

**BEFORE THE
GOVERNING BOARD OF THE
HUENEME ELEMENTARY SCHOOL DISTRICT
STATE OF CALIFORNIA**

In The Matter of the Layoff of:

**CERTIFICATED EMPLOYEES OF
THE HUENEME ELEMENTARY
SCHOOL DISTRICT,**

Respondents.

OAH No. 2010030715

PROPOSED DECISION

H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 21, 2010, at the Hueneme Elementary School District Office, Port Hueneme, California.

James R. Lynch and Erika D. Anderson, Attorneys at Law, represented the Hueneme Elementary School District (District).

Alexis Ridenour, Attorney at Law, represented the respondents.

The matter was submitted on April 21, 2010.

PRELIMINARY MATTERS

1. Prior to commencement of the hearing, the District withdrew the layoff notices of employees, Vickie Evans, Nicole Gardia, Carol Boerrigter, Maria Pilotzi, Cristina Rodriguez, Mariana Cabrera, and Leticia Perez-Garcia.

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2. Teachers, Etelina Durazo and Susana Orozco, received preliminary notices of layoff. Neither Ms. Durazo nor Ms. Orozco filed a Request for Hearing or a Notice of Defense. However, both wanted to participate in the hearing. Ms. Durazo testified that she failed to file a Request for Hearing and a Notice of Defense because she was not clear on the process to be followed. Ms. Orozco testified that she believed the purpose of the Notice of Defense was solely to contest her seniority number. Neither teacher was aware of any basis to contest her layoff. The District objected to the participation of Ms. Durazo and Ms. Orozco in the hearing on grounds that they had failed to comply with the filing requirements in the Education Code¹, and because they had not provided the District with any notice of their request to participate.

The reduction in force process is controlled by a series of complex, deadline-driven rules set forth in the Code. With very few exceptions (See, e.g., § 44949, subd. (c)(3).), both the districts and the affected teachers are bound by those rules. Timely submission of a certificated employee's Request for Hearing and Notice of Defense is mandated in section 44949, subdivisions (b) and (c)(1), respectively. Although an administrative law judge may permit an employee to participate in a hearing despite the employee's failure to file a Request for Hearing and/or Notice of Defense, the employee's reason for his/her failure to file one or both of those documents must establish good cause to permit him/her to participate despite the procedural defect. In this case, Ms. Durazo and Ms. Orozco failed to establish that good cause. If they were not certain as to the meaning of the documents and/or the nature of the process, they were obligated to protect their rights by making inquiry, either via their own research, their labor union, private counsel, or other means. Their failure to protect their own rights does not equate to a deprivation of due process. Ms. Durazo and Ms. Orozco were not eligible to participate in the hearing.

3. During the hearing, the parties stipulated that the seniority list should be amended to reflect a supplementary authorization in Spanish for Graciela Garcia (#14h). The parties also stipulated that the addition of that authorization does not change the order of seniority as reflected on the list.

SUMMARY OF PROPOSED DECISION

The Governing Board of the Hueneme Elementary School District (Board) determined to reduce or discontinue particular kinds of services provided by teachers and other certificated employees for budgetary reasons. The decision was not related to the competency and dedication of the individuals whose services are proposed to be reduced or eliminated.

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¹ All statutory references are to the Education Code.

District staff carried out the Board’s decision by using a selection process involving review of credentials and seniority, “bumping,” and breaking ties between employees with the same first dates of paid service. The selection process was in accordance with the requirements of the Education Code.

FACTUAL FINDINGS

1. Jerry Dannenberg, Ed.D. is the Superintendent of the District.

2. On or before March 15, 2010, the District served on each respondent a written notice that it had been recommended that notice be given to respondents pursuant to Code sections 44949 and 44955 that their services would not be required for the next school year. Each written notice set forth the reasons for the recommendation and noted that 45.3 full-time equivalent (FTE) positions would be reduced and/or discontinued.

3. Notice was served on all respondents by either personal service or certified mail. Certificated employees timely requested, in writing, a hearing to determine if there is cause for not reemploying them for the ensuing school year.

4. The Assistant Superintendent of Human Resources made and filed Accusations against each of the certificated employees who requested a hearing. The Accusations, with required accompanying documents and blank Notices of Defense, were timely served on those certificated employees.

5. Timely Notices of Defense were filed by or on behalf of those respondents who desired a hearing.

6. Respondents in this proceeding are probationary or permanent certificated employees of the District.

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7. On February 22, 2010, in Resolution No. 09-10-08, the Board took action to reduce or discontinue the following particular kinds of services for the 2010-2011 school year:

<u>SERVICES</u>	<u>NUMBER OF FULL-TIME EQUIVALENT POSITIONS</u>
<u>Management:</u>	
Assistant Superintendent, Educational Services	1.0
Assistant Principal	1.0
Coordinator of NFL and Preschool Services	1.0
Executive Secretary, Educational Services	1.0
<u>Certificated:</u>	
Literacy Coach	1.0
SIOP Coach	1.3
K-6 Teacher	39.0
Total	45.3

8. Subsequent to adoption of the Board’s Resolution, the District identified vacancies in School Year 2010-2011 due to retirements, release of temporary teachers, and resignations.

9. Exhibit “A” to Board Resolution No. 09-10-08 established tie-breaker criteria for determining the relative seniority of certificated employees who first rendered paid service on the same date. It provided that the order of termination shall be based on the needs of the District.

10. The District maintains a seniority list which contains employees’ seniority dates (first date of paid service as a probationary employee), current assignments and locations, advanced degrees, credentials, and authorizations. Credential and authorization data are obtained from the records of the County Office of Education, at which certificated employees must register such documents.

11. The District used the seniority list to develop a proposed layoff and “bumping” list of the least senior employees currently assigned in the various services being reduced. In determining who would be laid off for each kind of service reduced, the District counted the number of reductions not covered by the known vacancies, and determined the impact on incumbent staff in inverse order of seniority. The District then checked the credentials of affected individuals and whether they could “bump” other less senior employees.

12. The District used information from its seniority list to apply the tie-breaker criteria of Exhibit “A” to Board Resolution No. 09-10-08.

13. The District requires all new teachers, whether temporary or probationary, to attend a one-day new teacher orientation/training on their first day of paid service. New teachers are paid for their attendance as part of their regular salary. In order to accommodate that orientation/training, new teachers are required by contract to work 185 days in a school year, while returning teachers are required to work 184 days.

14. The failure of a new teacher to attend the new teacher orientation/training requires him/her to take a leave day (i.e., sick leave, etc.). The orientation/training is not made up because it consists of a consolidation of the kinds of subjects and issues the teacher will otherwise learn on the job. Therefore, if a teacher is hired as a probationary employee, his/her seniority date (first date of paid service) is the date of the new teacher orientation/training. If a teacher works as a temporary employee for one year and is then hired as a probationary employee, his/her one year of temporary service converts to probationary status (§ 44918, subd. (a)), and his/her seniority date is the date of the new teacher orientation/training taken at the beginning of the year of temporary service. However, if a teacher works for more than one year as a temporary employee before becoming a probationary employee, only the year of temporary service immediately before the probationary year converts to probationary status. Because the new teacher orientation/training would have occurred at the beginning of the first year of temporary service, the teacher loses the benefit of that day for seniority purposes. Because absence from the new teacher orientation/training affects only leave and not seniority, the first date of paid service remains the same whether or not the new teacher actually attends the new teacher orientation/training. The teacher either “works” (i.e. takes the training) or is on paid leave for that day.

15. Because of the above facts, a teacher with one or more years of experience greater than that of his/her peers could be junior to those peers on the seniority list. For example, a probationary teacher hired for the 2008-2009 school year, and a teacher hired as a temporary teacher for 2008-2009 and then as a probationary teacher for 2009-2010, would have the same seniority date because they would both have attended the new teacher orientation/training on the first day of the 2008-2009 school year. However, a teacher who worked as a temporary employee for the 2007-2008 and 2008-2009 school years before becoming a probationary employee for 2009-2010, would have a seniority date one day later than the other two even though he/she has more experience teaching in the district, because he/she would have attended the new teacher orientation/training on the first day of the 2007-2008 school year, a school year that was not converted to probationary status.

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16. This scenario was the case for respondents Karen Aldridge, Anna Reed-Sanchez, and Rosalyn Tellez-Soto. Although the concept of teachers with less experience in the District having higher seniority dates may seem anomalous at first blush, it does comport with the applicable law. Code section 44918, subdivision (a) provides that a probationary teacher may “tack” his/her prior’s year’s service as a temporary teacher if he/she taught in that capacity for at least 75 percent of the school year, but probationary credit may not be given for any service as a temporary teacher in an earlier school year. Because only time as a probationary or permanent employee counts toward seniority, time spent teaching in a temporary capacity other than the school year immediately preceding the one for which the teacher is hired as a probationary employee, cannot count for seniority purposes.

