

BEFORE THE
GOVERNING BOARD OF THE
ORO GRANDE SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Employment Status of:

OAH No. L2005040052

FREDERICK D'ALO AND LUANNE
BORQUE,

Respondents,

and

ORO GRANDE SCHOOL DISTRICT,

Complainant.

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, was assigned to decide this matter in San Diego, California on May 12, 2005.

Mark Thompson, Attorney at Law, represented complainant Oro Grande School District, a public entity.

Carlos R. Perez, Attorney at Law, represented respondent Fred D'Alo.

The matter was submitted on May 20, 2004, following the filing of a stipulation establishing foundational facts and the filing of briefs.

FACTUAL FINDINGS

Employment Status

1. Frederick D'Alo (D'Alo), Luanne Borque (Borque), Anna Hill (Hill) and Catherine Aure (Aure) were certificated employees of the Oro Grande School District (the

District). Each was a probationary employee under Education Code section 44929.23, subdivision (a).

The Economic Layoff

2. On March 8, 2005, Superintendent Kenneth L. Larson recommended to the District's Governing Board (the Board) that it adopt a resolution reducing or eliminating particular kinds of services for the 2005-2006 school year in accordance with Education Code sections 44949 and 44955.¹ Superintendent Larson specifically recommended the reduction of two Elementary Classroom Teacher full-time equivalents (known as F.T.E.s). He recommended D'Alo and Hill be given a layoff notice advising that their services would not be required for the upcoming 2005-2006 school year, and that Aure and Borque be given a precautionary notice advising them that their services would not be required for the upcoming 2005-2006 school year.

3. On March 8, 2005, the Board passed Resolution No. 7-2004-2005, which provided as follows:

"WHEREAS, the Board of Education of the Oro Grande School District has determined that the particular kinds of services set forth herein must be reduced or discontinued; and

WHEREAS, it is the opinion of the Board that because of the aforementioned reason it is in the best interest of the District that the number of regular certificated employees of the District must be reduced; and

WHEREAS, this Board does not desire to reduce the services of regular certificated employees based upon reduction of average daily attendance during the past two years.

¹ Notice is taken that Proposition 13 limited the imposition of local property taxes and reduced a major source of assured revenue for funding public education. After the passage of 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 the worst-case financial scenario develops.

A school board's obligation to balance its budget often requires that some teachers, administrators or other certificated employees be given preliminary layoff notices, warning them that their professional services will not be required in the next school year. These preliminary layoff notices must be given 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 others with less seniority.

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the Oro Grande School District as follows:

A. That the particular kinds of services set forth below be reduced or eliminated commencing in the 2005-06 school year.

<u>Elementary Classroom Teacher</u>	<u>2 F.T.E.</u>
TOTAL CERTIFICATED EMPLOYEES	2 F.T.E.

B. That due to the reduction or elimination of particular kinds of services the legal number of certificated employees of the District be terminated pursuant to Education Code section 44955.

C. That the reduction of certificated staff be achieved by the termination of regular employees and not by terminating temporary and substitute employees.

D. That the District Superintendent or designee is directed to initiate layoff procedures and give appropriate notice pursuant to Education Code sections 44955 and 44949,

PASSED AND ADOPTED at the regular meeting of the Board of Education held on March 8, 2005.

AYES: 3
NOES: 0
ABSENT: 0

_____/S/
President
Board of Education"

4. On March 8, 2005, the Board passed Resolution No. 6-2004-2005, which provided as follows:

"WHEREAS, Education Code section 44955, subsection (b), related to certificated layoffs, provides, in relevant part, '[a]s 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 need of the district and the students thereof;'

NOW, THEREFORE, BE IT RESOLVED that based upon the needs of the District and the students thereof, the following criteria shall be applied in order, one step at a time until the tie is broken to resolve ties in seniority between certificated employees:

1. Number of years credentialed teaching experience in the District prior to seniority date (substitute or temporary service).
2. Number of years of credentialed teaching experience outside the District.
3. Teaching experience in different grades of subjects.
4. Number of additional credentials or supplemental authorizations.
5. Possession of a Masters Degree – earliest date prevails.
6. Authorization to teach English Language Learners (CLAD, BCLAD, SB395, SDAIE, etc.).
7. If a tie still exists after applying steps one through six (1-6) above, seniority shall be determined based upon a comparison of the most recent employee evaluations.

PASSED AND ADOPTED at the regular meeting of the Board of Education held on March 8, 2005.

AYES: 3
NOES: 0
ABSENT: 0

_____/S/_____
President
Board of Education"

Jurisdictional Matters

5. On March 9, 2005, D'Alo, Borque, Hill and Aure were served with a "Notice of Recommendation that Services Will Not Be Required." Each was advised of the right to request a hearing. An Accusation dated March 9, 2005, together with other required jurisdictional documents, was enclosed with the notice.

6. Respondents D'Alo and Borque timely filed a Notice of Defense and a Request for Hearing under Government Code section 11506.² Hill and Aure did not request a hearing or file a Notice of Defense.

² Jurisdiction in this matter exists only as to respondents D'Alo and Bourque, the only employees who requested a hearing.

7. Respondents D'Alo and Borque were timely served with a Notice of Hearing under Government Code section 11509, which advised each of them that a hearing was set for April 27, 2005.

8. On April 26, 2003, the Office of Administrative Hearings received a continuance request from counsel for respondents, who advised of a conflict that compelled counsel to withdraw and which requested time for respondents to seek other representation. Thereafter, Mark Thompson, Attorney at Law, Carlos R. Perez, Attorney at Law, and Annette DeBellefeuille, Attorney at Law, participated in the telephonic conference related to the continuance request. There was no objection to a continuance, and good cause having been established, Steven V. Adler (PALJ Adler), Presiding Administrative Law Judge, Office of Administrative Hearings, continued the administrative hearing.

9. On May 5, 2005, PALJ Adler conducted a telephonic hearing in which Attorney Thompson, Attorney Perez and Attorney DeBellefeuille participated. Attorney Perez stated he would represent all respondents after waivers were received. The parties agreed to submit evidence by stipulation. The parties agreed to a schedule setting deadlines for the submission of the stipulation and the filing of briefs. It was agreed and ordered that the matter be submitted for decision on May 19, 2005.

Thereafter, the date for the submission of the matter was extended to May 20, 2005 by stipulation, briefs were received, the record was closed and the matter was submitted.

Stipulated and Undisputed Matters

10. The parties stipulated to the truth of the matters set forth in Factual Findings 1 through 7. Notice is taken of Factual Findings 2, 8 and 9.

11. The formal "Stipulation to Jurisdictional and Contested Facts" contained the following statements:

- Fred D'Alo has been employed by the District since August 25, 2003 under a professional clear multiple subject teaching credential. Respondent Luanne Borque has been employed by the District since August 27, 2002 under an emergency 30-day substitute teaching permit, two pre-intern certificates, and an internship multiple subject teaching credential . . .
- The parties have elected to waive a hearing in this matter and proceed with the filing of briefs, addressing the following issues of law:
 - a. Taking as fact that all certificated employees within the District are probationary employees, can employees who serve with emergency, pre-intern and intern credentials acquire seniority while serving with those credentials?

b. Does Fred D'Alo have priority over Luanne Borque in the order of lay off within the District because he was employed under a professional clear multiple subject credential?

c. Does Luanne Borque have priority over Fred D'Alo on the basis of her earlier seniority date with the District?

Arguments

12. The District argued that each respondent has a probationary (non-permanent) status with the District, "seniority" is the only statutory basis for retaining one employee over another in an economic layoff proceeding, and since respondent Borque has an earlier seniority date than respondent D'Alo, respondent Borque's services must be retained.

13. Respondent D'Alo argued respondent Borque's early employment with the District was under emergency permits and pre-intern certificates, that respondent Borque does not hold a preliminary or clear teaching credential, that respondent D'Alo has always been employed by the District under a professional clear credential, that no legal authority provides pre-interns and interns with seniority (except in circumstances not present here) and respondent Borque cannot acquire a seniority date until she concludes her intern year.

LEGAL CONCLUSIONS

1. *Jurisdiction*: Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements mandated by those sections were satisfied as to respondent certificated employees.

2. *Reduction of Particular Kinds of Services*: A school board's decision to reduce or discontinue particular kinds of services need not be tied to any statistical computation, such as a reduction in the number of students. It is within a board's discretion, subject to the minimum level required by law, to determine the extent to which a reduction of services is necessary and proper under the circumstances. The board's decision is made at the time of the final notice. *San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 635-636.

3. "*Elementary Classroom Teacher*" is a particular kind of service which can be reduced or eliminated. See, *Zalac v. Governing Board of Ferndale Unified School District* (2002) 98 Cal.App.4th 838, 854.

4. *Permanent/Probationary Status*: In *Fine v. Los Angeles Unified School District* (2004) 116 Cal.App.4th 1070, the appellate court considered the right of a teacher to claim permanent status dating back to the date she received her teaching credential. In reaching its decision, the appellate court held the Education Code does not explicitly or by implication tie the effective date of a teaching credential to a teacher's classification.

Fine noted there are only four possible teacher classifications: permanent, probationary, substitute and temporary. The Education Code does not refer to or classify teachers as "provisional" and refers only to service by a person under a provisional credential. The Education Code requires school districts to classify as probationary employees those persons employed in positions requiring certification qualifications for the school year, who have not been classified as permanent employees or as substitute employees. *Ibid.*, at 1077.

