

BEFORE THE  
GOVERNING BOARD OF THE  
EAST SIDE UNION HIGH SCHOOL DISTRICT  
STATE OF CALIFORNIA

In the Matter of the Accusation Against  
Certificated Employees:

AMELITA ABEE, et al.,

Respondents.

OAH No. 2009030096

**PROPOSED DECISION**

This matter was heard before Ruth S. Astle, Administrative Law Judge, State of California, Office of Administrative Hearings, in San Jose, California, on April 29 and 30, 2009.

Patricia R. McKernan and James R. Lynch, Attorneys at Law, represented the East Side Union High School District.

Christopher Schumb, Attorney at Law, represented all respondents. A complete list of respondents is found on Attachment 1.

The matter was deemed submitted for decision on April 30, 2009.

**FACTUAL FINDINGS**

1. On March 10, 2009, the governing board of the East Side Union High School District adopted Resolution No. 2008-2009-31 in which the board resolved to reduce or eliminate particular kinds of services for the 2009-2010 school year and directed the superintendent to send appropriate notice to the employees affected by this action. The total F.T.E.'s being reduced was 80 F.T.E. A list of the particular kinds of services to be eliminated or reduced is attached as Attachment 2.

2. The reductions were based on the district's financial situation. As a result of the state budget crisis, the district is projecting a budget shortfall. Considering this, the reductions are in the interest of the schools and their pupils.

3. Before March 15, 2009, the superintendent gave written notice to all respondents except Jennifer Higareda that, pursuant to Education Code sections 44949 and 44955, it was being recommended that their services would be reduced or eliminated for the 2009-2010 school year. All respondents, including Higareda, filed timely requests for hearing.

4. The March 15 notices were sent by certified mail to all respondents. The District had the wrong address for Higareda. The District had entered her address incorrectly in the system.

While conceding Higareda did not timely receive written notice of the recommendation that her services would be eliminated for the following school year, the district essentially argued that she was not prejudiced by that lack of notice; Higareda learned of her inclusion on the layoff list by no later than March 16, she timely filed a request for hearing, she was served with an accusation, she timely filed a notice of defense, and was represented at the hearing.

“Nonsubstantive procedural errors committed by the school district . . . shall not constitute cause for dismissing the charges unless the errors are prejudicial errors.” (Ed. Code, § 44949, subd. (c)(3).) However, failure to provide written notice of the layoff recommendation on or before March 15 cannot be considered an excusable nonsubstantive procedural error. The language of subdivision (a) of section 44949 is mandatory: “the employee shall be given written notice” no later than March 15. Further, Education Code section 44955, subdivision (c), provides, “In the event that a permanent or probationary employee is not given the notices and a right to a hearing as provided for in Section 44949, he or she shall be deemed reemployed for the ensuing school year.” (Emphasis added.) Receipt of written notice on or before March 15 is jurisdictional. Without such notice, an employee may not be dismissed. Higareda must be retained for the 2009-2010 school year.

5. On March 10, 2009, the governing board adopted Exhibit A attached to the resolution referred to in Finding 3, above. The resolution set forth seven criteria to be used in determining the order of termination of certificated employees first rendering paid service to the district on the same date.

The resolution directed the superintendent or his designee to apply the adopted criteria to the affected employees to determine order of termination as related to the needs of the District and its students.

6. The respondents found at least two errors in the seniority order based on the application of the tie breaking criteria. The District agreed to correct those errors and those errors did not affect the layoff notices.

7. Ralph Giannini and William Collins are not being laid off. They are presently assigned to specially funded programs. They may be returned to the classroom or otherwise be reassigned, but this will not affect any of the other respondents.

8. The notices given to R. Gietzen, T. Koumoutsakis, J. Bettencourt, T. Ueldegheorghis, J. Simons, J. Victorino, N. Quiroga, H. Simbron, I. Rowe, V. Monge, T. Rubusin, M. Baeza, S. Blanco, J. Daniels, A. De La Rosa, N. Baldwin, R. Kaur, K. Conroy, A. Mandel, H. Haas, N. Siguenza, P. Miller, J. Statten, G. Goebel, M. Ghali, P. Lee, R. Bartholomew, I. Hashimoto, T. Sterrett, D. Petersen, G. Dixon, M. Shernock, S. Albin, K. Allen, J. Pacheco, A. Parra, S. Kaur, S. Basegio, H. Stone, C. Ng, V. Trieu, F. Saldana, A. Li, D. De Paz, E. Fenton, and D. Giorgi have been rescinded.

