Office of Administrative Hearings