17. Respondent Jeannie Alvarez taught in the District in a temporary capacity for part of school year 2004-2005, and all of school years 2005-2006 and 2006-2007 before becoming a probationary employee for school year 2007-2008. She testified that she was never offered the new teacher orientation/training, and that all of her contracts reflected a 184-workday school year. She argued that, because she was not given the opportunity to attend the new teacher orientation/training, her seniority date should be one day earlier than the August 28, 2006 date reflected on the District’s seniority list. Ms. Alvarez is incorrect. Only Ms. Alvarez’s 2006-2007 school year was converted to probationary status. If she had attended the new teacher orientation/training, she would have done so on the first day of either the 2004-2005 or the 2005-2006 school year, and she would not be entitled to probationary credit for that day.

18. In addition to the mandatory new teacher orientation/training, the District offers various training sessions for all teachers, both new and continuing, during the summer months. Attendance at those sessions is voluntary and, if a teacher chooses to attend, he/she is paid a stipend exclusive from his/her regular salary. At the hearing, a number of teachers who had attended such voluntary training sessions before the beginning of the first school year in which they were considered probationary employees argued that their seniority dates should be adjusted to reflect that attendance. They are incorrect. Seniority credit is given for training when it occurs during the first school year in which the employee serves in a probationary capacity. In this case, the beginning of that school year was the start date reflected in the contract between the employee and the District. If the training was given during that school year, probationary credit should have been given if the training was mandatory and if the attendee was paid as part of his/her regular salary. The District’s summer training does not satisfy those criteria.

19. The fact that some of the teachers who took the summer training believed the training was required by the District does not affect its status as voluntary. Even if it did, the training did not occur during the school year, and it was not paid for through teachers’ regular salaries.

20. Respondent Robert Cooper offered into evidence re-employment lists for school years 2009-2010 and 2010-2011, showing conflicting hire dates of August 15, 2006 and August 25, 2006. He argued that the former date should be his seniority date. The correct date for purposes of seniority is not the hire date, but the first date of paid service as a probationary employee. That date, as reflected on Mr. Cooper's contract for the 2006-2007 school year, is August 25, 2006.²

21. Some of the respondents relied on a document entitled "Hueneme School District 2008-2009 Certificated Seniority List" (Respondents' Exhibit "A") to show that they were listed as senior to certain other teachers on that list, but are now listed as junior to those same teachers on the current seniority list. Jennifer Tissler credibly testified that Exhibit "A" was used in the 2008-2009 school year for purposes of transferring teachers between schools and/or between grades. The list was compiled without regard for the rules controlling seniority determinations to be made in connection with reduction in force proceedings.

LEGAL CONCLUSIONS

1. All notice and jurisdictional requirements set forth in sections 44949 and 44955 were met.

2. All of the identified services are particular kinds of services that could be reduced or discontinued under Code section 44955. The Board's decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion. Cause for the reduction or discontinuation of services relates solely to the welfare of the District's schools and pupils within the meaning of Code section 44949.

3. A District may reduce services within the meaning of section 44955, subdivision (b), "either by determining that a certain type of service to students shall not, thereafter, be performed at all by anyone, or it may 'reduce services' by determining that proffered services shall be reduced in extent because fewer employees are made available to deal with the pupils involved." (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)

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² The District's Director of Personnel, Jennifer Tissler, explained that, when the 2009-2010 document was prepared last year, she was under the impression that all training a teacher attended during the summer before the beginning of the school year counted toward seniority. She changed Mr. Cooper's seniority date for the 2010-2011 school year after the administrative law judge who heard the reduction in force case last year ruled that the training counted toward seniority only during contracted time.

4. 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. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render.

6. 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 is filling that position. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469.) Junior teachers may be given retention priority over senior teachers if the junior teachers possess superior skills or capabilities which their more senior counterparts lack. (*Santa Clara Federation of Teachers, Local 2393, v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831, 842-843.)

ORDER

1. The Accusations against the respondents are sustained. Notice may be given to the respondents that their services will not be required for the 2010-2011 school year because of reduction or discontinuance of particular kinds of services.

2. Notice shall be given in inverse order of seniority.

DATED: April 26, 2010

H. STUART WAXMAN
Administrative Law Judge
Office of Administrative Hearings