

BEFORE THE
GOVERNING BOARD
OF THE
DEL MAR UNION SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Reduction in Force
(RIF) of Certain Certificated Teachers
Employed by the Del Mar Union School
District:

OAH No. 2009020480

Respondents.

PROPOSED DECISION

Stephen E. Hjelt, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego, California on April 24, 2009.

William Wood Merrill, Attorney at Law, of Best, Best & Krieger, LLP, represented the Del Mar Union School District (District or DMUSD).

Fern M. Steiner, Esq. of Tosdal, Smith, Steiner & Wax represented respondent certificated employees of the Del Mar Union School District who received preliminary layoff notices as indicated in the record. She was assisted by Tim O'Neill of the California Teacher's Association.

The District has decided to reduce or discontinue certain educational services and has given respondents and other certificated employees of the District notice of its intent not to reemploy them for the 2009-2010 school year. Respondents requested a hearing for a determination of whether cause exists for not reemploying them for the 2009-2010 school year.

The matter was submitted on April 24, 2009, with the understanding that counsel for the parties, in addition to oral closing argument, could submit written argument as well as proposed findings by the close of business on April 27, 2009. Counsel for the District submitted a proposed finding and legal conclusion regarding respondent Sarah Lippe which was marked for identification as Exhibit 11.

Oral and documentary evidence, and evidence by way of stipulation, was presented and received. The case was submitted for decision on April 27, 2009.

FACTUAL FINDINGS

The Del Mar Union School District

1. The Del Mar Union School District is a basic aid school district serving the community of Del Mar in San Diego County. The District serves a diverse student community. Its educational facilities include 8 K-6 schools.

2. The District is governed by an elected five-member Board of Education (Board). Dr. Sharon McLain is the District Superintendent. She is supported by an administrative staff that includes Rodger Smith, Director of Human Resources and Facilities Planning. Smith testified at the administrative hearing on behalf of the District.

The Fiscal Crisis-Economic Layoffs

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

A school district cannot determine the level of state funding it will receive until the state budget is chaptered, an event usually occurring in late June. Before then, a school district's governing board must take steps to make certain that ends meet if a worst-case financial scenario develops. California's current economic crisis has made budgeting problems far more complicated than they were before. Some prior years left districts sailing in stormy seas. This year's state and national financial crisis can only be described as a tsunami.

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

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

The fiscal crisis that the state of California found itself in has created a ripple effect of chaos and dislocation throughout the state. This is particularly the case for school districts. At the time of the adoption of the layoff resolution in February 2009, all school districts in California were mindful of the State-wide budget crisis and its potential impact on State funding for schools at the level that was budgeted originally for the 2008-09 school year.

State law mandates that the District maintain a minimum reserve in its general fund. This District maintains a reserve that is larger than the minimum required by law. However, the reserve it maintains is consistent with the recommendations made to it by the State of California due to its status as a basic aid district.

The District's Response

4. In fall 2008, the District and its administrative personnel began to review the District's financial matters, staffing and enrollment. These meetings took place because the gathering state budget storm was clearly on the horizon. Eventually, these meetings produced a series of documents that reflected the anticipated District budget shortfall and various ways to meet that shortfall, including reductions in staffing and services.

5. Rodger Smith reported his findings to the Superintendent.

6. Based on the analysis provided by Mr. Smith and staff, the Superintendent in turn recommended a layoff resolution to the Board for adoption. The "Notice to the Board of Recommendation to Reduce and/or Eliminate Services for the 2009-2010 School Year Pursuant to Education Code Sections 44949 and 44955" set forth the particular kinds of services that were identified to be reduced or eliminated.

7. On February 25, 2009, the Board adopted Resolution No. 2009-03 recommending a reduction or discontinuance of particular kinds of services provided by the District for the 2009-2010 school year. The Board's adoption of Resolution No. 2009-03 set forth a list of the particular kinds of services being reduced and was based on the welfare of the schools and their students.

8. Resolution No. 2009-03 provided:

**BEFORE THE GOVERNING BOARD OF THE
DEL MAR UNION SCHOOL DISTRICT
COUNTY OF SAN DIEGO, STATE OF CALIFORNIA**

Reducing and Eliminating Certain)
Certificated Services for the 2009-2010) Resolution No. 2009-03
school year.)

