

BEFORE THE
BOARD OF EDUCATION
SAN BERNARDINO CITY UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Employment Status of:

FARAH AGHA, et al.,

Respondents.

OAH No. 2011031298

PROPOSED DECISION

Robert Walker, Administrative Law Judge, State of California, Office of Administrative Hearings, heard this matter in San Bernardino, California, on April 11, 2011.

Todd M. Robbins, Attorney at Law,¹ represented the complainant, Dr. Arturo Delgado, Superintendent, San Bernardino City Unified School District.

The respondents are listed in exhibit A.

Carlos R. Perez, Attorney at Law,² represented those respondents who are listed in exhibit B.

Mr. Perez also represented Rachael Payan. She did not satisfy the procedural requirements for obtaining a hearing, but the district waived the defect.

Mr. Perez also represented Melissa Anderson. She did not satisfy the procedural requirements for obtaining a hearing, and the district refused to waive the defect. Thus, she is not a party to this proceeding.

Guy Krant appeared in propria persona.

¹Todd M. Robbins, Attorney at Law, 3450 Fourteenth Street, Suite 420, Riverside, California 92501.

² Carlos R. Perez, Attorney at Law, 2670 North Main Street, Suite 300, Santa Ana, California 92705.

No appearance was made by or on behalf of Irene Esqueda, JoAnn C. Hammer, Joan Murphy, or Paulette Ortega.

The matter was submitted on April 11, 2011.

DEFAULT

As to Ms. Esqueda, Ms. Hammer, Ms. Murphy, and Ms. Ortega, on proof of compliance with Government Sections 11505 and 11509, this matter proceeded as a default pursuant to section 11520.

FACTUAL FINDINGS

General Findings Concerning Statutory Requirements

1. Education Sections 44949 and 44955,³ provide for two notices to be given in connection with terminating certificated employees. The first notice, which will be referred to as the Preliminary Layoff Notice, is given by the superintendent. It is given to the governing board and to the employees the superintendent recommends for layoff. The Preliminary Layoff Notice gives the board and the employees notice that the superintendent recommends that those employees be laid off. The superintendent must give the Preliminary Layoff Notice no later than March 15. There is no requirement that a governing board take any action in March. But while it is unnecessary, governing boards usually adopt a resolution ratifying the superintendent's recommendations.

2. The second notice is a notice of a governing board's decision to terminate an employee. That notice is provided for in Section 44955 and must be given before May 15. That notice advises a teacher that the district will not require his or her services for the ensuing school year. That notice will be referred to as a Termination Notice.

3. In this case, not later than March 15, 2010, the superintendent notified the governing board and the respondents that he recommended that the respondents not be retained for the ensuing school year. In this case, however, as to four respondents, there was a defect in the service of the notice.

4. The Preliminary Layoff Notice stated the reasons for the recommendation. The recommendation was not related to respondents' competency.

³ All references to the Code are to the Education Code unless otherwise specified.

5. Except as to four of the respondents, a Preliminary Layoff Notice was delivered to each respondent, either by personal delivery or by depositing the notice in the United States mail, registered, postage prepaid, and addressed to respondent's last known address.

6. The Preliminary Layoff Notice advised each respondent who was properly served as follows: He or she had a right to a hearing. In order to obtain a hearing, he or she had to deliver a request for a hearing in writing to the person sending the notice. The request had to be delivered by a specified date, which was a date that was not less than seven days after the notice was served.⁴ And the failure to request a hearing would constitute a waiver of the right to a hearing.

7. Respondents either timely filed written requests for a hearing or obtained a waiver of their failure to file. An accusation was timely served on respondents. Respondents were given notice that, if they were going to request a hearing, they were required to file a notice of defense within five days after being served with the accusation.⁵ Respondents either filed timely notices of defense or obtained a waiver of their failure to file. All prehearing jurisdictional requirements were either met or waived.

8. The governing board of the district resolved to reduce or discontinue particular kinds of services. Within the meaning of Section 44955, the services are "particular kinds of services" that can be reduced or discontinued. The decision to reduce or discontinue these services was not arbitrary or capricious but constituted a proper exercise of discretion.

Defects in Service of Notices

9. The district stipulated that, with respect to four respondents, there was a defect in the service of the Preliminary Layoff Notice. Those respondents are Brian Martinez, Maria Cecil Martinez-Guzman, Clynton H. Parsons, and Rachael Payan. The district further stipulated that it would not give Termination Notices to these respondents.

⁴ Employees must be given at least seven days in which to file a request for a hearing. Education Section 44949, subdivision (b), provides that the final date for filing a request for a hearing "shall not be less than seven days after the date on which the notice is served upon the employee."

⁵ Pursuant to Government Section 11506, a party on whom an accusation is served must file a notice of defense in order to obtain a hearing. Education Section 44949, subdivision (c)(1), provides that, in teacher termination cases, the notice of defense must be filed within five days after service of the accusation.

Services the District Intends to Reduce or Discontinue

10. The governing board of the district determined that, because particular kinds of services are to be reduced or discontinued, it is necessary to decrease the number of permanent or probationary employees in the district by 272 full time equivalents (FTE).

11. The particular kinds of services the governing board of the district resolved to reduce or discontinue are:

Elementary K-5 Teaching Services	223	F.T.E.
High School English Teaching Services	16	F.T.E.
High School Social Studies Teaching Services	8	F.T.E.
High School Math Teaching Services	7	F.T.E.
High School Physical Education Teaching Services	6	F.T.E.
High School Spanish Teaching Services	3	F.T.E.
High School Drafting Teaching Services	2	F.T.E.
High School Art Teaching Services	2	F.T.E.
High School Physical Science Teaching Services	2	F.T.E.
High School Biology Teaching Services	1	F.T.E.
High School Chemistry Teaching Services	1	F.T.E.
High School German Teaching Services	1	F.T.E.
TOTAL CERTIFICATED POSITIONS	272	F.T.E.