Some teachers retain a portion of their F.T.E. N. Brown retains .2 F.T.E.; J. McHam retains .2 F.T.E.; K. Conroy retains .6 F.T.E.; E. Youngblood retains .6 F.T.E.; and T. McLane retains .6 F.T.E.

9. The parties stipulated to changing the seniority date of A. Mandel, A. Para, J. Pacheco, and A. Nguyen based on the first date of paid service with the district. Most of the changes were based on teaching summer school or a class during the summer.

10. Kathy Lair has a seniority date of August 25, 2008. She attended a professional development program on August 4, 5, 6, 7, and 8, 2008. Her Department Co-Chair implied in an email that her attendance was required. She was paid a per diem to attend this workshop. This is not the type of service that would require a change in Lair's seniority date. While she may have believed her attendance was mandatory, she was not rendering services for the district that would qualify as a first paid date of probationary service to the district.

11. The recommendation to the Governing Board to reduce particular kinds of services was made after consideration of all positively assured attrition, including the non-re-election of probationary teachers, resignations and retirements. The District has discretion to do this. The fact that there were 39 probationary teachers that were not reelected does not affect the propriety of the layoff resolution.

There may be additional resignations and retirements. The District is not required to fill those positions, but if they do, they must fill them with teachers who have been laid off pursuant to this hearing and who are credentialed and competent to fill those positions.

12. There was testimony that about 16 administrators will be placed back in the classroom pursuant to another Board resolution that was not presented at the hearing on this matter and was not considered part of this layoff hearing. The administrators were not included in the bumping chart or the seniority list. The respondents argued that this denies them due process, since they cannot check if the Board is retaining a certificated employee who is junior to one of them to perform a duty that one of them is credentialed and competent to perform. The District's witness testified that they are aware of the Education Code sections that pertain to this matter and that they will follow them. If they do not they

will be in violation of the law. The District cannot retain a junior employee and place that employee in a position that one of the respondents is credentialed and qualified to perform, regardless of whether or not that employee is an administrator being returned to the classroom. The respondents are rightfully concerned about this issue. In a large layoff there are often clerical errors that occur. There were such errors discovered in this hearing. The hearing is to make sure that all of these concerns are addressed. It is too late now to include these administrators in the layoff proceedings. Since the respondents were unable to address the issues concerning any administrator being returned to work in the classroom, the District cannot return any administrators into a classroom position that is the subject of this layoff proceeding or, in the alternative, the District may rescind notices for the 16 most senior certificated employees.

13. Respondents contend that the District does not have a plan to deal with mandated services. There are subject area classes mandated by State law and by the District. The District's witness testified that they will meet all mandated levels of service and that they will hire teachers as needed to make sure that these levels are met. They do not know what the demand will be in the next school year for individual classes. The District is increasing class size. This was done in agreement with the union. Hiring back teachers to meet the mandated levels of subject offerings is an acceptable plan to meet mandated levels. The District must fill any position that is added to meet mandated levels in reverse order of seniority taking into account credentialing and competency.

14. Any contentions raised by respondents and not discussed above are found to be without merit and are hereby rejected.

15. The District skipped three certificated employees that should not have been skipped. The District rescinded notices to the most senior teachers that were credentialed and competent to bump into those positions. No junior employee is being retained to render a service that any of the respondents are certificated and competent to provide.

#### LEGAL CONCLUSIONS

Cause for the elimination of 80 F.T.E. positions exists in accordance with Education Code sections 44949 and 44955. Except as to Jennifer Higareda, cause further exists to give respondents notice that, to the extent shown in the layoff notices sent them, their services will not be required for the 2009-2010 school year. This cause relates to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949.

#### ORDER

1. Notice may not be given respondent Jennifer Higareda that her services will not be required for the 2009-2010 school year.

2. Notice may be given the remaining respondents that, to the extent shown in the layoff notices sent them, their services will not be required for the 2009-2010 school year.

3. The District may not fill any position that are the subject of this hearing with administrators or, in the alternative, the District may rescind notices for the 16 most senior certificated employees subject to layoff.

DATED: \_\_\_\_\_

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RUTH S. ASTLE  
Administrative Law Judge  
Office of Administrative Hearings