Fine also noted that Education Code section 44917 provides that a person employed for one complete school year as a temporary employee, if reemployed for the following school year, must be classified as a probationary employee, and the previous year's employment is deemed employment as a probationary employee. Education Code section 44918 has the same effect. *Ibid.*, at p. 1081.

5. Those employees not classified as permanent or substitute employees are classified by section 44915 as probationary employees. *San Jose Teachers Assn. v. Allen* (1983) 144 Cal. App. 3d 627, 640.

6. The stipulation specifically provided, "Taking as fact that all certificated employees within the District are probationary employees" ³

7. *Education Code section 44955* provides in part:

"(a) . . . no probationary employee shall be deprived of his or her position for cause other than as specified in Sections 44948 to 44949, inclusive.

...

(c) Notice of such termination of services shall be given . . . and *services of such employees shall be terminated in the inverse of the order in which they were employed*, as determined by the board in accordance with the provisions of Sections 44844 and 44845" (Emphasis added.)

8. The general rule is that junior employees may be given retention priority over senior employees only if they possess special skills or capabilities which their more senior counterparts lack. The manifest intent of the Legislature is that the discontinuance of a position must result in termination of the most junior qualified employee. See, *Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399, 406.

³ A stipulation is an agreement between opposing counsel ordinarily entered into for the purpose of avoiding delay, trouble, or expense in the conduct of the action and serves to obviate need for proof or to narrow [the] range of litigable issues. A stipulation in proper form is binding upon the parties if it is within the authority of the attorneys. *Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262, 279.

9. "Seniority" is not an inherent or constitutional right. Seniority itself confers no rights on employees but entitles them to preferential treatment only to the extent that a statute or collective bargaining agreement so provides. Seniority rights may be limited by subsequent legislation. However, "respect for seniority rights" has been emphasized in the interpretation of tenure statutes. See, *Alexander v. Board of Trustees* (1983) 139 Cal.App.3d 567, 572.

10. "Seniority" appears to be directly related to an employee's first date of paid service in a probationary position. This common sense interpretation is consistent with the Legislative intent expressed in Education Code section 44955, subdivision (b), which specifically refers to "employees who first rendered paid service to the district on the same date"⁴

11. Respondent D'Alo argued the decision in *Summerfield v. Windsor Unified School District* (2002) 95 Cal.App.4th 1026 [time worked under a provisional teaching credential does *not* count toward acquisition of permanent status] "should [by analogy] apply to accruing seniority while working as either a pre-intern or an intern." While this is as good an argument as can be made under the circumstances, the decision in *Summerfield* was based on an entirely different set of facts and involving entirely different issues. *Summerfield* is of no real assistance to respondent D'Alo in this matter.

12. What respondent D'Alo essentially argued is that he was more competent by reason of his professional clear multiple subject teaching credential than respondent Bourque (who did not have such a credential) and for that reason he should be given "seniority" over respondent Bourque.

However, the economic layoff statutes require termination in reverse order of seniority (i.e., first date of paid service in a position requiring a credential) and do not establish seniority based upon the earliest date an employee received a teaching credential.

13. *Conclusions:* Within the context of this particular economic layoff proceeding, respondent Borque established seniority over respondent D'Alo because of her earlier employment date with the District. Respondent Borque's first date of paid service as an Elementary School Teacher, a position requiring a credential, was about one year earlier than the first date of employment of respondent D'Alo, also a probationary Elementary School Teacher.

⁴ Education Code section 44955, subdivision (b) [the tie-breaking statute] does *not* apply in this matter because respondent Borque and respondent D'Alo did not render paid service to the district on the same date. If they had, their order of termination would be based "on the basis of needs of the district and the students thereof." The District's tie-breaking criteria in this matter are set forth in Factual Finding 4 and specifically included, "Number of years credentialed teaching experience in the District prior to seniority date (substitute or temporary service.)"

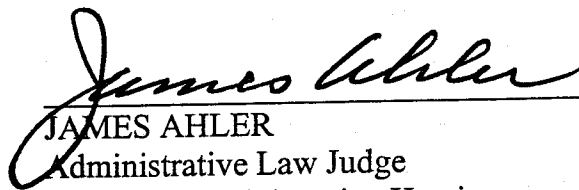
The District's determination of seniority was appropriate under existing law, notwithstanding the fact that respondent D'Alo held a professional clear multiple subject teaching credential when his service began with the District and respondent Borque did not.

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

RECOMMENDATION

It is recommended that the Governing Board of the Oro Grande School District issue final layoff notices so that the employment of respondent Fred D'Alo is terminated before the employment of respondent Luanne Bourque.

DATED: May 23, 2005.


JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings