

BEFORE THE
GOVERNING BOARD
OF THE
SAN DIEGO UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Reduction in Force of
Certain Certificated Teachers Employed by
the San Diego Unified School District,

Respondents.

OAH No. 2008030379

PROPOSED DECISION

Stephen E. Hjelt, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego California, on April 14 and 15, 2008.

Melanie A. Petersen , Attorney at Law, of Fagen, Friedman & Fulfrost LLP represented the San Diego Unified School District (the District or SDUSD).

Fern M. Steiner, Attorney at Law, of Tosdal, Smith, Steiner & Wax represented respondent certificated employees of the San Diego Unified School District who received preliminary layoff notices as indicated in the record.

For the purpose of determining the issues herein, the District, by stipulation, agreed that all respondents served with an Accusation were entitled to a hearing whether they filed a Notice of Defense or not.

The matter was submitted on April 15, 2008.

FACTUAL FINDINGS

The San Diego Unified School District

1. The San Diego Unified School District (the District or SDUSD) is the second largest district in California and the eighth largest urban district in the United States. It serves over 135,000 students and has been serving the city's educational needs for over 150 years. It has more than 221 educational facilities with over 14, 500 full time equivalent staff positions representing more than 15, 800 employees. The District's educational facilities

include 118 elementary schools, 24 middle schools, 29 high schools, 35 charter schools, and 15 atypical or alternative schools.

2. The District is governed by an elected five-member Board of Trustees. The Board's Chief Executive Officer is Dr. Terry Grier the Superintendent. Dr. Grier is supported by an administrative staff including Sam Wong, Chief Human Resources Officer and Tim Asfazadour, Interim Director of Certificated Staffing.

The Fiscal Crisis – Economic Layoffs

3. Proposition 13 limited the imposition of property taxes and reduced a major source of assured revenue for funding public education in California. Since Proposition 13, public school districts have looked primarily to the State of California and to other governmental entities for funding.

A school district cannot determine the level of state funding it will receive until the state budget is chaptered, an event usually occurring in late June. Before then, a school district's governing board must take steps to make certain that ends meet if a worst-case financial scenario develops. California's current economic crisis has made budgeting problems far more complicated than they were before.

A school board's legal obligation to balance its budget often requires that some teachers, administrators and/or other certificated employees be given preliminary layoff notices, warning them that their services will not be required for the next school year. Under Education Code section 44949, preliminary layoff notices must be given to affected certificated employees no later than March 15.

The economic layoff statutes found in the Education Code generally require the retention of senior employees over more junior employees and the retention of permanent employees over probationary employees and other employees with less seniority. A public school district may deviate from the general rule requiring termination in reverse order of seniority only if it can demonstrate that identifiable junior employees possess a credential, special training or experience necessary to teach a course of study or to provide services which more senior employees do not possess.

The District's Response

4. By early 2008, the District's administration (as well as the administrators of most other school districts) was well aware of the State of California's massive economic problems. As a result of the financial crisis and the Governor's proposed budget, the District projected an estimated budget deficit of about \$78 million for the 2008-2009 school year. The District was required to look into ways to meet the budget deficit.

Under the Superintendent's direction, budgetary cuts were considered across the board including the elimination and reduction of particular kinds of services provided by the District's certificated employees. On March 11, 2008, the District personnel presented to the

Board a recommendation concerning the reduction and elimination of particular kinds of services in the approximate amount of 919.85 FTEs (full time equivalent positions). This number is slightly misleading since it includes FTEs attributable to permanent and probationary employees. This layoff hearing related solely to permanent employees since probationary employees' rights are governed by the provisions of the collective bargaining agreement between the District and the teacher's union. This layoff hearing involved 477 permanent employees who received notices.

5. On March 11, 2008, the Board adopted a Resolution recommending a reduction in particular kinds of services provided by the District for the 2008-2009 school year, together with the adoption of tie-breaking criteria. The Board's adoption of the resolution and tie-breaking criteria was based on the welfare of the schools and their pupils.

