

BEFORE THE
GOVERNING BOARD OF THE
METROPOLITAN EDUCATION SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

Certificated Employees,

Respondents.

OAH No. 2009031072

PROPOSED DECISION

Administrative Law Judge Mary-Margaret Anderson, State of California, Office of Administrative Hearings, heard this matter in San Jose, California, on April 15 and May 1, 2009.¹

Nancy L. Ober, Attorney at Law, Littler Mendelson, represented the Metropolitan Education School District (Met Ed).

Christopher Schumb, Attorney at Law, represented the Respondents who are members of the California Teachers Association. Stewart Weinberg, Attorney at Law, and Vincent A. Harrington, Jr., Attorney at Law, Weinberg, Roger & Rosenfeld, represented the Respondents who are members of the American Federation of Teachers.

This matter was originally set for hearing, at the request of the Parties, on two days: April 15 and April 21. Although the Notices of Hearing sent to the Respondents contain both dates, the CTA Respondents were advised to appear on April 15 and the AFT Respondents were advised to appear on April 21. On April 15 the matter went forward as to the CTA Respondents only. No appearance was made by or on the behalf of the AFT Respondents. On April 20, at the Parties' joint request, the second hearing date was continued to May 1.

By letter dated April 30, Mr. Harrington, counsel for the AFT Respondents, advised "we have resolved and settled all matters affecting the respondents whom we represent in the case and thus we will not be appearing at the hearing tomorrow, May 1, 2009." At the May 1 hearing, Ms. Ober stipulated that the representations in the letter were true and correct. The April 30 letter is attached hereto as Exhibit I and incorporated in full by this reference.

¹ All dates are in 2009.

On May 1, Ms. Ober and Mr. Schumb advised that Met Ed had rescinded the notices against all but six of the remaining Respondents: Kenneth Schirle, Sara Crowder, Gina Fleming, Chantu Nguyen, Tahmores Gholamipour, and Victoria Staubinger. Mr. Schumb represents Chantu Nguyen, Tahmores Gholamipour, and Victoria Staubinger. He represented Sara Crowder on April 15, but for the May 1 hearing, she told him that she no longer needed representation.

No appearance was made by or on the behalf of Respondents Kenneth Schirle or Gina Fleming.

The record was left open to allow the Parties to file closing briefs. Respondents' (Mr. Schumb's clients) brief was timely received and marked for identification as Exhibit 14. Met Ed's brief was timely received and marked for identification as Exhibit M.

The record closed on May 8.²

SUMMARY

The Governing Board of the Metropolitan Education School District passed a resolution eliminating all of the services provided by certificated employees for the 2009-2010 school year. All of Met Ed's certificated employees were given a March 15 notice of layoff. Met Ed, however, intended to be in operation in 2009-2010; the Resolution and resulting notices were not grounded in fact. Accordingly, it is found that the layoff process did not comply with Education Code requirements and the Accusations will be dismissed.

FACTUAL FINDINGS

1. Paul Hay filed the Accusations in his official capacity as Superintendent of Met Ed.
2. Respondents Kenneth Schirle, Sara Crowder, Gina Fleming, Chantu Nguyen, Tahmores Gholamipour, and Victoria Staubinger are certificated employees of Met Ed.
3. On March 11, Met Ed's Governing Board (Board) adopted Resolution No. 08-03-11-09. The Resolution states, in pertinent part:

WHEREAS, the Superintendent of the Metropolitan Education District has recommended to the Governing Board that the District reduce or eliminate particular kinds of services listed below no later than the beginning of the 2009-2010 school year, and

² On May 11, a letter was received from Ms. Ober stating that Met Ed has rescinded the layoff notice to Respondent Tahmores Gholamipour and that "the issue of his layoff is now moot and should not be addressed in your decision." As the record had closed, this information was not considered.

WHEREAS, the Governing Board is required by law to give notice prior to March 15th to certificated employees directly affected by any decision to reduce or eliminate particular kinds of services.

NOW, THEREFORE, BE IT RESOLVED THAT:

A. The Governing Board of the Metropolitan Education District hereby determines to reduce the following particular kinds of service of the District no later than the beginning of the 2009-10 school year:

All of the classes, courses, and programs offered by the Metropolitan Education District and listed below:

<u>PARTICULAR KIND OF SERVICES</u>	<u>NUMBER OF FTE³ POSITIONS</u>
Air Conditioning & Refrigeration – CCOC	one (1) FTE
Animation – CCOC	one (1) FTE
Auto Body Repair – CCOC	two (2) FTE
Auto Brakes & Alignment – CCOC	.600 FTE
Auto Transmission Engines – CCOC	two (2) FTE
Auto Truck Mechanics – CCOC	one (1) FTE
Auto Tune Up & Engine Repair – CCOC	one (1) FTE
Baking and Catering – CCOC	one (1) FTE
Carpentry – CCOC	one (1) FTE
Computer Aided Drafting Instructor – CCOC	one (1) FTE
Computer Technology Careers – CCOC	one (1) FTE
Culinary Arts – CCOC	one (1) FTE
Dental Assisting – CCOC	two (2) FTE
Electrical Maintenance – CCOC	one (1) FTE
Fire Science/First Responder – CCOC	one (1) FTE
Forensic Investigation – CCOC	one (1) FTE
Graphic Design – CCOC	.600 FTE
Health Occupations – CCOC	one (1) FTE
Interior Design – CCOC	one (1) FTE
Law Enforcement – CCOC	one (1) FTE
Managerial Accounting – CCOC	one (1) FTE
Medical Assistant – CCOC	two (2) FTE
Medical Office Careers – CCOC	one (1) FTE
Metals Technology – CCOC	one (1) FTE
Multimedia – CCOC	one (1) FTE

³ Full-time equivalent

Office Assistant – CCOC	one (1) FTE
Probation & Legal Careers – CCOC	one (1) FTE
Small Business Management – CCOC	one (1) FTE
Teacher on Assignment – CCOC	one (1) FTE
Teacher/Student Advisor – CCOC	one (1) FTE
Veterinary Assistant – CCOC	one (1) FTE
Video Production – CCOC	one (1) FTE
Customer Services and Sales – Job Corp	one (1) FTE
Landscape Maintenance – Job Corp	one (1) FTE
Materials Handling – Job Corp	one (1) FTE
Office Assistant – Job Corp	one (1) FTE

AC Measurement
 AC Theory
 Accounting Clerk
 Administrative Assistant
 Adult Basic Skills
 Adult High School Diploma
 Adult Independent Study Program
 Adult Office Assistant
 Adult Machining
 Adult with Disabilities
 Air Conditioning/Refrigeration/Heating
 Art
 Auto Body Repair
 Auto CAD 2007
 Auto Engine Repair
 Auto Transmissions
 Baking & Catering I
 Basic Precision Machining
 Basic Study Skills
 Basic Principles of Small Business
 Building Maintenance I (Focus on Carpentry)
 Building Maintenance II (Focus on Plumbing)
 Building Maintenance III (Focus on Electrical)
 Building Maintenance IV (Focus on Painting)
 Bookkeeping/Accounting
 Cabinetmaking
 Capitol High School Program
 Citizenship
 Clinical Unit Secretary (Ward Clerk)
 CPR & First Aid
 Cosmetology
 DC Measurement
 DC Theory

Distance Learning
Electrical Troubleshooting
Electronic Control Devices
English
English Lab
English as a Second Language
Excel
Fifty Plus Program
Fine Arts
Fitness, Health & Sports
Foreign Languages
Gardening
GED Testing Preparation
General Clerk
Graphic Design
Health Occupations
High School English
High School Social Studies
High School Subjects
Hiking
Home Economics
Independent Study
Introduction to CNC Machining Theory
Introduction to PC's
Job Readiness
Keyboarding/ Word
Mathematics
Mature Driver Improvement
Materials Handler
Medical Assistant
Medical Assistant Back Office
Medical Assistant Front Office
Medical Assistant Terminology
Microsoft Office XP
Microsoft Office Applications
Music & Drama
National Electric Code
National Electric Code Calculations
Office Assistant
Office Clerk
Office Specialist
Parent Education
Photography
Programmable Logic Controllers
Property Management

Quickbooks		
Reading/Writing/Math		
Solar Applications & Installation		
Teacher Credential Classes		
US Government		
US History		
Visual Communication		
Welding/All Levels		
Wiring Methods		
Writing		
World History	TOTAL	71 FTE

Assistant Principal CCOC	two (2) FTE
Assistant Principal MAEP	three (3) FTE
Credential Supervisor	.25 FTE
Dean – CCOC	one (1) FTE
Director CCOC	one (1) FTE
Director MAEP	one (1) FTE
Director of Instruction and Accountability	one (1) FTE
Program Coordinator – CCOC/MAEP	two (2) FTE
Site Program Supervisors	two and a half (2.5) FTE
CalWORKS Site Representative	nine (9.0) FTE
CalWORKS Bridge Representative	one (1) FTE

4. By letters dated March 12, Superintendent Paul Hay sent written notice to all of the certificated employees of Met Ed, including the six Respondents, that their services would be terminated at the close of the 2008-2009 school year. The content of the March 12 letters varied depending upon how Met Ed had classified the individual’s status. One group of letters was sent to 37 “provisional Regional Occupational Center certificated employee[s],” including Respondents. The letter states:

As you are likely aware, under Education Code section 44910, as an ROC teacher you are not eligible to gain tenure at the . . . District. Based on that status, this letter shall constitute notice that your employment with the . . . District will end no later than June 30, 2009 . . . [¶] In the event you challenge your status and claim that you are a probationary employee, this letter constitutes a layoff notice in accordance with the provisions of Education Code sections 44949 and 44955, and [notice] that your services will not be required for the 2009-2010 school year. . . . [¶] If you are challenging your status and are claiming that you are entitled to probationary status, you may request an explanation from Human Resources. You are further advised that you may request a hearing to determine if there is cause for not reemploying you for the 2009-2010 school year. . . .

5. Respondents filed timely requests for hearing to determine if there is cause for terminating their services. An Accusation was prepared and served on each Respondent. Every Respondent except Gina Fleming filed a Notice of Defense. This hearing followed.

6. Met Ed is an unusual institution. It combines the adult education programs (Adult Ed) and career technical education programs (CTE) for six separate school districts: San Jose Unified School District, Campbell Union High School District, Eastside Union High School District, Milpitas Unified School District, Los Gatos-Saratoga Union High School District, and Santa Clara Unified School District (the Districts). The Districts contribute funds they have received to Met Ed so that programs can be provided in a more cost-efficient manner and with the benefits that result from combining resources.

7. Met Ed operates pursuant to a joint powers agreement with the Districts. This agreement provides that a district must give at least one year's notice to Met Ed before it can terminate the agreement. Some grant funding is received, but primary funding is from the state, and has historically been based upon average daily attendance figures. Met Ed's total budget in 2008-2009 is approximately \$30 million.

8. The Adult Ed programs and classes operate at about 40 different sites throughout the area. Teachers are hired on an hourly basis and may attain permanent status while working for Met Ed.

The CTE program is operated primarily from Met Ed's Central County Occupational Center (CCOC) at its main campus. High school students from the participating districts can opt to enroll in a CTE program and also graduate from their home high school. In addition to the CTE program, these students may take basic subjects such as U.S. Government and English at CCOC as well. Teachers are hired pursuant to temporary contracts every year.

9. Respondents are CCOC teachers and they all received the March 12 letter set forth in Finding 4. Met Ed maintains that they are temporary employees, but for the purposes of this layoff proceeding, Met Ed decided to treat them as probationary employees, so that they would receive notices of layoff and, if they chose, a hearing. The reasoning behind this position was not explained.

Basis for the resolution

10. Daniel Gilbertson is Met Ed's Director of Human Resources. He testified about the basis for the Resolution. He and other members of the Superintendent's cabinet began discussing budget issues about six months ago, when the state was facing a \$42 billion deficit and the state budget was not resolved. Met Ed had already reduced expenditures over 15 percent and had sufficient reserves to make it through the current year. But the cabinet members were informed that categorical funding, which is their primary funding source, would be reduced at least 20 percent for the 2009-2010 school year. Gilbertson represented

that the cabinet members were unable to determine which programs would be impacted by the reductions.

According to Gilbertson, the group ultimately decided that, because of the “state budget crisis of historic proportions,” they would recommend a “universal layoff.” It was therefore decided that Superintendent Hay would recommend to the Board that March 15 layoff notices be given to every certificated employee.

11. Gilbertson repeatedly stated Met Ed’s need for maximum flexibility because of the uncertainty of the state’s finances. But Gilbertson also stated that he believes that Met Ed “will be in business in next year,” and that Met Ed planned to rescind notices. On May 1 Gilbertson stated that many notices had been rescinded, based on information Met Ed had received between the two hearing dates.

12. Superintendent Paul Hay testified on May 1. He gave a thorough explanation of how Met Ed is funded and he expressed great concern regarding funding for next year. He explained that given the short period of time that they had “to put something together,” and the fact that Met Ed’s administrators “didn’t know what our districts would do,” they “went for maximum flexibility for ourselves for that Board meeting [the Board meeting when the Resolution was passed].”

Hay also stated, however, that he did not intend that Met Ed would not be operating in the 2009-2010 school year. No contracting school district had advised Hay that it would not be funding Met Ed in the 2009-2010 school year. He estimated that teaching positions for next year would likely be reduced by 20 percent.

13. The evidence therefore shows that Met Ed’s Superintendent has always known that Met Ed would still be in business in 2009-2010. And, although there was uncertainty in many areas, there was also information available from which to formulate a realistic forecast for the 2009-2010 school year. Nonetheless, no attempt was made to estimate what services would likely need to be reduced, and positions eliminated, based upon the facts at hand. Instead, Superintendent Hay recommended, and the Board passed, a resolution stating that “all of the classes, courses, and programs offered by [Met Ed] and listed below . . .” would not be offered in 2009-2010. In fact, this was not true.

14. Pursuant to the Board’s Resolution, March 15 notices were sent to all of the certificated employees. The notices recited the inaccurate information contained in the Resolution.

LEGAL CONCLUSIONS

1. Education Code section 44955, subdivision (b), provides, in pertinent part, that “whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year . . . the governing board may terminate the services of

not more than a corresponding percentage of the certificated employees of the district . . . at the close of the school year.”

This provision implies that a board must make a good faith effort to determine what services need to be reduced or eliminated, and to what extent. Met Ed did not make such good faith effort. Instead, it issued what was in essence a fictional resolution that it would be closing its doors.

2. Education Code section 44949, subdivision (a), requires that before an employee is told that he or she will not be employed the following year, the superintendent must give the governing board of the district and the employee written notice that such a recommendation has been made. The notice must be given before March 15 and it must contain the reason for the recommendation.

Met Ed noticed all of its certificated employees that their employment would end because of a reduction of services. The notice, therefore, contained the reason for the recommendation. But the reason was false; it was based upon a fictional Resolution that Med Ed never intended to implement.

3. Met Ed asserts that the method it employed of noticing all employees is supported by the case of *Campbell Elementary Teachers Association v. Abbott* (1978) 76 Cal.App.3d 796. This reliance is misplaced. That case is distinguishable, in part, because that district engaged in a reasoned and fact-based process in determining the particular services it might likely reduce. The reductions were quite substantial, and they were challenged by the laid-off teachers. But there was no issue concerning the integrity of the notice to the teachers, as there is here.

4. More relevant is another case cited by Met Ed, *San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627, where the Court did discuss the sufficiency of the March 15 notices. In that matter, the teachers challenged the district’s failure to identify in the notices the specific positions intended to be reduced or eliminated. The Court held that because the March 15 notice “is only the initial step in the termination process . . . the specific positions to be eliminated need not be identified.” (*Id.* at p. 632.) But again, the integrity of the notices was not in question.

5. In the case of *Karbach v. Board of Education* (1974) 39 Cal.App.3d 355, the Court addressed the importance and content of the March 15 notice. In that matter, the Superintendent had sent March 15 notices that identified a drop in average daily attendance as the reason for layoffs. But final notices were sent to some teachers citing a reduction in services as a reason for the layoffs. The Court held that this violated the requirement that the reason for the recommendation be included in the March 15 notice. It construed the statutory scheme as “intending to insure that before the March 15 date the affected employee be informed of facts upon which he can reasonably assess the probability he will not be reemployed.”

6. It is recognized that school districts are charged with a very difficult task. The law requires them to estimate early on what services they will be offering the next school year, and accordingly how many teachers they will be retaining. Given this charge, districts prudently consider a “worse case scenario” when making their estimates. There is no doubt that the current year’s budgetary situation made this task even more difficult, and yet, districts all over the state wrestled with the facts at hand, came up with their best estimates, and noticed their employees accordingly. This is the course of action required by the statutory scheme.

7. Met Ed’s approach was in essence an abdication of its statutory responsibilities. Met Ed’s Board, on the Superintendent’s recommendation, resolved to reduce services down to zero. The Superintendent then gave March 15 notices to all of the certificated employees. Yet, there was no evidence that Met Ed was going out of business; to the contrary, Met Ed intended and expected to operate next year, albeit with at least a 20 percent reduction in funding. In reality, Met Ed faced no greater uncertainty than any other California school district in March 2009. Thus, the March 15 notices were flawed. The statute requires that a reason for the recommendation be identified, and the reason given here was not true. There was no reasonable basis for notifying the employees of what they were told – to expect that Met Ed would shut down – because this was not going to happen. And, similar to the situation in *Karbach*, noticing everyone prevented the individual teachers from possessing valid information from which to reasonably assess whether the positions they held were likely to be eliminated.

8. Accordingly, it is concluded that the March 15 notices were invalid under Education Code sections 44955 and 44949. And as valid March 15 notices are required before a layoff can proceed, the accusations in this matter must be dismissed.

ORDER

The Accusations against Respondents are dismissed. Notice may not be given to Respondents Kenneth Schirle, Sara Crowder, Gina Fleming, Chantu Nguyen, Tahmores Gholamipour, and Victoria Staubinger, that their services will not be required for the 2009-2010 school year.

DATED: _____

MARY-MARGARET ANDERSON
Administrative Law Judge
Office of Administrative Hearings