- A. The District Superintendent has recommended to this Board that those programs and services performed by certificated employees and shown in Exhibit "A" attached hereto and incorporated herein by reference be reduced and eliminated, effective at the end of the 2008-2009 school year.
- B. The Board finds it is in the best interests of the District to reduce and eliminate the programs and services shown in Exhibit "A", effective at the end of the 2008-2009 school year.

NOW, THEREFORE, THE BOARD RESOLVES THAT:

- 1. The above recitals are true and correct.
- 2. The programs and services described in Exhibit "A" attached to this Resolution are reduced and eliminated, starting with the 2009-2010 school year in accordance with the recommendations of the Superintendent.

3. The Superintendent is directed to determine which employees' services will not be required for the 2009-2010 school year as a result of this reduction and elimination in programs and services and to take all steps necessary under the law not to employ those certificated employees of the District because of the reduction and elimination of these programs and services.

I CERTIFY that the above resolution was duly passed and adopted by the Governing Board of the Del Mar Union School District of San Diego County, California, at an official and public meeting thereof held on February 25, 2009, by the following vote:

AYES: _____

NOES: _____

ABSTENTIONS: _____

ABSENT: _____

DATED: February 25, 2009

GOVERNING BOARD OF THE
DEL MAR UNION SCHOOL
DISTRICT

By _____

Katherine White, President

EXHIBIT “A”

RESOLUTION 2009-03, REDUCING AND ELIMINATING

CERTAIN CERTIFICATED SERVICES FOR THE

2009-2010 SCHOOL YEAR

The services to be reduced and/or eliminated are:

<u>Services</u>	<u>FTE Reduction</u>
Music Teaching	8.0
Art Teaching	8.0
Science Teaching	3.0
Physical Education Teaching	4.0
Technology Teaching	3.0
Drama Teaching	.5
Math/Technology Teaching	1.0
Spanish Teaching	.5
BTSA Support Provider	1.0
Grades K-6 Teaching	15.0
Total FTE Reduction	44.0

9. On February 25, 2009, the Board adopted what is commonly referred to as a “tie breaker Resolution,” Resolution No. 2009-02. The Resolution provided:

**BEFORE THE GOVERNING BOARD OF THE
DEL MAR UNION SCHOOL DISTRICT
COUNTY OF SAN DIEGO, STATE OF CALIFORNIA
RESOLUTION NO. 2009-02**

**DETERMINATION OF SENIORITY AMONG CERTIFICATED
EMPLOYEES WITH THE SAME SENIORITY DATE (Tie-Breaker
Resolution)**

WHEREAS, pursuant to Education Code Section 44955, the Board is required, as between employees who first rendered paid service to the District on the same date, to determine the order of termination solely on the basis of the needs of the District and its students; and

WHEREAS, Education Code Section 44955 requires that upon the request of any employee whose order of termination is determined as stated above, the governing board shall furnish in writing no later than five days prior to the commencement of the hearing held in accordance with Section 44949, a statement of the specific criteria used in determining the order of termination and the application of the criteria in ranking each employee relative to the other employees in the group.

NOW THEREFORE, BE IT RESOLVED, as follows:

1. That this Board determines that the needs of the District and the students of this District are best served by resolving seniority ties within the meaning of Education Code Sections 44955, subdivision (b) (third paragraph) and Section 44846, by applying the criteria set forth below;
2. That as between employees who first rendered paid service to the district in a probationary position on the same date, the order of termination of said employees shall be determined by reference to the criteria which follow and the application thereof to each employee;
3. That the criteria set forth in paragraph 3 (a) through 3 (j) below are listed in priority order and each criterion shall be used only if the preceding criteria do not delineate the order of termination;
 - (a) Possession of a currently valid California clear multiple subject credential (or equivalent, if any, under previous provisions of law).
 - (b) Possession of a valid Cross-cultural Language and Academic Development (CLAD) Emphasis or Certificate, English Language Learner Authorization, Specially Designed Academic Instruction in English (SDAIE), California Teacher of English Certificate (CTEL), Bilingual Cross-cultural Language and Academic Development (BCLAD) or Bilingual Certificate of Competence (or their equivalent, if any, under

previous provisions of law or other document permitting the instruction of English Language Learners)

- (c) The broader scope of services, as defined by additional credentials or supplementary authorizations, as the case may be. Possession of a single subject credential will be regarded as equivalent for purposes of application of this criterion.
- (d) Possession of a valid master's degree.
- (e) Earlier date of issuance of a professional clear credential (or equivalent, if any, under previous provisions of law).
- (f) Earlier date of awarding of master's degree.
- (g) Greater number of semester units of education above a bachelor's degree.
- (h) Earlier date of issuance of preliminary credential.
- (i) Greater number of years of paid certificated service in the District.
- (j) Greater number of years of paid certificated service outside the District.
- (k) Greater number of years of paid classified service in the District.
- (l) Random drawing by lot.