6. The Resolution provided:

RESOLUTION OF THE GOVERNING BOARD OF THE
SAN DIEGO UNIFIED SCHOOL DISTRICT

WHEREAS, the Board of Education of San Diego Unified School District ("District") has determined that it shall be necessary to reduce or discontinue the particular kinds of services of the District listed on Exhibit A no later than the beginning of the 2008-2009 school year.

WHEREAS, as a result of said reduction or discontinuance in particular kinds of services, it is necessary to decrease a corresponding number of certificated employees in the District at the close of the current school year in accordance with Education Code section 44955; and

WHEREAS, it is necessary that among employees who first rendered paid services to the District on the same day, the order of termination be based solely on the needs of the District and the students thereof based on application of the following specific criteria and in the listed priority order.

1. Number of teaching and/or special service credentials.
2. Number of supplementary authorizations No Child Left Behind -Highly Qualified Teacher compliant.
3. Earned degrees beyond the BAIBS level.
4. Multiple language skills relevant to District need.
5. Lottery

NOW THEREFORE, BE IT RESOLVED that the particular kinds of services of the District as listed in Exhibit A be reduced or discontinued no later than the beginning of the 2008-2009 school year;

BE IT FURTHER RESOLVED that at the end of the 2007-2008 school year the number of employees serving in certificated positions in the District shall be decreased by a maximum of full time equivalent certificated positions as a result of said reduction or discontinuance in particular kinds of services; and

BE IT FURTHER RESOLVED that among employees who first rendered paid services to the District on the same day, the order of termination will be based solely on the needs of the District and the students thereof based on application of the following specific criteria in the listed priority order:

6. Number of teaching and/or special service credentials.
7. Number of supplementary authorizations No Child Left Behind -Highly Qualified Teacher compliant.
8. Earned degrees beyond the BAIBS level.
9. Multiple language skills relevant to District need.
10. Lottery

BE IT FURTHER RESOLVED that the Superintendent or his designated representative is directed to send appropriate notices to all employees whose services shall be affected by this action. Nothing herein shall be deemed to confer any status or rights upon temporary certificated employees or any other employee in addition to those specifically granted to such by statute.

7. Exhibit A to the resolution set forth a list of the particular kinds of services being reduced and the extent of the reductions measured by FTEs as follows:

EXHIBIT A
March 11, 2008

Reduction/Elimination of Particular Kinds of Services

<u>Administrators</u>	<u>FTE Reduction</u>
Principals	21.5
Vice Principals	54
Special Ed Site Administrators	13
Central Office Certificated Managers	12
	<hr/> 100.5
<u>Support Services</u>	
Central Office Resource Teachers	68
Counseling	61.75
Vocational Rehabilitation Counseling/Teachers	16
Library Services	15
Nursing	28
	<hr/> 188.75
<u>Elementary Education</u>	
Elementary Teaching (K-6)	416
Gate Seminar	8.6
Of Campus Integrated Learning Experience (OCILE)	8
	<hr/> 432.6
<u>Middle/High/Alternative Education</u>	
Art	6

English	96
Music	9
P.E.	28
Social Science	42
Spanish	17
	<hr/> 198

TOTAL FULL TIME EQUIVALENT (FTE) REDUCTION **919.85**

8. The Board's tie-breaking criteria provided:

WHEREAS, it is necessary that among employees who first rendered paid services to the District on the same day, the order of termination be based solely on the needs of the District and the students thereof based on the application of the following specific criteria and the listed priority order.

1. Number of teaching and/or special service credentials.
2. Number of supplementary authorizations No Child Left Behind-Highly Qualified Teacher compliant.
3. Earned degrees beyond the BA/BS level.
4. Multiple language skills relevant to District needs.
5. Lottery

The District's tie-breaking criteria were to be applied to certificated employees with the same date of hire. The tie-breaking criteria were prepared specifically to meet the needs of the District and the students and it was applied appropriately.

9. Before preliminary layoff notices were served, the administrative staff circulated a certificated seniority list that contained the names of all credentialed employees, ordered in longevity from the most senior employee to the most junior employee; the site where the employee provided services; the subject/grade level in which services were provided; the employee's full time employment status (a "1.0 FTE" indicated full time employment); the employee's credential(s) information; the employee's seniority date (i.e., the employee's first date of paid service with District on a probationary basis); the employee's hire date; and the employee's tenured status (i.e., permanent, probationary 2 or probationary 1). Employees were invited to review the seniority list and to respond to the administrative staff with any changes or corrections.

~~There were some misunderstandings regarding requests for updated information. A~~
certain amount of distrust has existed between the District and the union. This is probably not surprising based on the size of the District and the complexity of the issues it faces and the past history of turmoil. However, despite how either side wishes to characterize the other, the difficulty in having complete, up to date and totally accurate information regarding credentials and seniority dates relates far more to the compressed time-frame that the District

and the teachers had to cooperatively put this information together. No one is to blame. Everyone was trying to do their best. Nevertheless, the record in this case demonstrates that what was presented during the hearing was a snap-shot of what the District had on file in mid March. During the hearing more information was supplied to the District and they made good faith efforts to evaluate and integrate the information into their data base. This Proposed Decision is based on the best information available at the time of the hearing.

10. On or before March 15, 2008, each certificated employee who is party to this proceeding was given a letter and notice that the Board had recommended that his or her services with the District would be terminated at the conclusion of the current school year. The letter stated the reduction in the District's workforce was due to California's serious budget shortfall. A notice advised each respondent that his or her services would be terminated at the close of the current school year, that the reasons for the termination were set forth in the Board's resolution (which was enclosed), that the employee had the right to request a hearing to determine if there was cause for termination, and specified dates on which the request for hearing had to be filed.

The letter and notice supplied by the District was proper and appropriate, except for errors made with respect to approximately 40 teachers. These 40 teachers were improperly served. The San Diego Unified School District is somewhat unique in terms of its layoff procedure. For permanent teachers, the layoff procedure is governed by the dictates of the Education Code. For probationary teachers, there is a separate layoff procedure that was the product of bargaining by the District and the teacher's union that is referenced in District Exhibit 4 in evidence.

The forty teachers identified in District's Exhibit 4 received a notice that they were to be laid off pursuant to Article 19 of the collective bargaining agreement and that their recourse was to file a grievance. It is acknowledge that substantially fewer rights and protections are available to teachers under Article 19 than are available under the Education Code. After this notice was given to these 40 teachers, the District determined that such notice had been given in error. These 40 teachers were permanent, not probationary, teachers. So, on or about March 26, 2008 the District gave notice to the teachers of the District's error and notified the teachers that they were entitled to appear in the layoff hearings as permanent teachers.

This error by the District did not legally disadvantage the 40 teachers. They were not prejudiced in any way. The defect in the initial misidentification was cured by the subsequent actions of the District. These 40 teachers were properly noticed for the purpose of the necessary jurisdictional elements under the Education Code.

11. Most of the certificated employees served with the preliminary layoff notice requested a hearing. An accusation packet was thereafter served on the certificated employees who requested a hearing. The District determined that all respondents who were served with the Accusation packet were entitled to a hearing even if a Notice of Defense was not filed.

The Administrative Hearing

12. On April 14, 2008, the record in the administrative hearing was opened. Jurisdictional documents were presented. The District gave an opening statement. An opening statement was given on behalf of all respondents represented by counsel. A written stipulation to jurisdictional facts was filed, sworn testimony and documentary evidence was received, closing arguments were given, the record was closed and the matter was submitted.

Year Round Schools and Their Issues

13. There are two issues involving the relatively few year round schools operated by the District. The first involves first date of paid service. The second involved the last two weeks of the school year for year round schools. The last two weeks at year round schools extends two weeks into July. June 30/July 1 represents the beginning and end of the fiscal year for the District. It is the District's intention to allow the teachers currently teaching in these schools to complete the school year by working the first two weeks in July whether they were to be laid off or not.

The District's decision to retain the teachers to finish the school year in the year round schools is reasonable and appropriate. To do otherwise would not be in the best interest of the students.

The first date of paid service issues is more complicated. The evidence established that the date of August 25, 2003 was the first date of paid service for the following teachers: Alison Borman (was Dinell), Kelly Gelsomino, Monique Falcon, Marlo Milligan, Judith Morais, Ginny Ostertag, Allison Curry, Joy Delgallego, Katherine Escalante, Sharon Fargarson, Cheryl Groeschel, Renee Jaeger, David Mace, Jennifer Manglicmot, Sharon Martin, Michael McEwen, Sydney Nicholson (was Ibarra), Kelly O'Brien, Laurie Owings, Corrin Parkey, Jennifer Ruark, Kathy Ryan, Jennifer Sandoval, Robert Schaeible, Patty Snyder, Kristina Teesdale, Margaret Trent, Amy Wood, Alison Williams, Courtney Young.

The above named teachers should be credited with the August 25 seniority date because that was, in fact and in law, their first date of paid service. It was not voluntary and they received pay for it.

The Particular Kinds of Services

14. The services identified by the Board for reduction or elimination in Exhibit A (Factual Finding 7) were particular kinds of services that could properly be reduced and discontinued. ~~The reduction and elimination of those services was neither arbitrary nor~~ capricious, and the reduction or elimination of those services constituted a matter well within the proper exercise of the Board's discretion. The layoff related to the welfare of the District, the schools, and the students. No services were reduced below levels required by federal and state laws.

The Seniority List

15. With a few exceptions which do not impact the layoffs in this matter but which possibly could affect the order of rehiring (the order of rehiring is not at issue in this matter), the District's seniority list was accurate. The preponderance of the evidence did not establish that the certificated employees who were the subject of this layoff proceeding were improperly classified. Nevertheless, the District should be available to make corrections to the District's seniority list as may be appropriate following this hearing upon verification of the new information provided. To the extent that the District may have retained a junior employee due to miscalculating seniority or failing to recognize the employee is subject to bumping by a more senior employee the remedy should be to reinstate the most senior employee competent and credentialed to perform the service because only that employee was prejudiced by the error. The so-called Domino Theory, argued by respondents, would dictate that if the District retained a junior employee erroneously then all persons senior to that junior employee who are scheduled to be laid off must be spared because an employee with less seniority is occupying a position that they are entitled to have, i.e., "domino effect." Such an argument no longer has a persuasive basis. In this case, it is clear that the District made a good-faith effort and substantially complied with the requirements that seniority be used to determine layoff order.

The District's Layoff Procedure

16. The Board's resolution called for the elimination or reduction of about 919 FTEs in particular kinds of services. Using the Board's resolution and the District's seniority list, the District's staff identified the most junior employees providing the particular kinds of services identified in the resolution. For those employees who were displaced, the District attempted to determine if the displaced employee could "bump" a more junior employee by providing a particular kind of service that the displaced senior employee was credentialed and competent to provide.¹ The Board's tie-breaking criteria established a method by which employees having the same seniority date could be ranked for layoff purposes. It was used only once and applied correctly. Through the tedious step-by-step elimination process, the District correctly determined which certificated employees should receive preliminary layoff notices. No permanent or probationary employee with less seniority will be retained to render a service any respondent is certificated and competent to provide.

The District "skipped" in high need areas where it has difficulty in recruiting such as in math and science. It also skipped in order to retain the athletic director at Lincoln High School. Ron Hamamoto, with a seniority date of August 29, 2007, was retained and therefore skipped over others with more seniority. Mr. Hamamoto was chosen for this position after a lengthy search due to the unique circumstances surrounding the re-opening of Lincoln High School. There is sufficient evidence in the record to allow for inferences to be

¹ A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated and competent to fill. In doing so, the senior employee may displace or "bump" a junior employee who holds that position.

drawn about the special needs of this position and the special qualifications of Mr. Hamamoto. Mr. Hamamoto was properly skipped.

In making determinations regarding the layoff and reassigning teachers based upon credentials and qualifications, the District used, as one factor, No Child Left Behind (NCLB) compliance. In other words, if a teacher was NCLB compliant, that teacher was advantaged in rankings of reassignment. The District appropriately considered NCLB compliance for the purpose of potential reassignment.

Respondent's Contentions

17. Respondents contended the District retained the services of several junior employees to provide services more senior employees who were laid off were credentialed and competent to provide. The evidence did not support this contention. No junior employee was retained over a more senior employee.

Respondents suggested that the District may have failed to afford permanent status to some employees who were classified as probationary employees, or may not have provided a correct seniority date for employees who had worked under emergency permits or as teacher interns, or may not have afforded employees providing services in categorically funded programs the seniority rights to which they were entitled. No evidence established that any mistake in classifying any certificated employee had any impact in this layoff proceeding.

Respondents argued that the layoff decisions of the District were arbitrary and capricious because, inter alia, the budget shortfall is less than 78 million dollars (closer to 40 million) and that the reserve fund could be tapped into. Respondents strongly argued that there were significant numbers of teachers who were over-noticed unnecessarily. Although each of these arguments has legitimacy, none of them, either in isolation or collectively, rise to the level of demonstrating that the District acted in an arbitrary or capricious fashion.

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 as to those respondent certificated employees identified herein.

2. A school board's decision to reduce or discontinue particular kinds of services (PKS) need not be tied to any statistical computation, such as a reduction in the number of students. ~~The number of terminations through PKS reductions depends totally upon the~~ decision about how many services to reduce. A board may consider the school district's economic circumstances in making the determination to eliminate particular kinds of services. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627.)

A school board may "reduce services" by eliminating certain types of service or by reducing the number of district employees providing such services. The decision to reduce

or discontinue a particular kind of service is not unfair or improper simply because a school board made a decision it was empowered to make. (*Rutherford v. Board of Trustees of Bellflower Unified School District* (1976) 64 Cal.App.3d 167.)

3. Education Code section 44955, subdivisions (b) and (c), sets forth a general rule requiring school districts to retain senior employees over more junior employees and to retain permanent employees over temporary employees. Any exception to this general rule must be based on statute. For employees hired on the same date, Education Code section 44955, subdivision (d) provides:

“(d) Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons:

(1) The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess.

(2) For purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws.”

4. Seniority determines the order of dismissals; between employees with the same first date of paid service, the order of termination is determined on the “basis of the needs of the district and its students.” Senior employees are given “bumping” rights and will not be terminated if junior employees are being retained to render services which the more senior employee is certificated and competent to render. (*Alexander v. Board of Trustees* (1983) 139 Cal.App.3d 567.)

A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated and competent to fill. In doing so, the senior employee may displace or “bump” a junior employee who holds that position. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469.)

5. As a result of the District’s lawful reduction of particular kinds of services, cause exists under Education Code section 44955 for the District to give notice to all respondents who were previously served with preliminary layoff notices that their employment will be terminated at the close of the current school year and that their services will not be needed for the 2008-2009 school year, except for the following: Sara Burgin, Ann Doyen-Pareja, Adriana Howe, Gina Maklary, Edna Mikulanis and Roger Rosenberg.

This conclusion is based on all Factual Findings and on all Legal Conclusions.

DISCUSSION

Teacher layoff hearings occur irregularly in California. Often years pass with no such reduction in force (RIF) ever being filed by a school district or heard by the Office of Administrative Hearings. However, due to the way education in California is presently funded, school districts and their teachers are always a blip in the economy away from the draconian measures required by the Education Code. The reasons for the continued existence of this inefficient and wasteful system are beyond the scope of this hearing. However, to the District and its teachers, the dislocation, the anxiety and uncertainty, the distrust and disgust are corrosive and cause wounds that can take years to heal.

There are a number of unfortunate ironies in this case. Recently, much column space was devoted in the San Diego Union Tribune to an article about where California ranks in terms of per pupil spending. The article provocatively asked: "Does the amount of spending on each public school student in California, with the world's eighth-biggest economy, rank near the bottom among states or near the middle?" The answer, depending on who you ask is 46th, or 49th, or 29th or 25th. Recent press reports also reveal that school districts from other states are now actively advertising and courting California teachers with incentives and bonuses and jobs that will not be at jeopardy from year to year.

The ultimate irony is that on the day that this Proposed Decision is signed and sent to the Board for action (May 6, 2008) a page-one article appeared in the San Diego Union Tribune under the heading "School stands to lose nearly all its teachers." The article recounts the story of Jackson Elementary School, an inner city school that was considered by some to be one of the least desirable places for a teacher to work at. As soon as most teachers accrued any seniority they would transfer out. In the last few years the school and its students have been transformed by the efforts of a young and enthusiastic faculty and administration into an award winning campus. Nevertheless, as a result of the actions of the District, 24 of the 26 teachers at the school are due to be laid off. Any reasonable person reading this article might wonder, are these folks daft?

The answer is "No." No one in this picture is daft, not the District, not the teachers, not their union. The problems that result in this craziness are structural and systemic and reflect how education is truly prioritized by those charged with enacting and carrying out our laws.

The measure by which a District's actions is to be judged is set forth in an appellate decision in the case of *Campbell Elementary Teachers Association v. Abbott* (1978) 76 Cal. App. 3d 796 at page 808. The court wrote:

"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 forth by reason and reasonable people, bearing in mind that such a standard may permit a different of opinion on the same subject. The record reveals that the board resolution of March 13, 1975, was not an arbitrary decision arrived at through the exercise of mere caprice, but rather

was a decision supported by a fair and substantial reason. It is true that the governing board hoped that when its final budget was adopted it would not be necessary to terminate all of the enumerated services. Although the governing board wanted to keep as many certificated employees as possible, the school district was facing financial uncertainties, and the board acted in an attempt to allow the district maximum flexibility in determining staffing for the ensuing school year in light of both available resources and needs."

Judging the District's actions against this standard, there is nothing arbitrary or capricious about its actions. They are reasonable under the circumstances. There may well be other alternatives that might be available. These may result in fewer layoffs. The District is expected to consider them in good faith. But, ultimately, the District must be accorded the deference to make these "no win" decisions as long as they are made in good faith with the students and the District's needs in mind. The record in this case demonstrates that the District has done so.

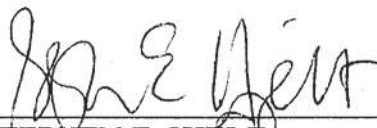
RECOMMENDATIONS

1. It is recommended that the Board give notice to all respondents identified in **Attachment A** to this Proposed Decision previously served with a preliminary layoff notice that their employment will be terminated at the close of the current school year and that their services will not be needed for the 2008-2009 school year save and except for those mentioned below in recommendation 2.

2. It is recommended that the Accusation be dismissed as to the following named respondents: Sara Burgin, Ann Doyen-Pareja, Adriana Howe, Gina Maklary, Edna Mikulanis and Roger Rosenberg.

DATED: _____

5/6/08



STEPHEN E. HJELT
Administrative Law Judge
Office of Administrative Hearings

ATTACHMENT A

District Seniority List consisting of 26 pages (double sided).