Notices to be Rescinded

12. The district stipulated that it will rescind the Preliminary Layoff Notice served on the following respondents:

- Gallery, Jon Eric
- Lee Jr., Robert P
- McCuistion, Michael D
- Oliver, Shirley A
- Phillips, Ramona Rae
- Schlagel, Lacie
- Smith, Alton Michael
- Smith, Christal
- Stewart, Hope M
- Thach, Hue Thi

Bunn, Tira
Burg, Kevin
Craig, Sally Z
Danridge, Victoria
Emrich, Stephen J
Hann, Tristan M.
Henaio, Jennifer
Holley, Daniel M.
Parker, Olivia
Paz, Elva Y
Perez, Cristina
Reding, April Denise
Rios, Adriana Brenes
Rios, Erika
Smith, Kevin
Tabler, Joeleinn J
Torres, Gina

USE OF TIE-BREAKING CRITERIA BASED ON THE CURRENT NEEDS OF THE DISTRICT AND STUDENTS

13. Pursuant to Section 44955, subdivision (b), the governing board of the district adopted criteria for determining the order of termination as among employees who first rendered paid service on the same day. Section 44955, subdivision (b), requires a district to adopt such criteria and provides that the criteria are to be based on “needs of the district and the students” The district’s tie-breaking criteria are as follows:

[I]n the event of a certificated layoff the following criteria shall be applied in order based on information on file as of February 1, [2011], one step at a time until the tie is broken, to resolve ties in seniority between certificated employees:

1. Highly Qualified Status under NCLB in area of assignment.
2. Possession of an authorization to teach English Language Learners in order of priority:
 - a. Bilingual Cross Cultural Language and Academic Development (BCLAD)
 - b. Cross Cultural Language and Academic Development (CLAD), SB 1969 or SB 395 Certificate, Language Development Specialist Certificate, Supplemental Authorization for English as a Second Language, Specially Designated Academic Instruction in English (SDAIE), other

3. Credential status in area of assignment, in order of priority:

- a. Clear, Life, Standard Secondary, etc.
- b. Preliminary
- c. Intern
- d. Provisional, STC, other

4. Possession of a Clear or Preliminary Single Subject credential in the following areas, in order of priority:

- a. Special Education
- b. Math
- c. Science
- d. English

5. Possession of a supplemental authorization to teach in the following areas, in order of priority:

- a. Math
- b. Science
- c. English

6. Total number of Clear or Preliminary credentials.

7. Total number of supplementary authorizations.

8. Number of years of credentialed teaching experience prior to employment with District, as indicated by initial salary schedule placement.

9. Possession of a Doctorate Degree, earliest date prevails.

10. Possession of a Masters Degree, earliest date prevails.

11. Total number of post-secondary credits on file with the District by February 1.

12. If ties cannot be broken by using the above criteria then order of seniority shall be determined by a random drawing among employees in the individual tie.

14. Application of the tie-breaking criteria resulted in determining the order of termination solely on the basis of needs of the district and the students thereof.

DISTRICT'S INTENTION TO DEVIATE FROM SENIORITY (SKIPPING)

15. Pursuant to Section 44955, subdivision (d)(1), the governing board of the district resolved to deviate from terminating employees in the order of seniority, i.e., the board resolved to skip over teachers with a particular qualification and lay off more senior teachers who do not possess that qualification.

16. The district identified the following course or course of study as one creating a specific need for personnel: English Learner (EL). The district demonstrated a specific need for personnel to teach EL students; demonstrated that certain teachers have special training and experience necessary to teach that course or course of study; and demonstrated that other teachers, in spite of being more senior, do not possess that special training and experience.

17. The board resolved as follows:

WHEREAS, this Board has determined that due to a significant population of English language learners with specialized educational needs, a specific and compelling need exists to employ and retain certificated employees who *have* formal (not emergency) authorization to teach English Learner ("EL") students, as determined by the California Commission on Teacher Credentialing, and the special training and experience that comes therewith; and

WHEREAS, State law mandates that each failure to staff a classroom containing one or more EL students with a certificated employee possessing an appropriate EL authorization is "misassignment" subject to sanction by the County Superintendent of Schools; and

WHEREAS, compliance with the provisions of the No Child Left Behind Act ("NCI B"), the Williams Settlement, and Education Section 44253.1 require that EL students be served by certificated employees with appropriate EL authorizations; and

WHEREAS, the needs of the District and the students thereof should not and cannot be adequately served by concentrating EL students in particular classrooms in such a manner as to lessen the need for certificated employees with EL authorizations; and
WHEREAS, EL authorizations are not required for school counselors, nurses, psychologists; and

WHEREAS, Education Section 44955(d) authorizes this Board to deviate from terminating a certificated employee in order of seniority for the above reasons, if necessary.

RIGHT TO BE RETAINED ACCORDING TO SENIORITY AND QUALIFICATIONS – DATE OF HIRE

18. Job security is not inherent in seniority. The Legislature chose to provide teachers with limited job security according to their seniority.

19. Danielle Greene contends that she is more senior than the district lists her as being. Ms. Greene began rendering paid service in October of 2007. She held an emergency certificate. She continued to teach on that certificate until June 30, 2010, when the district non-re-elected her.

20. In March of 2010, Ms. Greene obtained a preliminary credential. On July 30, 2010, which was one month after the district non-re-elected Ms. Greene, the district re-hired her. On this occasion she was hired as an intern.

21. Ms. Greene contends that her date of hire is October of 2007. The district contends that it is July 30, 2010.

Guy Krant

22. Guy Krant is a high school art teacher. He began teaching at San Geronio High School in September of 1998 and has continued to teach there.

23. The federal No Child Left Behind Act of 2001 (NCLB), Title 22, United States Section 6301 et seq. requires that English language learners be served by teachers who have EL authorization. Also, the California Legislature, in Section 44253.1 et seq., required the Commission on Teacher Credentialing to “implement an assessment system to certify those teachers who have the essential skills and knowledge necessary to meet the needs of California’s limited-English-proficient pupils.” The Commission on Teacher Credentialing did that and made the system applicable to any teacher assigned to provide EL services to one or more EL students. The system applies not only to core content classes but also to elective subjects such as art and music.

24. A school district that assigns a teacher who does not have EL authorization to teach an EL student faces a risk of being sanctioned by the County Superintendent of Schools and a risk of being found to be out of compliance with NCLB.

25. By a letter dated July 16, 2009, the San Bernardino City Unified School District advised all teachers who did not have EL authorization that their failure to obtain it would put them at risk of being laid off. The letter stated, in part, the following:

Given that 34% of the District's students are designated as English Learners, it is the District's expectation that all teachers possess this authorization. This allows the District to meet state credentialing requirements, as well as providing assignment flexibility.

[¶ . . . ¶]

If you do not currently possess EL authorization, please be informed that if the District moves toward layoffs in the future (which, given the state budget crisis, seems likely), it will be the administration's recommendation to the Board of Education to implement "skipping" criteria. This will mean that within any identified type of service (i.e. elementary teachers, secondary English, etc.), less senior staff members with EL authorization will be skipped, leading to the potential layoff of more senior staff members who do not possess EL authorization.

On the attached sheet you will find the current options that are available to obtain EL authorization. Please indicate which option you will pursue and return this form to Trina Brown in Certificated Human Resources It is imperative that you take the necessary steps to obtain appropriate EL authorization as soon as possible.

If you have any questions or need more information, we are hosting two (2) informational meetings. You are certainly encouraged to attend: [The dates, times, and place are stated.]

26. In the attachment, the district outlined two ways in which one could obtain EL authorization. One could take an examination, or one could complete a course of study at a college or university. The district listed the colleges and universities that offered the courses. The district also offered to reimburse the cost of the examination.

27. Mr. Krant was one of the teachers to whom the district sent the July 16, 2009, letter.

28. When Mr. Krant was in the second grade, he was diagnosed as being dyslexic. It is difficult for him to remember things. It also is difficult for him to understand things and respond quickly. He testified that he has never taken a test without accommodation, i.e., without being provided extra time, special instructions, or some other necessary

accommodation. He started and stopped college several times. After he obtained help through the Disabled Student Center at California State University at Long Beach, he was able to earn his degree. Mr. Krant testified that, without special accommodation, he never would have been able to pass the California Basic Educational Skills Test (CBEST).

29. On September 9, 2009, Mr. Krant began taking California Teacher of English Learners (CTEL) classes in order to prepare to take the EL examinations. This was less than two months after the district sent out the July 16, 2009, letter. The training program consists of 15 classes. He completed eight classes in September, five in October, one in November, and one in December of 2009.

30. On November 18, 2009, while Mr. Krant was taking the classes, he applied to register to take the three EL tests on June 12, 2010. As part of his application, he requested special accommodation. CTETL responded and said Mr. Krant would need to submit a completed Alternative Testing Arrangement Request Form no later than May 14, 2010. On April 7, 2010, which was five weeks before the deadline for submitting the form, Mr. Krant faxed the completed form along with a January 27, 1993, memorandum from the Adult Learning Disabilities Program at California State University, Long Beach. The memorandum said that, when taking tests, Mr. Krant might need accommodations such as extended time, an alternative location away from distraction, and use of a thesaurus or misspeller dictionary. By a letter dated April 23, 2010, CTETL advised Mr. Krant that, in order to obtain alternative testing arrangements, he would have to submit the name, date, and results of evaluations that had resulted in his being found to be disabled.

31. Mr. Krant set about to obtain that documentation. He contacted his health care insurer and, on May 5, 2010, obtained a list of psychologists who might evaluate him and provide the documentation. He left voice mail messages for 15 psychologists, but only one, Charity Paxton-Hennings, Psy.D., returned his call. Mr. Krant saw Dr. Paxton-Hennings on May 17, 2010; she told him that her schedule would not permit her to complete an evaluation before the CTETL test date of June 12, 2010. Mr. Krant cancelled his appointment to take the tests on that date. Dr. Paxton-Hennings tested Mr. Krant on June 7 and 15, 2010, and wrote a report dated June 24, 2010. Thus, it was not Mr. Krant's fault that he was unable to take the tests on June 12, 2010.

32. Dr. Paxton-Hennings also wrote a letter dated April 4, 2011, addressed to "Whom it may concern." She wrote that Mr. Krant has multiple learning disabilities that constitute a handicapping condition for him. She wrote that he needs extra time to complete tasks and that giving him additional time to obtain EL authorization would be a reasonable accommodation. The letter is as follows:

I previously evaluated Mr. Guy Krant in June of 2010 and found him to be a person with multiple learning disabilities in spite of overall intelligence scores within the Gifted range. These findings were consistent with other evaluations (beginning as early as 2nd grade) which found him to be "dyslexic" and show

significant delays in “processing speed.” As an individual with a handicapping condition, Mr. Krant is eligible for reasonable accommodations within the workplace. These accommodations may include, but are not limited to:

- 1) Extra time to complete tasks
- 2) Extended time for examinations/evaluations
- 3) Repetition of mandatory instructions in both auditory and visual formats

Mr. Krant was initially referred to me in order [for me] to determine if he qualified for testing accommodations to complete California state tests which are required for him to maintain his teaching position. It is my professional opinion that Mr. Krant will be granted accommodations for this test/s given the severity of his disability. However, he was unable to take them due to illness. Mr. Krant has re-registered for the next administration of this examination.

It is a reasonable accommodation, given Mr. Krant’s disability, to grant him additional time to meet this requirement.

33. After obtaining Dr. Paxton-Hennings’s June 24, 2010, report, Mr. Krant planned to take one of the three tests in December of 2010. He planned to take only one of the tests because Dr. Paxton-Hennings had advised him that he should take one test at a time – not all three in one administration.

34. As it turned out, Mr. Krant was unable to take the test in December because of an extended illness. He began feeling unwell in September of 2010. He continued to feel unwell and in November was diagnosed with pharyngitis, sinusitis, and bronchitis. He continued to be ill in December. On December 13, 2010, his doctor began a second series of injections to combat infection. Other teachers may have been delayed in taking the tests because of illnesses. It is not Mr. Krant’s illness that entitles him to accommodation. It is his dyslexia. If it had not been for his dyslexia, he would have taken the tests on June 12, 2010.

35. On January 30, 2011, Mr. Krant registered to take one of the CTEL examinations on June 11, 2011. Again, he requested special accommodation. He has not yet received a reply to that request.

36. Thus, Mr. Krant did not procrastinate. After the district sent out the July 16, 2009, letter, he began taking the necessary classes. He made timely application for accommodation. When the testing authority notified him that it required a particular type of evidence of his disability, he promptly set about to obtain it. He has been diligent in his effort to comply with the requirement that he obtain EL authorization.

37. As noted above, High School Art Teaching Services are being reduced by two FTEs. The superintendent skipped all teachers who have EL authorization. If Mr. Krant had had EL authorization, the district would have skipped him, i.e., would not have served him with a Preliminary Layoff Notice.

38. Mr. Krant contends that, because he has multiple learning disabilities, the district should have given him additional time to obtain EL authorization. If the district had done that, the superintendent, in order to achieve the reduction of two FTEs, would have given a Preliminary Layoff Notice to a teacher who has greater seniority than Mr. Krant has, i.e., a teacher whose date of hire was earlier than his.

39. Two high school art teachers who are senior to Mr. Krant do not have EL authorization.

40. In the 2011-12 school year, the district will have approximately 50 teachers who do not have EL authorization.

RIGHT TO BE RETAINED ACCORDING TO SENIORITY AND QUALIFICATIONS – BUMPING

41. The second paragraph of section 44955, subdivision (c), does not add to teachers' seniority rights. It does, however, make it clear that governing boards must make assignments in such a way as to protect seniority rights. Employees must be retained to render any service their *seniority* and qualifications entitle them to render. Thus, if a senior teacher whose regular assignment is being eliminated is certificated and competent to teach a junior teacher's courses, the district must retain the senior teacher and reassign him or her to render that service. This is commonly referred to as bumping. The district must either reassign or terminate the junior employee.

42. Bridgett Gonzalez, whose date of hire is August 23, 2006, teaches one of the services being reduced and is subject to layoff. Tina Lingenfelter, whose date of hire is October 16, 2008, does not teach one of the services being reduced. Ms. Gonzalez, however, is qualified to fill Ms. Lingenfelter's position, i.e., Ms. Gonzalez has a right to bump into Ms. Lingenfelter's position. As of the present, however, Ms. Gonzalez has not advised the district as to whether she chooses to do that.

43. Ms. Lingenfelter testified. She acknowledged that Ms. Gonzalez is qualified to fill the position but testified that she, Ms. Lingenfelter, has some unique experience and qualification that cause her to be better qualified. Ms. Lingenfelter's qualification, however, is not the issue; the focus of the inquiry is on Ms. Gonzalez's qualification. If Ms. Gonzalez is qualified to fill the position, that is the end of the matter. And she is qualified.

MANDATED SERVICES

44. State and federal laws mandate that certain services be provided at or above mandated levels. There was no evidence that the district is reducing those services below mandated levels.

SUMMARY OF FINDINGS REGARDING RETENTION OF EMPLOYEES

45. With regard to respondents who are permanent employees, the district is not retaining any probationary employee to render a service that such a respondent is certificated and competent to render.

46. With regard to respondents who are permanent employees, the district is not retaining any employee with less seniority than such a respondent has to render a service that the respondent is certificated and competent to render.⁶

47. With regard to respondents who are either permanent or probationary employees, the district is not retaining any employee with less seniority than such a respondent has to render a service that the respondent's qualifications entitle him or her to render.⁷

LEGAL CONCLUSIONS

General Conclusions

1. Jurisdiction in this matter exists under Sections 44949 and 44955. Except as noted above, all notice and jurisdictional requirements contained in those sections were satisfied.

2. Within the terms of Sections 44949 and 44955, the district has cause to reduce or discontinue particular kinds of services and to give Termination Notices to certain respondents. The cause relates solely to the welfare of the schools and the pupils.

Conclusions Regarding Ms. Greene

3. By reason of the matters set forth in Findings 19 through 21, it is determined that Ms. Greene's date of hire is July 30, 2010.

⁶ Section 44955, subdivision (b), provides seniority protection for a permanent employee in terms of the services *the employee is "certificated and competent to render."*

⁷ Section 44955, subdivision (c), provides seniority protection for both permanent and probationary employees in terms of the services *an employee's "qualifications entitle [him or her] to render."*

4. *Summerfield v. Windsor Unified School District* (2002) 95 Cal.App.4th 1026, concerns a teacher who taught under an emergency permit for two years and under a preliminary credential the following year. Before March 15 of the teacher's third year, the district sent her a notice of non-reelection. She contended that, as a result of being reelected after serving two years under the emergency permit, she became a tenured teacher and that, therefore, she no longer was subject to non-reelection. The court disagreed and held that time spent teaching under an emergency permit cannot be counted toward accruing tenure as a permanent employee.

5. Thus, the district had a right to non-reelect Ms. Greene. When the district rehired her one month later, that became her new date of hire. Because of the break in service, her original date of hire no longer applies.

Conclusions Regarding Mr. Krant

6. The Americans with Disabilities Act of 1990 (ADA or Act), (42 U.S.C. § 12101 et seq.), prohibits an employer from discriminating against an "individual with a disability" who, with "reasonable accommodation," can perform the essential functions of a job. (42 U.S.C. § 12112, subs. (a) and (b)).

7. An employer who fails to make "reasonable accommodations to the known physical or mental limitations of an [employee] with a disability" discriminates "*unless*" the employer "can demonstrate that the accommodation would impose an *undue hardship* on the operation of [its] business." (Italics added.) (42 U.S.C. § 12112, subd. (b)(5)(A)).

8. The process to identify whether a reasonable accommodation must be made for an employee begins with defining the "essential functions" of the employee's job. "The term 'essential functions' means the fundamental job duties of the employment position the individual with a disability holds or desires." (29 C.F.R. § 1630.2.) The law contemplates an interactive and cooperative process to determine appropriate accommodations. To determine the appropriate reasonable accommodation, it may be necessary for the covered entity to initiate an informal, interactive process with the employee who is in need of an accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. (29 C.F.R. § 1630.2, subd. (o).)

9. In *US Airways, Inc., v. Barnett*, (2002) 535 U.S. 391, the United States Supreme Court held that, generally, a requested accommodation cannot be reasonable if it conflicts with the rules of a seniority system.

This case, arising in the context of summary judgment, asks us how the Act resolves a potential conflict between: (1) the interests of a disabled worker who seeks assignment to a particular position as a "reasonable accommodation," and (2) the interests of other workers with superior rights to bid for the

job under an employer's seniority system. In such a case, does the accommodation demand trump the seniority system?

In our view, the seniority system will prevail in the run of cases. As we interpret the statute, to show that a requested accommodation conflicts with the rules of a seniority system is ordinarily to show that the accommodation is not "reasonable." Hence such a showing will entitle an employer/defendant to summary judgment on the question—unless there is more. (*US Airways, supra*, at pp. 393 – 394.)

10. The Court concluded that, generally, such an accommodation would necessarily be unreasonable because of the impact on other employees. The Court said:

Yet a demand for an effective accommodation could prove unreasonable because of its impact, not on business operations, but on fellow employees – say, because it will lead to dismissals, relocations, or modification of employee benefits to which an employer, looking at the matter from the perspective of the business itself, may be relatively indifferent. (*US Airways, supra*, at pp. 400 – 401.)

11. The Court emphasized the importance of not undermining employees' expectations of uniform treatment with regard to a seniority system. The Court said:

Most important for present purposes, to require the typical employer to show more than the existence of a seniority system might well undermine the employees' expectations of consistent, uniform treatment – expectations upon which the seniority system's benefits depend. That is because such a rule would substitute a complex case-specific "accommodation" decision made by management for the more uniform, impersonal operation of seniority rules. Such management decisionmaking, with its inevitable discretionary elements, would involve a matter of the greatest importance to employees, namely, layoffs (*US Airways, supra*, at pp. 404 – 405.)

12. But in a case in which other employees can not have a legitimate expectation that a seniority rule will be followed, an accommodation may be reasonable in spite of the fact that it conflicts with the rules of a seniority system. The Court said:

The plaintiff (here the employee) nonetheless remains free to show that special circumstances warrant a finding that, despite the presence of a seniority system (which the ADA may not trump in the run of cases), the requested "accommodation" is

“reasonable” on the particular facts. That is because special circumstances might alter the important expectations described above. (*US Airways, supra*, at p. 405.)

[¶ . . . ¶]

[A] showing that [a proposed accommodation] would violate the rules of a seniority system warrants summary judgment for the employer – unless there is more. The plaintiff must present evidence of that “more,” namely, special circumstances surrounding the particular case that demonstrate the [accommodation] is nonetheless reasonable. (*US Airways, supra*, at p. 406.)

13. It is determined that the present case is one in which special circumstances warrant a finding that, despite the presence of a seniority system, the requested accommodation is reasonable. In the present case, special circumstances altered the expectations the senior teachers legitimately could have. The district sent the July 16, 2009, letter to all teachers. Thus, the two teachers who are senior to Mr. Krant knew that the district expected them to obtain EL authorization. The letter advised them that their failure to obtain EL authorization would put them at risk of being laid off. As noted above, the letter stated, in part, the following:

If you do not currently possess EL authorization, please be informed that if the District moves toward layoffs in the future (which, given the state budget crisis, seems likely), it will be the administration’s recommendation to the Board of Education to implement “skipping” criteria. This will mean that within any identified type of service (i.e. elementary teachers, secondary English, etc.), less senior staff members with EL authorization will be skipped, leading to the potential layoff of more senior staff members who do not possess EL authorization. [¶ . . . ¶] It is imperative that you take the necessary steps to obtain appropriate EL authorization as soon as possible.

14. The superintendent should not have given a Preliminary Layoff Notice to Mr. Krant. Rather, the superintendent should have given the notice to one of the two senior teachers who, also, have not obtained EL authorization.⁸ Mr. Krant has been diligent in his

⁸ Phrasing the matter in this way is instructive. It, however, suggests that the superintendent was presented with this issue at the time he sent out Preliminary Layoff Notices. In fact, the superintendent did not know that Mr. Krant needed accommodation. The superintendent did not know that Mr. Krant is dyslexic. Mr. Krant prefers that people not know. Thus, at the time the superintendent sent out Preliminary Layoff Notices he did not know there was reason to consider sending a notice to one of the two more senior art

effort to comply with the requirement that he obtain EL authorization. If it had not been for his dyslexia, he would have had the authorization. Because of his dyslexia, he needs additional time to obtain it.

15. In the terms of *US Airways, supra*, 535 U.S. 391, there are special circumstances here that alter the expectations the two more senior art teachers legitimately could have. Thus, in spite of the fact that the accommodation Mr. Krant seeks is in conflict with a seniority rule, it is a reasonable accommodation.

16. Here the seniority system is established by state law, not merely by contract. Under the doctrine of federal preemption, however, the reasonable accommodation requirement of the ADA must prevail over the state law.

17. That leaves a final matter. As noted above, an employer is not required to provide a reasonable accommodation if the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business. Would giving Mr. Krant additional time impose an *undue* hardship on the district? It is determined that it would not. It is true that giving Mr. Krant more time will impose a hardship. The district may have to create classes with no EL students in them or risk being in violation of NCLB and facing sanctions. The district may have to advise parents that Mr. Krant, who does not have EL authorization, is teaching their EL children. But it is not as though the district would not face those hardships if it were not for Mr. Krant. As noted above, the district, in the 2011-12 school year, will have approximately 50 teachers who do not have EL authorization. Thus, accommodating Mr. Krant will not create a hardship. Rather it merely will increase the hardship by two percent. Viewed in the light of the important policies underlying the ADA, that is not an *undue* hardship.

18. It is determined that the district must make a reasonable accommodation in an attempt to enable Mr. Krant to maintain his position as an art teacher. Mr. Krant has multiple learning disabilities. They constitute an impairment that substantially limits one or more of his major life activities. He requires much more time than most people require to complete tasks involving memory, assimilating information, and responding to information. He has a long record of this impairment. In spite of this impairment, he can perform the essential functions of a high school art teacher. He is prepared to engage in an interactive and cooperative process with the district to determine appropriate accommodations; he recently sent the district's human resources department a package of materials describing his impairment and outlining the efforts he has made to obtain EL authorization.

teachers. Nevertheless, as a precaution, the superintendent served a Precautionary Preliminary Layoff Notice on each of the two senior art teachers. Thus, in spite of not having known of Mr. Krant's need for accommodation, the district could have terminated one of the senior teachers. At the hearing, however, the district elected to rescind those precautionary notices. Unfortunately, this set of circumstances may result in the district's being able to reduce its staff by only 271 FTEs rather than by 272 FTEs.

Conclusions Regarding Ms. Gonzalez and Ms. Lingenfelter

19. By reason of the matters set forth in Findings 41 through 43, it is determined that the district may give a Termination Notice to either Ms. Gonzalez or Ms. Lingenfelter but not to both of them. If Ms. Gonzalez chooses to bump into Ms. Lingenfelter's position, the district may give a Termination Notice to Ms. Lingenfelter. If Ms. Gonzalez does not choose to bump into Ms. Lingenfelter's position, the district may give a Termination Notice to Ms. Gonzalez.

Cause Exists to Terminate Certain Respondents

20. Cause does not exist to terminate the following: The respondents identified in Findings 9 and 12, Mr. Krant, and either Ms. Gonzalez or Ms. Lingenfelter.

21. With those exceptions, cause exists to give notice to the respondents that their services will not be required for the ensuing school year.

ORDER

1. As to Brian Martinez, Maria Cecil Martinez-Guzman, Clynton H. Parsons, and Rachael Payan, there was a defect in the service of the Preliminary Layoff Notice, and, pursuant to stipulation, the district shall not give Termination Notices to those respondents. As to those respondents, the accusation is dismissed.

2. Pursuant to stipulation, the district shall rescind the Preliminary Layoff Notices served on the following respondents, and the district shall not give Termination Notices to them:

Gallery, Jon Eric
Lee Jr., Robert P
McCuiston, Michael D
Oliver, Shirley A
Phillips, Ramona Rae
Schlagel, Lacie
Smith, Alton Michael
Smith, Christal
Stewart, Hope M
Thach, Hue Thi

Bunn, Tira
Burg, Kevin
Craig, Sally Z
Danridge, Victoria
Emrich, Stephen J

Hann, Tristan M.
Henaio, Jennifer
Holley, Daniel M.
Parker, Olivia
Paz, Elva Y
Perez, Cristina
Reding, April Denise
Rios, Adriana Brenes
Rios, Erika
Smith, Kevin
Tabler, Joeleinn J
Torres, Gina

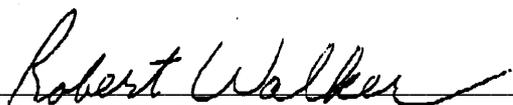
As to those respondents, the accusation is dismissed.

3. Within the terms of the ADA, Mr. Krant has a right to reasonable accommodation. The district shall not give him a Termination Notice.⁹ As to Mr. Krant, the accusation is dismissed.

4. The district may give a Termination Notice to either Bridgett Gonzalez or Tina Lingenfelter but not to both of them. If Ms. Gonzalez chooses to bump into Ms. Lingenfelter's position, the district may give a Termination Notice to Ms. Lingenfelter, and in that event, the accusation against Ms. Gonzalez is dismissed. If Ms. Gonzalez does not choose to bump into Ms. Lingenfelter's position, the district may give a Termination Notice to Ms. Gonzalez, and in that event, the accusation against Ms. Lingenfelter is dismissed.

5. The district may give Termination Notices to the remaining respondents.

Dated: April 18, 2011


ROBERT WALKER
Administrative Law Judge
Office of Administrative Hearings

⁹ In the present proceeding, there is no jurisdiction to deal with matters other than teacher lay off issues. It is appropriate to note, however, that under the ADA, the district and Mr. Krant have an obligation to engage in an interactive and cooperative process to determine what accommodations should be provided.

EXHIBIT A

RESPONDENTS

SAN BERNARDINO CITY UNIFIED SCHOOL DISTRICT

2011

1	Agha, Farah	35
2	Aguayo, Anabel	36
3	Alas-Negri, Marisela	37
4	Alba, Maribel	38
5	Amador, Martha	39
6		40
7	Applegate, Valerie	41
8	Arreola, Fiorella A	42
9	Arroyo, Nancy	43
10	Atencio, Callie	44
11	Back, Tiffany Moree	45
12	Bagnell, Annette Christine	46
13		47
14	Ballantyne, Eugene	48
15		49
16	Barbu, Diana	50
17	Besheer, Rebecca Marie	51
18	Beuler, Joyella Jane	52
19	Black, Clinton	53
20	Blacksher, Francine	54
21	Blacksher, Kristina	55
22	Bogarin, Alexis R	56
23	Boles, Danielle	57
24	Boren, Alba Leticia	58
25	Bougetz, Jaimie Elizabeth	59
26	Briggs, Jason	60
27	Brothers, Danielle	61
28		62
29		63
30	Brown, Eboni	64
31	Brown, Nicole R	65
32	Brown, Norma	66
33	Bruce, Pamela Sue	67
34	Bullock, Kimberly Nicole	68
		Burns, Socorro
		Burt, Krystle
		Cachu, Laura
		Calloway, Donna
		Cals Southern, Jennifer
		Carson, Wendi
		Cartwright, Heidy Fong
		Chavez, Patricia
		Chen, Susan
		Cobos, David
		Cochrane, Leahanna
		Concepcion, Marissa
		Connell, Lindsay
		Cooney, Melody
		Cordova, Erika
		Corral Cabral, Janett
		Cox, Keith
		Crockett, Joelle Imauni
		D'Alessandro, Alicia
		Dean, Cassandra
		Dean, Kristen M
		Demarco, Ana Beatriz
		Dorame, Eric
		Downing, Stephanie
		Drake, Stuart

69	Duag, Elaine	112	Higuera, Sonia
70	DuBois, Diane	113	Hill, Justin
71	Duran, Samuel	114	
72	Durant, Jacquay	115	Hodges, Rosario
73	Eck, Barbara	116	Horta, Naomi
74	Elliott, Lindsay N	117	
75	Elmore, Nicole D	118	
76		119	James, Alisha
77	Enriquez, Hank	120	Jimenez, Pete G
78	Esqueda, Irene	121	Jimenez-Garcia, Maria
79	Esquibel, Malissa	122	Johns King, Vanessa
80	Estrada, Stephanie	123	Jones, Jennifer
81		124	Kane, Sheena
82	Fields, Mary B	125	Kang, Grace H
83	Flansburg, Darcie Jo	126	
84	Fromby, Allegra	127	Krant, Guy G
85	Gallery, Jon Eric	128	
86	Garcia, Diana	129	Lackie, Laura
87	Garcia, Helen	130	Lambert, Martha A
88		131	
89	Gillespie, Mary	132	
90	Girasek, Berenise	133	Le, Thu
91		134	Lee Jr., Robert P
92	Gonzalez, Stephanie	135	Lemos, Whittney
93	Grajeda, Marie	136	Lopez, Elizabeth
94	Greene, Danielle	137	
95	Groezinger, Heather S.	138	Lopez-Alonso, Monica
96	Gueringer, Ronnie J	139	Lovely, Lori A
97	Guerrero, Yadira	140	Lovett, Wikitoria
98	Guillen. Karla	141	Luna, Felicia
99	Gutierrez, Blanca	142	Lyons, Jessica Lynn
100	Gutierrez, Mayra	143	
101	Gutierrez, Veronica	144	Madrigal, Anacelia
102	Guzman, Cynthia	145	Mancha, Sandra
103	Guzman, Liset	146	Manjarrez, Amanda
104	Haggerty, Heather	147	Mao, Elisa
105		148	Marruffo, Laura
106	Hammer, JoAnn C.	149	
107	Harrison, Lisa Marie	150	Martin, Marrina R
108	Hermosillo, Rosa Imelda	151	
109	Hernandez, Laura	152	Martinez, Brian
110	Hernandez-Guzman, Stefani Ho	153	Martinez-Guzman, Maria Cecil
111	Herrin, Keiana	154	Mashni, Basima Mosa

155	McCustion, Michael D	198	Ramirez, Brianna M
156		199	Ramirez, Melissa Yong
157	McNair, Lisa Renee	200	
158	Meaca, Marisol	201	Rawls, Michael
159		202	Reinor, Eugene
160		203	Reyes, Nancy
161	Mendoza, Nora	204	
162	Mojica-Mastranzo, Diana	205	Robinson, Stephanie
163	Moneta, Katie	206	Robles, Rebecca Alexandra
164	Moore, Robin	207	Rodriguez III, Santos
165	Morales Alfonso, Sarah Mary	208	Rodriguez, Beatriz
166	Moreno, Denise	209	Rodriguez, Magda A
167	Moss, Robert	210	Romero, Jesse
168	Muir, Erin	211	Romero, Sara Victoria
169	Muller, Kimberly	212	Roundy, Robin
170	Muller, Thomas	213	Roybal, Heather Lynn
171		214	
172	Murphy, Joan	215	Russo, his
173		216	Salazar, Adriana
174		217	
175	Ochoa, Joseph	218	Salazar, Mayra
176	Ochoa, Mayra	219	Salazar-Jimenez, Guadalupe
177	Oliver, Shirley A	220	Saldivar-Juarez, Dora A
178	Ortega, Anna Marie	221	
179	Ortega, Paulette	222	Sanz, Lizette
180	Ospina, Blanca	223	
181	Padilla, Paola	224	Sassaman, Sandra
182		225	Schlagel, Lacie
183	Parker, MarLan	226	
184	Parrish, Janet	227	Schmidt, Tara Nicole
185	Parsons, Clynton H	228	Scoggin, Kelly
186		229	
187	Perez, Angela I	230	Shih, Angela
188		231	Silva, Lanaya Marie
189	Perez, Sarah	232	Simental-Gladin, Maribel
190	Phillips, Ramona Rae	233	Sinclair, Lisa M.
191	Pinon, Enriqueta	234	Singer, Trimonisha
192	Ponce, Christine	235	Sinner, Mayte
193	Ponsler, Shawn	236	Slowinski, Aimee
194	Prato, Patricia	237	Smith, Alton Michael
195	Psilopoulos, Elizabeth	238	Smith, Christal
196	Quezada, Rosalinda Vera	239	Smith, Trudy L
197		240	Sorrell, LaTonya

241 Spencer, Rebecca
242 Spooner, Kimberlee
243 Stark, Lisa R
244 Stephens, Eileen Catherine
245 Stewart, Hope M
246 Teig, Gina D
247 Thach, Hue Thi
248 Torn', Sierra Diane
249 Tornero, Jessica Christine
250 Torres, Angela
251 Torres, Oscar
252 Tran, Diem
253 Tran. Linda

254 Verduzco, Georgina
255 Villalobos, Maria
256 Wang, Thelma
257 Warren, Bonnie
258
259 Williams, Christine
260 Williams, Nyesha Danielle
261
262 Wong, Jessica
263 Yates, Jennifer Lynn
264 Zapata, Norma Angelica
265 Zatory, Cynthia

1 Bunn, Tira
2 Burg, Kevin
3
4 Craig, Sally Z
5 Danridge, Victoria
6
7
8 Emrich, Stephen J
9 Escalante Butterfield, Angel
10 Gomez, Paloma
11 Gonzales, Brigette
12 Hann, Tristan M.
13 Henao, Jennifer
14 Holley, Daniel M.
15 Kohler, Christopher H

16 Lingenfelter, Tina
17 Parker, Olivia
18 Paz, Elva Y
19 Perez, Cristina
20 Reding, April Denise
21 Rios, Adriana Brenes
22 Rios, Erika
23 Smith, Kevin
24 Tabler, Joeleinn J
25 Torres, Gina
26
27
28
29 Zavala, Agustin

Rachael Payan did not satisfy the procedural requirements for obtaining a hearing, but the district waived the defect, and she, also, is a respondent.

EXHIBIT B

RESPONDENTS REPRESENTED BY MR. PEREZ

SAN BERNARDINO CITY UNIFIED SCHOOL DISTRICT

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		Cachu, Laura
		Calloway, Donna
		Cals Southern, Jennifer
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		Chavez, Patricia
		Chen, Susan
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		Cox, Keith
		Crockett, Joelle Imauni
		D'Alessandro, Alicia
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86	Garcia, Diana	129	Lackie, Laura
87	Garcia, Helen	130	Lambert, Martha A
88		131	
89	Gillespie, Mary	132	
90	Girasek, Berenise	133	Le, Thu
91		134	Lee Jr., Robert P
92	Gonzalez, Stephanie	135	Lemos, Whittney
93	Grajeda, Marie	136	Lopez, Elizabeth
94	Greene, Danielle	137	
95	Groezinger, Heather S.	138	Lopez-Alonso, Monica
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102	Guzman, Cynthia	145	Mancha, Sandra
103	Guzman, Liset	146	Manjarrez, Amanda
104	Haggerty, Heather	147	Mao, Elisa
105		148	Marruffo, Laura
106		149	
107	Harrison, Lisa Marie	150	Martin, Marrina R
108	Hermosillo, Rosa Imelda	151	
109	Hernandez, Laura	152	Martinez, Brian
110	Hernandez-Guzman, Stefani Ho	153	Martinez-Guzman, Maria Cecil
111	Herrin, Keiana	154	Mashni, Basima Mosa

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163	Moneta, Katie	206	Robles, Rebecca Alexandra
164	Moore, Robin	207	Rodriguez III, Santos
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166	Moreno, Denise	209	Rodriguez, Magda A
167	Moss, Robert	210	Romero, Jesse
168	Muir, Erin	211	Romero, Sara Victoria
169	Muller, Kimberly	212	Roundy, Robin
170	Muller, Thomas	213	Roybal, Heather Lynn
171		214	
172		215	Russo, his
173		216	Salazar, Adriana
174		217	
175	Ochoa, Joseph	218	Salazar, Mayra
176	Ochoa, Mayra	219	Salazar-Jimenez, Guadalupe
177	Oliver, Shirley A	220	Saldivar-Juarez, Dora A
178	Ortega, Anna Marie	221	
179		222	Sanz, Lizette
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184	Parrish, Janet	227	Schmidt, Tara Nicole
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251 Torres, Oscar
252 Tran, Diem
253 Tran. Linda

254 Verduzco, Georgina
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256 Wang, Thelma
257 Warren, Bonnie
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259 Williams, Christine
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22 Rios, Erika
23 Smith, Kevin
24 Tabler, Joeleinn J
25 Torres, Gina
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27
28
29 Zavala, Agustin