

BEFORE THE GOVERNING BOARD
OF THE
DESERT SANDS UNIFIED SCHOOL DISTRICT

In the Matter of the Reduction in Force
Involving 158 Certificated Employees of the
Desert Sands Unified School District,

Respondents.

OAH No. 2010030639

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in La Quinta, California, on April 23, 2009.

Candace M. Bandolan, Attorney at Law, represented the Desert Sands Unified School District.

Dana Martinez, Attorney at Law, represented respondents Joshua Alvarez, Ella Anderson, Debra Apple, Susan M. Baker, Jennifer Baxa, Deborah Bray, Phyllis Brown, Shira Brynjegard, Bridget Burden, Brenna Carnt, Vanessa Castro, Susan Cercone, Haimanti Tanya Chakraborty, Helen Chang, Brenda Cohagan, Jennifer Costello, Astria Cota, Darcie Cotton, Michael Daugherty, Mona Davidson-Murray, Patricia Doherty, Tracie Dohrman, Victoria Dougherty, Deanna Dreweatt, Eileen Ellis, Nicole Faay Dean, Jennifer Fanton, Veronica Fernandez, Jason Fosselman, Jane Gallegos, Ada Jeanne Gatherum, David Gibbs, Jr., Jesse Gill, Jared Goldman, Ileana Gomez, Maria G. Gonzalez-Mares, Maria Gonzalez-Salazar, Amber Granik, Leticia Hernandez, Veronica Hernandez, Melissa Hollis, Cassandra Howell, Devin Howell, Allison Hualde, James Hutcheson, Howard Todd Johnson, Michele Jones, Lisa Kenmuir, Melanie Kiss, Linda Knight, Jana Lew, Lynn Lockard, Paulina Lowrie, Sandra Mangan, Stephanie Mann, Justin Martin, Charles Mazet, Liliana Mazet, Yvonne Marie McLoud, Kelly Meka, Melissa Melchor, Maria Mendoza, Stephen Merritt, Rosa Mesa, Carol Miller, Morgan Miller, Jaimee Montali, John Mook, Xochitl Moore, Cynthia Mulvey, Jessica Netti, Jeannine Nielsen, Tiffany Norton, Veronica Ortega, Michelle Ostendorf, Karla Otten, Katherine Overley, Belma Pera, Nicole Phillips, John Preston, Robert Quintana, Shirley Ramsay, David Ritland, Melissa Rizzo, Richard Romero, John Romero, Maria Ruelas, Wendy Rush, Michele Sanchez, Noemi Sanchez, Ashley Schantz, Kari

Schwartz, Philip Solis, Laura Spradlin, Michelle St. Louis, Michael Sugarman, Katherine Thompson, Serena Van Leuven, Anna Velasquez, Kristin Walker-Tierney, Michael Walsh, Eve Wehler, Megan Weitz, Floydell Wilson, Steven Wood, Tracy Workman-Gross, and Kira Zabrowski.

Respondents Athena Milis, Gabriel Gutierrez, Melissa Labayog, Bettyrae Easley, Trina Champagne-Belmonte represented themselves.

The matter was submitted on April 23, 2010.

FACTUAL FINDINGS

The Desert Sands Unified School District

1. Desert Sands Unified School District (DSUSD or the district) provides educational services to approximately 29,000 pre-Kindergarten through adult education students in the communities of Indio, La Quinta, Palm Desert, Indian Wells, Bermuda Dunes, and Rancho Mirage. DSUSD maintains and operates 20 elementary schools, six middle schools, one charter middle school, four comprehensive high schools, and three alternative high schools. The district employs about 1,300 certificated employees and about 1,000 classified employees. The district's annual budget is approximately \$205 million, about 85 percent of which pays for employee salaries and benefits.

2. The district is governed by an elected five member Board of Education (the governing board). Dr. Sharon McGehee is the Superintendent of Schools. Sherry Johnstone is the Assistant Superintendent, Personnel Services.

The Fiscal Crisis – Economic Layoffs

3. A school district cannot determine the level of state funding it will receive until the state budget is chaptered, an event occurring each year in late June but sometimes taking place much later in the year. 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 and 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, these preliminary layoff notices must be given no later than March 15.

In early 2010, DSUD's administration (as well as the administrators of most other school districts) became aware of California's continuing budget deficit and its likely crippling impact on the district in the next school year. As a result of the crisis, the district projected the need to trim its budget by more than \$15 million for the 2010-11 school year.

The district was once again required to look into ways to balance its budget, including the elimination or reduction of various educational programs and downsizing its staff.

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. 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 specific credentials, special training, experience or unique qualifications necessary to teach a course of study or to provide services which more senior employees do not possess and that the junior employees will be assigned to provide services requiring such special education, training or experience.

The District's Response

4. The district established a budget study committee to look into various methods by which the district might be able to meet the projected budgetary shortfall. The committee included district administrators, certificated employees, parents and others with an interest in the process. Community meetings were held. After gathering data and recommendations, the superintendent's cabinet met and conferred. Following deliberations, it was painfully concluded that it would be in the best interest of the district and the students thereof to reduce certificated services by 211 full time equivalent (FTE) positions. Many of the reductions were a result of increasing the student-teacher classroom ratio at all grade levels. A recommendation was provided to Dr. McGehee concerning the specific reduction and elimination of particular kinds of services being provided by certificated employees to help meet the projected budgetary shortfall.

On March 10, 2010, under Education Code sections 44949 and 44955, Dr. McGehee recommended to the governing board the need to reduce or discontinue particular kinds of services, to notify certain employees that their services would not be required in the 2010-2011 school year, and to notify those employees of the reason for the proposed reduction in force.

The Governing Board's Resolutions

5. On March 10, 2010, the district's governing board passed Resolution No. 27.2009-2010. It provided:

**RESOLUTION NO. 27/2009-2010
TO DECREASE THE NUMBER OF CERTIFICATED EMPLOYEES
DUE TO A REDUCTION OR ELIMINATION OF PARTICULAR KINDS OF SERVICES**

WHEREAS, Education Code section 44955 permits the Governing Board to reduce or discontinue particular kinds of programs and services not later than the beginning of the following school year; and

WHEREAS, the Governing Board of the Desert Sands Unified School District (“District Board”) has determined that it shall be necessary to decrease the following programs and services of the District no later than the beginning of the 2010-2011 school year; and

WHEREAS, it shall be necessary to terminate at the end of the 2009-2010 school year the employment of certain certificated employees of the District as a result of the reduction or elimination of the programs and services;

THEREFORE, BE IT RESOLVED, by the Governing Board of the Desert Sands Unified School District that the following services shall be reduced or eliminated no later than the beginning of the 2010-2011 school year:

PARTICULAR KINDS OF SERVICES	NUMBER OF FULL TIME EQUIVALENT (FTE)
<u>ELEMENTARY SCHOOL EDUCATION</u>	
Kindergarten Class Size: Increase Student to Teacher Ratio, 31:1 to 34:1	-15.0
Grades 1-2 Class Size: Increase Student to Teacher Ratio, 24:1 to 31:1	-39.0
Grades 3-5 Class Size: Increase Student to Teacher Ratio, 31:1 to 35:1	-30.0
<u>Subtotal – Elementary School Program</u>	<u>-84.0</u>
<u>MIDDLE SCHOOL EDUCATION</u>	
Grades 6-8 Class Size: Increase Student to Teacher Ratio, 30:1 to 35:1	-25.0
“CORE” Classes taught by personnel possessing only a general or multiple credential including but not limited to: Math/Science; Humanities; Humanities/Language Arts; English/Social Science	-10.0
Opportunity (Middle)	-2.0
<u>Subtotal – Middle School Program</u>	<u>-37.0</u>
<u>HIGH SCHOOL EDUCATION</u>	
Grades 9-12 Class Size: Increase Student to Teacher Ratio, 30:1 to 33:1	-24.0
<u>Subtotal – High School Program</u>	<u>-24.0</u>
<u>Physical Education Instruction</u>	<u>-10.0</u>
<u>CERTIFICATED SUPPORT SERVICES</u>	
Elementary Counselors	-14.0
AB 1802 Counselors	-5.0
Behavior Specialists	-2.0
Librarians	-3.0
District Level Project Facilitators, Project Teachers, and Teachers on Special Assignment	-14.5
School Site Level Project or Middle School Facilitators, Project Teachers, and Teachers on Special Assignment	-10.5
<u>Subtotal – Support Staff</u>	<u>-49.0</u>