Each criteria shall be applied to rank the order of individuals for purposes of layoff and reemployment, subject to exceptions allowed by law;

The Governing Board of the Del Mar Union School District adopted the foregoing Resolution on the 25th day of February, 2009 by the following vote:

White AYES; 5 Members Easton, McDowell, Perkins, Rodriguez, and

NOES: 0

ABSENT: 0

Katherine White
President, Governing Board of the Del Mar Union
School District

10. On or before March 15, 2009, each certificated employee who is party to this proceeding was given a letter and notice that the Board had recommended that his or her services with the District would be terminated at the conclusion of the current school year.

A copy of the sample preliminary layoff notice, which recited the services to be reduced from the layoff resolution, as well as the fact that the employee was entitled to request a hearing to determine whether there was legally justified cause for not reemploying the employee for the ensuing 2009-2010 school year, is in evidence.

The preliminary layoff notice supplied by the District was proper, appropriate, and duly served on each certificated employee who is a party to this proceeding. An accurate summary of all certificated employees that were served notice, along with whether or not they requested a hearing, is contained in the evidence received at the hearing.

An Accusation packet was thereafter served on the certificated employees who requested a hearing and most of the employees receiving an Accusation package filed a Notice of Defense. All employees receiving an Accusation package were duly served with a Notice of Hearing, advising them of the date, time and place of the layoff hearing.

11. The District and its staff continued to monitor the financial condition of the District and determined that it would be possible to retain a substantial number of the teachers who were originally identified for layoff. On April 15, 2009, the Governing Board of the District adopted a "Resolution to Amend Resolution Reducing and Eliminating Certain Certificated Programs and Services for the 2009-2010 School Year." The Resolution, No. 2009-04, reduced the number of FTEs subject to the layoff procedure.

12. Mr. Smith, with the assistance of the Human Resources Department staff, in turn, applied the tie-breaker criteria to the certificated employees in this proceeding. Exhibit 2 constitutes the District's implementation of the tie-breaker resolution that was prepared by Mr. Smith and his staff.

The Administrative Hearing

13. On April 24, 2009, the record in the administrative hearing was opened. Jurisdictional documents were presented. The District presented an opening statement. A written stipulation regarding the District's exhibits was received into evidence. (Exhibit 7.) The District called as its witness Mr. Smith. Smith presented sworn testimony and documentary evidence and was cross-examined regarding the various exhibits and the reasons behind their adoption and preparation. Prior to the respondent's attorney calling witnesses there was a break in the proceedings so that respondents could meet with their attorney to review the exhibits. Respondent's attorney then presented exhibits and called two witness.

14. At the conclusion of the administrative hearing, it was agreed that in addition to oral closing argument, counsel would be provided the opportunity to submit written argument and/or proposed findings to the Office of Administrative Hearings with respect to this matter by the close of business on April 27, 2009. The District submitted a proposed finding and legal conclusion regarding Ms. Lippe. Respondent did not.

The Particular Kinds of Services

15. The services identified by the Board for reduction or elimination in the layoff resolution are particular kinds of services that could properly be reduced and discontinued. The reduction and elimination of those services was neither arbitrary nor capricious, and the reduction or elimination of those services constituted a matter well within the proper exercise of the Board's discretion. The layoff related to the welfare of the district, the schools, and the students. No services were reduced below levels required by federal and state law.

The District's Layoff Procedure

16. The Board's amended resolution called for the elimination or reduction of substantially fewer FTEs in particular kinds of services than originally proposed. Using the Board's resolution and the District's seniority list, the District's staff first identified certificated employees who were not returning for the following 2009-2010 school year. The District staff then identified those employees by credential to determine whether the amount of particular kinds of services to be reduced could first be obtained by offsetting the number of layoffs by those employees who were not returning.

17. The District's staff then created a lengthy worksheet to track those certificated employees by seniority to determine the remaining employees to be laid off, as well as those who had so-called "bumping" rights or who could be "skipped" from layoff. For those employees who provided the particular kinds of services identified in the resolution, the District determined if the employee could "bump" a more junior employee by providing a particular kind of service that the more senior employee was credentialed and competent to provide. The Board's tie-breaking criteria established a method by which employees having the same seniority date could be ranked for layoff purposes. Through the tedious step-by-step elimination process, the District correctly determined which certificated employees should receive preliminary layoff notices. This tracking is reflected in the evidence.

18. The District served preliminary layoff notices and Accusation packages on a number of certificated employees in order to reach the FTEs identified in the layoff resolution.

19. No permanent or probationary employee with less seniority will be retained to render a service any respondent is certificated and competent to provide.

20. Respondent Sarah Lippe is an employee with a seniority date of August 24, 2005. She is currently assigned as a 50% FTE art teacher. For the 2005-2006 and 2006-2007 school years, she was a full-time teacher. At the beginning of the 2007-2008 school year, and continuing to the present, she voluntarily accepted a 50% part time art position at Ocean Air School, health benefits not included. This was not a "job share" position, and she was not granted a leave of absence for the balance of a full-time assignment. The evidence shows that Sarah Lippe is a .50 FTE and that she did not retain her full-time service status. At the hearing, Sarah Lippe contended that her prior full-time service entitled her to be retained over a junior full time employee.

21. The part-time position to which Ms. Lippe is assigned has been discontinued. Sarah Lippe does not have the right to force the District to divide a full-time position to accommodate her part-time employment. No part-time junior employee is being retained in a position for which Ms. Lippe holds the required credential. Therefore, the District may lay off Sarah Lippe.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notice and jurisdictional requirements set forth in Education Code sections 44944 and 44945 were met as to those respondent certificated employees identified herein.

2. The measure by which a school board's actions is to be judged is set forth in language in *Campbell Elementary Teachers Association v. Abbott* (1978) 76 Cal. App. 3d 796 at page 808. The court wrote:

“In determining whether the decision of a school board is reasonable as distinguished from fraudulent, arbitrary, or capricious, its action is measured by the standard set forth by reason and reasonable people, bearing in mind that such a standard may permit a difference of opinion on the same subject. The record reveals that the board resolution of March 13, 1975, was not an arbitrary decision arrived at through the exercise of mere caprice, but rather was a decision supported by a fair and substantial reason. It is true that the governing board hoped that when its final budget was adopted it would not be necessary to terminate all of the enumerated services. Although the governing board wanted to keep as many certificated employees as possible, the school district was facing financial uncertainties, and the board acted in an attempt to allow the district maximum flexibility in determining staffing for the ensuing school year in light of both available resources and needs.”

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

A school board may “reduce services” by eliminating certain types of services or by reducing the number of district employees providing such services. The decision to reduce or discontinue a particular kind of service is not unfair or improper simply because a school board made a decision it was empowered to make. (*Rutherford v. Board of Trustees of Bellflower Unified School District* (1976) 64 Cal. App. 3d 167.)

4. Education Code section 44955, subdivisions (b) and (c), sets forth a general rule requiring school districts to retain senior employees over more junior employees and to retain

permanent employees over temporary employees. Any exception to this general rule must be based on statute. For employees hired on the same date, Education Code section 44955, subdivision (d) provides:

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

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

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

Under subdivision (d)(1), the District may skip a junior teacher being retained for specified reasons. (*Bledsoe v. Biggs Unified School District* (2008) 170 Cal. App. 4th 127, 131.) Sufficient authorization is provided to skip Woodward (No. 110) and Nee (No. 96) from layoff based upon their training and experience related to their assignment at the District’s SSA.

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

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

6. As a result of the District’s lawful reduction of particular kinds of services, cause exists under Education Code section 44955 for the District to give notice to all respondents listed on Attachment A to this Proposed Decision who were previously served with preliminary layoff notices that their employment will be terminated at the close of the current school years and that their services will not be needed for the 2009-2010 school year.

7. With specific reference to Sarah Lippe, a senior certificated employee whose part-time position is being discontinued does not have the right to force the District to divide the full-time position of a less senior certificated employee. (*Hildebrandt v. St. Helena Unified School District* (2009) 172 Cal. App. 4th 334.)

A part-time senior certificated employee does not have the right to bump into a full-time assignment occupied by a junior certificated employee. (*Hildebrandt*, supra, 342-343).

8. The Factual Findings and the Legal Conclusions in this case are not a referendum on the wisdom of the choices made by the Del Mar Union School District. There may well be many better choices. However, this is not the forum to determine “better choices.” This is the forum to determine whether the District has identified appropriate particular kinds of services for reductions and discontinuances, and whether the District had established a valid method for deviating from strict application of seniority in deciding who to layoff. On the basis of the evidence presented, the District has met its burden. The reality, as all well know, is that conditions may change and some or all of the final decisions made by the District as a result of this Proposed Decision may change.

9. Teacher layoff hearings occur irregularly in California. Often years pass with no reduction in force (RIF) ever being filed by a school district or heard by the Office of Administrative Hearings. However, due to the way education in California is presently funded, school districts and their teachers are always a blip in the economy away from the draconian measures required by the Education Code. The school year 2008/2009 was very harsh and difficult for many Districts and teachers. The current year is beyond nightmarish. The reasons for the continued existence of the current inefficient and wasteful system are beyond the scope of this hearing. However, to the District and its teachers, the dislocation, anxiety and uncertainty create a climate that can be corrosive and cause wounds that can take years to heal.

10. Are the actions of this District arbitrary in this layoff proceeding? Of course they are. They are arbitrary in the same way that two competent surgeons might argue about the relative wisdom of an amputation. One might feel that an above-the-knee amputation was best. The other might opt for a below-the-knee procedure. The disagreement is not over the need for the operation, but over the exact method. The reference to amputation is not made casually. These layoffs are like an amputation. They are painful and traumatic and change the District in so many different ways. Although the District’s actions are arbitrary, they are not “arbitrary or capricious” as this legal term of art is defined.

11. None of the proposed layoffs will reduce services below state mandated levels. This is not to say that the layoffs, if ultimately implemented, will result in the optimum delivery of services. These layoffs are simply the best that the District could do under extremely difficult and unpleasant circumstances. They reflect a reasonable decision making process. They are certainly not the only way to reduce a budget deficit nor do they necessarily represent the best way to reduce a deficit and continue to supply the best quality public education possible.

12. These decisions by a Board are particularly susceptible to second guessing because they represent choices between various competing versions of “bad.” The choices here are between competing unpleasant scenarios in non-optimum circumstances. These aren’t choices between good and bad. These are choices made in an uncertain situation with many variables in the equation and one overriding concern-where can we cut the budget deficit and do

the least amount of damage. This is, after all, the pragmatic issue the Board and the District face.

13. The testimonial and documentary record in this case, as well as reasonable inferences drawn from them, strongly supports a finding that this District made every reasonable effort to minimize the harm done to its most valuable asset, its teachers. It exercised its discretion in good faith. Ultimately, the District must be accorded the deference to make these “no win” decisions as long as they are made in good faith with the ultimate welfare of the students and the District’s needs in mind. The record in this case demonstrates that the District has done so.

14. In considering teacher layoffs as a way to balance a budget, Districts must think carefully and be cautious because of the huge impact of the decision on the teachers, students and community. This is always a necessary cautionary reminder to any District that is contemplating teacher layoffs. With respect to the Del Mar Union School District, it is clear that they have made these cuts with sensitivity and good faith effort. Unlike most litigation, the result in this case is that no one wins.

15. Initially, the Board gave preliminary notices to 52 teachers. Through good faith efforts, by the time of the hearing, there were 8 teachers who the District sought to layoff. Six appeared to contest their layoff. Two did not request a hearing and did not appear. The two teachers who did testify, Ms. Lippe and Ms. Roberts, are prime examples of why this process, though mandated by law, is so problematic. They are young, passionate, and devoted to their students. It is a safe assumption that they are representative of the remainder of teachers subject to layoff. This is a tragedy.

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

ORDER

It is recommended that the Board give notice to all respondents identified in Attachment A to this Proposed Decision previously served with a preliminary layoff notice that their employment will be terminated at the close of the current school year and that their services will not be needed for the 2009-2010 school year.

DATED: _____

STEPHEN E. HJELT
Administrative Law Judge
Office of Administrative Hearings

ATTACHMENT A

1. Marisa Camarillo
2. Sarah Grosso
3. Ariella Leeder
4. Sarah Lippe
5. Lauren Markarian
6. Shawna Roberts
7. Jennifer Baker
8. Shayne Griffith