<u>ADMINISTRATION</u>	
Assistant Principals – Secondary (Grades 6-12)	-3.0
Assistant Principals – Adult Education	-1.0
Psychologists	-3.0
<u>Subtotal – Administration</u>	<u>-7.0</u>
<u>TOTAL FTE REDUCTIONS – ALL PROGRAMS</u>	<u>-211.0</u>

BE IT FURTHER RESOLVED that the District may deviate from terminating certificated employees in order of seniority, based on a specific need for personnel who possess special training and/or experience, or competency, necessary to teach specific courses or courses of study or to provide specific services, which others with more seniority do not possess, as follows:

1. All Regular and Pre-K Special Education Programs and Services (excluding Behavior Specialists and Psychologists).
2. Art teachers with experience within the past five (5) years teaching Digital Photography and/or Video Production and/or Graphic Design at grade levels 6-12 and who are in possession of a credential in Art.
3. Music teachers with experience within the past five (5) years of teaching Band and/or Choral/Choir at grade levels 9-12 and who are in possession of a credential in Music.
4. Authorized Single Subject Credentials in the following areas:
 - a. Mathematics including Foundational Level but excluding Introductory and Supplemental credentials
 - b. Sciences including but not limited to Geosciences and Biological Sciences but excluding Supplemental, Introductory and/or Specialized credentials
5. ROTC
6. Nurse

BE IT FURTHER RESOLVED, that the Superintendent or her designated representative is directed to send appropriate notices to all employees whose positions may be lost by virtue of 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 employees by statute.

PASSED AND ADOPTED by the Governing Board of the Desert Sands Unified School District on March 2, 2010.

The Particular Kinds of Services

6. The services identified in the governing board's resolution to reduce or eliminate particular kinds of services were the kinds of educational services that properly could be reduced or discontinued. The reduction or elimination of those services was not arbitrary or capricious and constituted a matter within the proper exercise of the governing board's discretion. No particular kinds of services were proposed to be lowered to levels less than those levels mandated by state or federal law.

Skipping

7. Johnstone's credible testimony established that DSUSD experienced difficulty filling certain positions. For example, special education teachers and ROTC instructors were not easy to recruit and retain. The district "skipped" junior employees holding appropriate credentials providing services in these difficult to fill fields on the basis of the junior employee's specialized training, experience or other unique qualifications, attributes that more senior employees did not possess, in those areas where there was a need for such services. These junior employees thereby became exempt from termination in this layoff proceeding. The skipping of these junior employees was not arbitrary or capricious, was in the best interests of the districts and its students, and was a matter well within the discretion of the governing board.

8. The district retained Monica Guarino (rank 125), a school counselor who holds a pupil personnel services credential and a single subject teaching credential in Spanish, over more senior counselors because of her ability to speak Spanish, the need for a Spanish-speaking counselor, and the lack of other Spanish-speaking counselors within DUSD. While the governing board did not specifically exempt Guarino from the layoff in Resolution No. 27/2009-2010, Education Code section 44955, subdivision (d) does not require that skipping criteria be in writing, simply that the district demonstrate a specific need for personnel to teach a specific course or course of study or to provide services authorized by a services credential 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. There was no objection to the district's skipping Guarino over more senior employees, and the district's doing so was supported by the evidence.

The Seniority List

9. Johnstone's testimony established that DSUSD maintains a seniority list, a constantly evolving document that is updated as new certificated employees are hired and as other employees resign or retire. The seniority list is a spreadsheet containing the

employee's rank (from the most recently hired certificated employee to the most senior certificated employee), the employee's name, a seniority date (listed as "prob. date"), the employee's status, the school site where the employee provides services, the employee's teaching credentials, any special certificates held by the employee, and the employee's current assignment.

10. In January 2010, when it became apparent that a reduction in force might be required, DSUSD circulated a preliminary seniority list to all employees with the request that each employee review and verify or update his or her seniority information if there was an error or if additional information should be included. In response to that request, many employees provided verifications or updates. Several weeks after the initial request for information was sent out, DSUSD directly contacted the employees who did not respond to the earlier request. Most of those who were contacted in February 2010 provided verification or updates.

11. According to Johnstone, DSUSD continued to accept newly filed information and to include such information in the seniority list until early March 2010. The governing board adopted the seniority list on March 2, 2010. After that date, an error made by the district could be corrected and the list could be updated, but new information provided by a district employee after March 15, 2010, was not relevant to this layoff proceeding unless the new information arose out of an error made by the district or some other governmental entity. The district's use of a March 15 cutoff date was not arbitrary, and the use of that date was reasonable because the district was required by the Education Code to serve preliminary layoff notices by then.

The Issuance of Layoff Notices

12. Using the updated seniority spreadsheets, Johnstone's staff began the painstaking process of identifying those certificated employees who should receive preliminary layoff notices and those who should not. Whenever an employee was tentatively slated to receive a preliminary layoff notice as a result of the governing board's resolution, that employee's seniority and credentials were considered to determine if that employee was eligible to "bump" into a position held by a more junior employee.

For those employees who first provided service on the same day, Johnstone's staff applied the governing board's tie breaking resolution. The criteria set forth in that resolution were reasonable, and the application of the tie breaking criteria was in the best interest of the district and the students. The use of a lottery was not required.

Before issuing the preliminary layoff notices, the district's administrative staff considered all known positively assured attrition to determine the number of layoff notices that should be served. More layoff notices were served than full time equivalents were proposed to be reduced to protect against the possibility of error and because many employees had the same seniority date. Some believed that the amount of the district's reduction and elimination of particular kinds of services was unreasonable, but the extent to

which more notices were served than number of positions were ultimately reduced and eliminated was not outrageous and it did not result in any prejudice.

13. Taking into account all known attrition, the district identified those individuals whose employment was impacted by Resolution No. 27/2009-2010. The district timely served upon each of those employees a written notice advising that the superintendent had recommended that their services would not be required for the upcoming school year. Resolution No. 27/2009-2020 was provided. The formal notice and accompanying explanatory letter set forth the reasons for the recommendation. The permanent and probationary employees served with the preliminary notice were advised of the right to a hearing, and each of them was instructed that the failure to submit a written request for a hearing would constitute a waiver of the right to a hearing. A blank request for hearing form was provided to each employee who was served with the preliminary layoff notice.

The recommendation that respondents be terminated from employment was not related to their fitness or abilities as teachers.

158 of the certificated employees who were served with the preliminary layoff notices requested a hearing. These employees were served thereafter with the formal accusation packet. These employees are the respondents in this reduction in force proceeding.

All parties to this reduction in force proceeding stipulated that all prehearing jurisdictional requirements were met.

The Administrative Hearing

14. On April 23, 2010, the record in the layoff proceeding was opened. Jurisdictional documents were presented, an opening statement was given on the district's behalf, an opening statement was given on behalf of the respondents who were represented by Ms. Martinez, the respondents representing themselves waived the presentation of an opening statement, sworn testimony was taken, documentary evidence was received, several stipulations were reached, closing argument was given, the record was closed, and the matter was submitted.

Precautionary Layoff Notices

15. The district believed it possible that there might be a challenge to its proposal to skip certain junior employees. For this reason, the district issued precautionary layoff notices to respondents Helen Chang, Diego De La Luz, James Floyd, Craig Gahnz, Kelly Gill, Alison Hutcheson, Tisa Kopstein, Norbert Guy Lake, Darren Loney, Darcy B. Maio, Gidion Murrell, Brandon Newby, Jennifer Robinson, Gabriel Rocha, James Serven, and Delores Uribe. During the course of this proceeding, all parties stipulated that there was no objection to the district's skipping criteria. Based upon this stipulation, the parties agreed that the precautionary layoff notices issued to these respondents should be withdrawn and that the accusations filed against them should be dismissed.

Other Issues

16. Athena Milis (rank 102) has a seniority date of August 30, 2007. She holds a single subject teaching credential in English and CLAD authorization. She teaches English in high school. Milis is subject to layoff in this proceeding by virtue of her seniority date. She was concerned that a more senior teacher with a multiple subject teaching credential and a supplemental authorization in English (which permits the teaching of English in a departmentalized setting through 9th grade) would be given rehiring priority at the high school level. Johnstone testified that the district honors the value of single subject teaching credentials at the high school level and that persons holding such credentials will be rehired in the order of their seniority to teach high school English in a departmentalized setting over individuals with multiple subject credentials and a supplemental authorization in English.

17. Melissa Labayog (rank 203) has a seniority date of August 31, 2006. She holds a single subject teaching credential in English and CLAD and GATE authorizations. She teaches English in high school. Labayog is subject to layoff in this proceeding.

Labayog asserted that her seniority date should be June 24, 2006, the date she began AVID training to serve as an AVID provider at her school site. To support her claim, Labayog provided a letter from the district's fiscal services department to change the reservation for an individual who could not attend the AVID training to Labayog's name, a registration form, a request to attend the conference, and an email dated April 23, 2010, from Labayog's (then) school site supervisor (now employed by a different school district) that stated Labayog was "required to attend the AVID Summer Institute in August of 2006 as part of your AVID teacher duty at LQHS" and "to continue to certify LQHS and maintain LQHS's AVID status." Labayog was uncertain if attending the conference was required under her employment agreement with DSUSD or if she was paid by the district for attending that conference. The district produced a written offer of employment that established that Labayog was offered employment commencing August 31, 2006 and it produced a written notice of intent to employ and conditions of employment indicating a beginning date of employment of September 2006. Nothing in either of those documents, each of which Labayog signed, stated that Labayog's attendance at the AVID training was a condition of her employment with the district. The preponderance of the evidence established that attendance at the AVID training was required if Labayog wished to serve as the AVID teacher at her high school; it was not established that her attendance at the AVID training was required under her contract of employment with the district.

Labayog did not establish that her seniority date should be changed.¹ The district correctly assigned August 31, 2006, as Labayog's first paid date of probationary service.

¹ Even if Labayog were given a June 24, 2006, seniority date, which would not be appropriate given the evidentiary record, Labayog would still receive a layoff notice because of her relative lack of seniority.

18. Devin Howell (rank 263) is one of many employees with a seniority date of September 1, 2005. Howell and many others with this seniority date hold multiple subject credentials, CLAD certification and teach elementary school. Howell was concerned that his International Baccalaureate (IB) certificate² had not been considered in the application of the tie-breaking criteria. Johnstone reviewed the district's seniority list and established that staff had considered Howell's IB certificate.

19. Kimberly Watson (rank 246) is one of many employees with a seniority date of September 1, 2005. Watson holds a preliminary multiple subject teaching credential and CLAD certification. She teaches elementary school.

Watson testified that she filed all of the necessary paperwork to receive a clear credential with the Riverside County Office of Education in July 2009 and that due to an error by that office or the district, her clear credential was not on file by March 15, 2010. Watson is attempting to obtain verification of her clear credential and believed it would be obtained a few days after the hearing.

All parties stipulated that the district's seniority list should be amended to show Watson's possession of a clear credential on and before March 15, 2010, and that Watson's status would be updated upon verification of her clear credential before that date.

20. John Mook (rank 186) was concerned that a preference was given to retain persons who taught science. It was not established that Mook's seniority date was incorrect, that the district improperly noticed him, or that he has sufficient seniority and credentials to bump a junior employee.

21. Ron Fanelle (rank 56), who holds a clear social science single subject teaching credential and a CLAD authorization, teaches 10th grade. The district assigned Fanelle a seniority date of November 19, 2007. Fanelle testified that he found numerous errors with regard to his seniority date and that it should be November 2, 2007. Even if that were the case, the district properly served Fanelle with a layoff notice.

Fanelle did not establish that he was improperly noticed of that he had sufficient seniority and credentials to bump a more senior employee. The district invited Fanelle to bring the evidence he claimed supported his November 2, 2007, seniority date to its attention and promised to change his seniority date if the evidence he presented supported his claim.

22. Jason Fosselman (rank 276) has a seniority date of September 1, 2005, as do many other elementary school teachers with a single subject teaching credential and CLAD authorization. Fosselman holds a bachelor's degree and teaching credential issued by a school in Pennsylvania, where it takes four years to obtain a credential rather than the five

² The International Baccalaureate (IB) is an international educational foundation headquartered in Geneva sponsored by UNESCO. Founded in 1968, IB offers educational programs for children ages 3–19 and establishes a unique curriculum. Consequently, "IB" can refer to the organization itself, any of the three programs or the diploma or certificates awarded at the end of the diploma program.

years it takes in California. Fosselman asserted that the school board's tie breaking criteria unfairly discriminated against persons in his position.

Fosselman did not establish that the school board's tie breaking criteria were arbitrary or capricious. He did not establish that the tie breaking criteria were improperly applied in his situation. Fosselman did not establish that he was improperly noticed, that his seniority date was incorrect, that his seniority ranking was incorrect, or that he had the seniority and credentials to bump a more junior employee who was being retained.

LEGAL CONCLUSIONS

Statutory Authority for Reduction in Force Proceedings

1. Education Code section 44944 provides in part:

“No later than March 15 and before an employee is given notice by the governing board that his or her services will not be required for the ensuing year . . . the governing board and the employee shall be given written notice by the superintendent of the district or his or her designee . . . that it has been recommended that the notice be given to the employee, and stating the reasons therefor . . .

(b) The employee may request a hearing to determine if there is cause for not reemploying him or her for the ensuing year . . . If an employee fails to request a hearing on or before the date specified, his or her failure to do so shall constitute his or her waiver of his or her right to a hearing . . .

(c) In the event a hearing is requested by the employee, the proceeding shall be conducted and a decision made in accordance with . . . the Government Code and the governing board shall have all the power granted to an agency therein, except that all of the following shall apply:

(1) The respondent shall file his or her notice of defense, if any, within five days after service upon him or her of the accusation and he or she shall be notified of this five-day period for filing in the accusation.

. . .

(3) The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof. The proposed decision shall be prepared for the governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the

sufficiency of the cause and disposition. None of the findings, recommendations, or determinations contained in the proposed decision prepared by the administrative law judge shall be binding on the governing board. Nonsubstantive procedural errors committed by the school district or governing board of the school district shall not constitute cause for dismissing the charges unless the errors are prejudicial errors. Copies of the proposed decision shall be submitted to the governing board and to the employee on or before May 7 of the year in which the proceeding is commenced. . . .”

2. Education Code section 44955 provides in part:

“(a) No permanent employee shall be deprived of his or her position for causes other than those specified in Sections 44907 and 44923, and Sections 44932 to 44947, inclusive, and no probationary employee shall be deprived of his or her position for cause other than as specified in Sections 44948 to 44949, inclusive.

(b) Whenever . . . a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year . . . and when in the opinion of the governing board of the district it shall have become necessary . . . to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.

. . .

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 . . .

. . .

(c) Notice of such termination of services shall be given before the 15th of May . . . 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. In the event that a permanent or probationary employee is not given the notices and a right to a hearing as provided for in Section 44949, he or she shall be deemed reemployed for the ensuing school year.

The governing board shall make 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. However, prior to assigning or reassigning any certificated employee to teach a subject which he or she has not previously taught, and for which he or she does not have a teaching credential or which is not within the employee's major area of postsecondary study or the equivalent thereof, the governing board shall require the employee to pass a subject matter competency test in the appropriate subject.

(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.”

Jurisdiction

3. 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 all respondent employees.

The Reduction of Particular Kinds of Services

4. A school board may determine whether a particular kind of service is to be reduced or discontinued, and it cannot be concluded that the board acted unfairly or improperly simply because it made a decision that it was empowered to make under the statute. (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 174.) A school board's decision to reduce or discontinue a particular kind of service is not tied in with any statistical computation. It is within the discretion of a school board to determine the amount by which it will reduce or discontinue a particular kind of service as long as a district does not reduce a service below the level required by law. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 635-636.)

Competence

5. The Education Code leaves to a school board's discretion the determination of whether in addition to possessing seniority an employee is also "certificated and competent" to be employed in a vacant position. The term "competent" relates to an individual's specific skills or qualifications including academic background, training, credentials, and experience,

but it does not include evidence related to on-the-job performance. (*Forker v. Board of Trustees* (1984) 160 Cal.App.3d 13, 18-19.) In addition to seniority, the only limitation in placing a teacher in a vacant position is that the teacher selected be “certificated and competent” to render the service required by the vacant position. Among employees who meet this threshold limitation, there is no room in the statutory scheme for comparative evaluation. (*Martin v. Kentfield School Dist.* (1983) 35 Cal.3d 294, 299.) An employee holding a special credential or needed skill, if such credentials or competence are not shared by a more senior employee, may be retained even though it results in termination of a senior employee. (*Moreland Teachers Assn. v. Kurze* (1980) 109 Cal.App.3d 648, 655.)

Seniority, Bumping, and Skipping

The Statutory Scheme

6. Education Code section 44955, the economic layoff statute, provides in subdivision (b), in part, as follows: “Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while . . . any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.” Essentially this language provides “bumping” rights for senior certificated and competent employees, and “skipping” authority to retain junior employees who are certificated and competent to render services which more senior employees are not. Subdivision (d)(1) of section 44955 provides an exception to subdivision (b) where a district demonstrates specific need for personnel to teach a specific course of study and that a junior certificated employee has special training and experience necessary to teach that course that the senior certificated employee does not possess. (*Bledsoe v. Biggs Unified School Dist.* (2008) 170 Cal.App.4th 127, 134-135.)

Bumping

7. The district has an obligation under section 44955, subdivision (b), to determine whether any permanent employee whose employment is to be terminated in an economic layoff possesses the seniority and qualifications which would entitle him/her to be assigned to another position. (*Bledsoe v. Biggs Unified School Dist.*, supra. at pp.136-137.)

Skipping

8. Subdivision (d)(1) of section 44955 expressly allows a district to demonstrate its specific “needs” and there is nothing in the statute that requires that such needs to be evidenced by formal, written policies, course or job descriptions, or program requirements. (*Bledsoe v. Biggs Unified School Dist.*, supra., at p. 138.)

Information Filed with DSUSD after March 15, 2010

9. A school district must issue and serve preliminary layoff notices no later than March 15. Before then, a district must consider all information on file that assists the district

in making assignments and reassignments based on seniority and qualifications. After March 15 the district has no authority to issue a layoff notice to an employee who has become junior by reason of another employee's filing of proof of additional qualifications. Thus, a credential filed with a district after March 15 could not be the basis for bumping. (*Degener v. Governing Board* (1977) 67 Cal.App.3d 689, 698.)

Cause Exists to Give Notice to Certain Employees

10. As a result of the governing board's lawful reduction of particular kinds of service, cause exists under the Education Code for the Desert Sands Unified School District to give final notice to those respondents who are identified hereafter that their employment will be terminated at the close of the current school year and that their services will not be needed by the district for the 2010-2010 school year.

Determination

11. The charges set forth in the accusation were sustained by the preponderance of the evidence and were related to the welfare of the Desert Sands Unified School District and its pupils. The district's administrative staff made necessary assignments and reassignments in such a manner that the most senior employees were retained to render services which their seniority and qualifications entitled them to render, except as otherwise noted herein. No employee with less seniority than any respondent will be retained to render a service which any respondent is certificated, competent and qualified to render.

This determination is based on all factual findings and on all legal conclusions.

RECOMMENDATION

It is recommended that the governing board withdraw the precautionary layoff notices served upon respondents Helen Chang, Diego De La Luz, James Floyd, Craig Gahnz, Kelly Gill, Alison Hutcheson, Tisa Kopstein, Norbert Guy Lake, Darren Loney, Darcy B. Maio, Gidion Murrell, Brandon Newby, Jennifer Robinson, Gabriel Rocha, James Serven, and Delores Uribe and that it dismiss the accusations filed against these respondents.

It is recommended that the district's seniority list be amended to show that Kimberly Watson (rank 246) held a clear preliminary multiple subject teaching credential before March 15, 2010, upon Watson's submission of verification thereof.

It is recommended that the governing board issue final notices to the following certificated employees: Susan Finch; Crystal Gentry; Shalaby Masoud; Jesse Gill; Marlon Martinez; Andrew Smith; Lynsey Haij; Stephanie Smith; Robert Rojo; Steve May; Brian Gleeson; David Montes; James Hamann; Phyllis Brown; Philip Jess; Ronald Fanelle; Michael Daugherty; Claudia Santos; Bridget Burden; Heidi Knigge; Michael Holtz; George Ihara; Julie Warner; John Romero; James Adkins; Lauren Young; Wendy Rush; Morgan

Miller; Rosa Mesa; Lara Runck; Sean Dougherty; William Lampi; Kendra Bennett; Michael Sugarman; Michael Tyler; James Wiesen; Athena Milis; Steven Eelkema; Christie Angelo; Linda Arseo; Adela Tili; Philip Solis; Xochitl Moore; Astria Cota; Trina Champagne-Belmontez; Mark Brenner; Laura F. Spradlin; Deirdre K. Murphey; Jared Goldman; Floydell Wilson; Martha Raim; Wende Hamann; Rachelle Sakemi; Victoria Dougherty; Belma Pera; Darcie Cotton; Maria Mendoza; Brenna Carnt; Mark Wipf; Allison Hillman; Cynthia Mulvey; Ashley Gervin; Kara Contreras; Michael Walsh; Verdlee Stegvenson; Meredith Zengler; Kimberly Jenkins; Carol Miller; Veronica Fernandez; Christa Aubry; Danette Shipley; Katherine Thompson; John Preston; Kathleen Cummings; Haimanti Chakraborty; Tiffany L. Norton; Shirley Ramsay; Danielle Reynolds; Nicole Faay Dean; Monica Rodriguez; Justin Martin; James Hutcheson; John Mook; Karen De Novi; Mark Winsten; Kevin Campbell; Briana Samuelson; Nicole Phillips; Kira Zabrowski; Michelle St. Louis; Jennifer Fanton; Lisa Kenmuir; Melissa Labayog; Julia Morgan; Mara Freeman; Gabriel Gutierrez; Debra Apple; Ada Jeanne Gatherum; Benjamin Bridges; Shaw Saidins; Mandy Wiltrot; Veronica Hernandez; Christina Taylor; Michele Sanchez; Anna Maria Velasquez; Shane Cain; Yvonne McCloud; Lynn Lockard; Stephanie Mann; Bethany Martinez; Sarah Doyle; Jeanette Rudolph; Kimberly Watson; Maria Duenas Ruelas; Paul Hernandez III; Ella Anderson; Brenda Cohagan; Kirsten Hill; Tracy Workman-Gross; Jana Lew; Eve Wehler; Liliana Mazet; Devin Howell; Melissa Rizzo; Amy Hisgen; Richard Romero; Cassandra Howell; Jennifer Costello; Jason Fosselman; Deborah Bray; Kelly May; Martha Laberge; Jorge Rosales; Michael Macro; Stephanie Mendoza; Angelina Head; Kelly Meka; Anita Carstairs; Jennifer Baxa; Tracey Scoggin; Leticia Hernandez; Noemi Sanchez; and Krissy Gross.

Dated:

JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings