

BEFORE THE  
GOVERNING BOARD  
OF THE  
PALM SPRINGS UNIFIED SCHOOL DISTRICT  
STATE OF CALIFORNIA

In the Matter of the Employment Status of:

OAH No. 2009060693

The Certificated Employees Receiving  
Notices of Recommendation Dated June 15,  
2009, that their Services Would Not Be  
Required for the 2009-2010 School Year,

Respondents.

**PROPOSED DECISION**

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Jamul, California, on July 15, 2009.

William A. Diedrich, Attorney at Law, and Mark W. Thompson, Attorney at Law, represented the Palm Springs Unified School District.

Jon Y. Vanderpool, Attorney at Law, represented the 47 respondents in this reduction in force proceeding to whom notices had not been withdrawn.

The matter was submitted on July 15, 2009.

**FACTUAL FINDINGS**

*The Palm Springs Unified School District*

1. The Palm Springs Unified School District (the district) is located in the Coachella Valley, Riverside County. The district covers over 500 square miles and provides educational services to approximately 24,300 pre-school to 12<sup>th</sup> grade students at 23 different school sites. The district employs approximately 1,200 certificated employees, most of whom are teachers. Approximately 75 percent (75%) of the district's student body is eligible to receive federally funded lunches. The district receives Title I funding, intended to improve the academic achievement of the disadvantaged, and Title III funding, designed to provide language instruction for limited English speaking proficient students.

2. The district is governed by an elected five member Board of Education (the governing board). Dr. Lorri McCune (Dr. McCune) is the Superintendent of Schools. She is assisted by Jim Novak (Assistant Superintendent Novak), who is in charge of budget services, Mauricio Arellano (Assistant Superintendent Arellano), who is responsible for human resources, and others who comprise the district's administrative cabinet. Linda Riccio (Ms. Riccio) serves as the district's senior credential specialist.

### *The Fiscal Crisis*

3. A school district's governing board must take steps to make certain that ends meet if the worst-case financial scenario develops. If a governing board cannot balance its budget, then the school district's operations will be taken over by the County Board of Education, which results in educational services being administered through persons other than locally elected trustees.

Before May 2009, the district planned to meet an anticipated budgetary shortfall within the district by eliminating the services of administrators and by sweeping certain categorical funds into the district's general fund. The district's budget and the solutions to the district's shortfall was based upon the State of California's 2009 Budget Act, passed in February 2009, which contained proposals designed to meet California's projected \$41.6 billion budget deficit.

Before May 2009, the Governor's annual budget forecast, known as the "May Revise," had never included a second round of budget cuts in the area of educational funding. However, in May 2009, following the defeat of several statewide budgetary propositions,<sup>1</sup> unprecedented cuts were proposed. The Palm Springs Unified School District, as well as other public school districts, was required to make educated and responsible assumptions concerning what might happen next.

### *The Decision to Recommend the Reduction of Particular Kinds of Services*

4. Superintendent McCune, Assistant Superintendent Novak, Assistant Superintendent Arellano and others conferred to determine how best to proceed in light of an uncertain revenue stream and a likely budgetary deficit of approximately \$12 million for the 2009-2010 fiscal year and the financial uncertainties in the following years.

---

<sup>1</sup> Proposition 1A would have created a state spending cap and strengthened the state's rainy day fund and had it passed, it would have triggered a continuation of the tax hikes for an extra one or two years. Proposition 1B would have restored more than \$9 billion for education funding, but it would have taken effect only if 1A passed. The measure most critical to California's current shortfall was Proposition 1C, which would have authorized the state to borrow \$5 billion and repay it with interest with future revenue from the state lottery. Propositions 1D and 1E sought to borrow from child development and mental health programs, and to inject about \$900 million into the state's general fund. These proposed budgetary measures lost by wide margins.

Assistant Superintendent Novak determined that the district's total revenue limit per unit of average daily attendance for the fiscal year of 2009-2010 would not only not increase by at least two percent (2%) from the 2008-2009 fiscal year, but that the district would experience a loss of at least one percent (1%) in the total revenue limit per unit of average daily attendance before the May Revise and would experience a 7.25 percent (7.25%) loss in the total revenue limit per unit of average daily attendance based upon the May Revise data. Assistant Superintendent Novak reached that revenue limit determination by reviewing the 2009-2010 budget and comparing it to 2008-2009 fiscal year budget.

After reviewing all the data, Assistant Superintendent Novak concluded that the district would likely experience an approximate \$12 million budget shortfall for the 2009-2010 school year if matters did not change (which was uncertain given the political situation). In reaching this conclusion, Assistant Superintendent Novak projected the district's financial condition two years into the future, as required by law.<sup>2</sup>

5. Because the district did not enjoy at least a two percent (2%) increase in its budget for the 2009-2010 fiscal year from the previous fiscal year, consideration was given to implement the summer layoff procedure authorized by Education Code section 44955.5.

The decision to eliminate and reduce particular kinds of services being provided by certificated employees was complex and not easily reached. The district had carefully recruited the individuals who were providing identified services, and each employee had proven himself or herself to be highly competent. The more recently hired certificated employees had become a vital part of the educational community and their services were irreplaceable. Nevertheless, a reduction in forced was deemed necessary.

The district's cabinet looked at the financial problem and concluded that in order to cover a portion of the projected \$12 million shortfall, some particular kinds of services needed to be eliminated. It was initially determined that the services of 129 elementary school teachers, elementary school PE teachers, 13 elementary school music teachers, two secondary PE teachers, four secondary business services teachers, nine secondary English teachers, four secondary math teachers, two secondary physics teachers, three Spanish teachers, two 180 Reading instructors, two social studies teachers, two BTSA consulting teachers, one health teacher, four secondary science teachers, one site coach, and two art teachers could be eliminated, for a total of 206 full-time equivalent (FTE) positions.

6. On June 9, 2009, Superintendent McCune recommended to the governing board that 206 FTEs be eliminated based upon the decrease in the district's decrease in the total revenue limit per unit of average daily attendance and the need to meet its budget.

---

<sup>2</sup> Assistant Superintendent Novak has a bachelor's degree in accounting, a master's degree in business, and is currently engaged in a doctoral program. Novak has served as the chief financial officer for several school districts over the past 12 years, the last five with the Palm Springs Unified School District. Assistant Superintendent Novak was highly experienced in the field of establishing and evaluating school district budgets.

7. On June 9, 2009, the governing board passed the following resolution:

"BOARD OF EDUCATION OF THE  
PALM SPRINGS UNIFIED SCHOOL DISTRICT  
REDUCTION OF PARTICULAR KINDS OF CERTIFICATED SERVICES  
RESOLUTION NO. 2008/09-80

WHEREAS, Education code Section 44955.5 permits the BOARD OF EDUCATION of a school district to terminate the services of permanent and probationary certificated employees during the period between five (5) days after the enactment of the Budget Act and August 15 of that fiscal year, pursuant to the provisions of Education Code section 44955, if the BOARD OF EDUCATION determines the following conditions exist: (1) its total revenue limit per unit of average daily attendance for the fiscal year of that Budget Act has not increased by at least two (2) percent; and (2) it is necessary to decrease the number of certificated employees in the District, including employees holding a position that requires an administrative or supervisory credential; and

WHEREAS, The Governor of the state of California signed a Budget Act for the 2009-2010 fiscal year on February 20, 2009; and

WHEREAS, this Board has determined that under the Budget Act the District's total funded revenue limit per unit of average daily attendance for the 2009-2010 fiscal year has not increased by at least two (2) percent;

WHEREAS, this Board has determined that it is both necessary and in the best interests of the District and the welfare of the schools and the pupils thereof that the particular kinds of services set forth herein must be reduced or discontinued;

WHEREAS, it is the opinion of this Board that because of the aforementioned reason, the number of certificated employees of the District must be reduced pursuant to Education Code section 44955.5; and

WHEREAS, this Board has determined that this layoff shall be based upon a reduction or elimination of particular kinds of services, and not based upon reduction of average daily attendance during the past two years.

WHEREAS, this Board has determined that to maintain the highest level of excellence in its secondary music program, a specific and compelling need exists to employ and retain certificated employees in its secondary instrumental music and band programs who have experience within the District teaching secondary instrumental music and/or band, and the special training and experience that comes therewith; and

WHEREAS, this board has determined that to maintain the highest level of excellence in its dance program, a specific and compelling need exists to employ and retain certificated employees in its dance classes who have experience within the District teaching dance, and the special training and experience that comes therewith; and

WHEREAS, this board has determined that to maintain the highest level of excellence in its athletic program, a specific and compelling need exists to employ and retain certificated employees who have experience within the District in the past year serving as head coaches, and the special training and experience that comes therewith;

WHEREAS, Education Code section 44955(d) authorizes this Board to deviate from terminating a certificated employee in order of seniority for the above reason, if necessary; and

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the Palm Springs Unified School District as follows:

- A. That all of the foregoing recitals are true and correct.
- B. That the particular kinds of services set forth below be reduced or eliminated No later than August 14, 2009:

| <b>Particular Kinds of Services</b>                 | <b>Full Time Equivalent Positions</b> |
|---|---------------------------------------|
| Elementary (K-5) Teaching Services                  | 129                                   |
| Middle School Core/Self-Contained Teaching Services | 14                                    |
| Elementary Physical Education Teaching Services     | 12                                    |
| Elementary Music Teaching Services                  | 13                                    |
| Secondary Physical Education Teaching Services      | 2                                     |
| Secondary Business Teaching Services                | 4                                     |
| Secondary English Teaching Services                 | 9                                     |
| Secondary Math Teaching Services                    | 4                                     |
| Secondary Physics Teaching Services                 | 2                                     |
| Secondary Spanish Teaching Services                 | 3                                     |
| Secondary Read 180 Teaching Services                | 2                                     |
| BTSA Consulting Teaching Services                   | 2                                     |
| Social Studies Teaching Services                    | 2                                     |
| Health Teaching Services                            | 1                                     |
| Secondary Science Teaching Services                 | 4                                     |
| Site Coach Teaching Services                        | 1                                     |
| Art Teaching Services                               | 2                                     |
| <b>Total:</b>                                       | <b>206</b>                            |

B. That due to the reduction or elimination of particular kinds of services, the corresponding number of certificated employees of the District shall be terminated pursuant to Education Code section 44955.5, 44955 and 44949.

C. That the reduction of certificated staff be achieved by the termination of regular employees and not by terminating temporary and substitute employees.

D. That the particular kinds of services above include certain vacancies the District wishes to eliminate. As a result, the actual number of employees terminated will very likely be less than the total number of particular kinds of services eliminated.

E. That "competency" as described in Education Code section 44955(b) for the purposes of bumping shall necessarily include (1) possession of a valid credential in the relevant subject matter area, (2) possession of a valid English Language Learners certificate, if required for the position, (3) "highly qualified" status under the No Child Left Behind Act in the position into which the employee is bumping, (4) for secondary instrumental music or band positions, prior District experience in secondary instrumental music or band (5) for dance positions, prior District experience in the instruction of dance, and (6) for positions currently occupied by an employee also serving as a head athletic coach, prior district experience in the past year as a head athletic coach.

F. That, as between certificated employees with the same seniority date, the order of termination shall be determined solely by Board-adopted criteria.

G. That the District Superintendent or designee is directed to initiate layoff procedures and give appropriate notice pursuant to Education Code sections 44955.5, 44955 and 44949, and in accordance with the schedule adopted in Resolution No. 2008/09-80.

PASSED AND ADOPTED this 9th day of June, 2009, in the County of Riverside, California.

I, Dr. Lorri S. McCune, Superintendent of the Palm Springs Unified School District of Riverside County, California, do hereby certify that the foregoing is a full, true and correct copy of a Resolution adopted by the District's Board of Education at a duly scheduled meeting thereof.

Dated: June 9, 2009"

8. The Board also enacted a resolution that set forth various dates related to the services of notices and other documents and a hearing concerning the proposed reduction in force in accordance with Education Code section 44955.5.

### *The Layoff Proceeding*

9. On and after June 15, 2009, the district timely served written notice on 178 certificated employees (134 notices and 44 precautionary notices) who were identified in Exhibit A, together with other required jurisdictional documents.

Each respondent in this proceeding signed and returned a request for hearing and notice of defense in a timely fashion.

Each respondent was duly served with a notice of hearing, setting the hearing in this reduction in force proceeding for July 15, 2009.

On July 15, 2009, the record in this reduction in force proceeding was opened. The district filed a written brief and gave an opening statement. Respondents filed a written brief and an opening statement was given on their behalf by counsel. Thereafter, sworn testimony

was received, documentary evidence was produced, and a stipulation was recited. Closing arguments were given on behalf of the district and respondents. Following closing arguments, the record was closed and the matter was submitted.

### *The Reduction of Particular Kinds of Services*

10. The district's cabinet and Superintendent McCune went through a reasonable process to identify the number and kinds of positions that needed to be eliminated or reduced. No particular kinds of services were lowered to levels below those levels mandated by state or federal law, even though elementary school physical education teachers were subject to elimination.

Assistant Superintendent Arellano testified that teachers with multiple subject teaching credentials could provide necessary instruction to elementary school students in the field of physical education. Assistant Superintendent Arellano conceded that the district likely had not been providing the required amount of physical education services to elementary school students mandated by the Education Code,<sup>3</sup> and that the failure to provide

---

<sup>3</sup> Education Code section 51210 provides:

“The adopted course of study for grades 1 to 6, inclusive, shall include instruction, beginning in grade 1 and continuing through grade 6, in the following areas of study:

(a) English, including knowledge of, and appreciation for literature and the language, as well as the skills of speaking, reading, listening, spelling, handwriting, and composition.

(b) Mathematics, including concepts, operational skills, and problem solving.

(c) Social sciences, drawing upon the disciplines of anthropology, economics, geography, history, political science, psychology, and sociology, designed to fit the maturity of the pupils. Instruction shall provide a foundation for understanding the history, resources, development, and government of California and the United States of America; the development of the American economic system including the role of the entrepreneur and labor; the relations of persons to their human and natural environment; eastern and western cultures and civilizations; contemporary issues; and the wise use of natural resources.

(d) Science, including the biological and physical aspects, with emphasis on the processes of experimental inquiry and on the place of humans in ecological systems.

(e) Visual and performing arts, including instruction in the subjects of dance, music, theatre, and visual arts, aimed at the development of aesthetic appreciation and the skills of creative expression.

(f) Health, including instruction in the principles and practices of individual, family, and community health.

(g) *Physical education, with emphasis upon the physical activities for the pupils that may be conducive to health and vigor of body and mind, for a total period of time of not less than 200 minutes each 10 schooldays, exclusive of recesses and the lunch period.*

(h) Other studies that may be prescribed by the governing board. (Emphasis added.)”

that level of education was due the district's need to provide sufficient core content instructional services to meet No Child Left Behind (NCLB) directives to enable the district to remain eligible to receive federal funding. Assistant Superintendent Arellano testified that it is common within the educational community for teachers with multiple subject teaching credentials to provide physical education instruction to elementary school students, and that such instruction need not be provided by persons holding a physical education credential.

Assistant Superintendent Arellano testified that the individuals who were teaching in the secondary music program, including the secondary instrumental and band programs, had sufficient seniority that it was not necessary to skip those individuals.

With regard to dance instruction, Assistant Superintendent Arellano testified that there were two secondary teachers (Alexis Dagul and Melissa Wallace) who were qualified by reason of their training and experience to teach dance, and that dance was an offering that should be continued. Each was a dance instructor. It was later established through Ms. Dagul's credible testimony that the district's offerings of Dance II, Dance III and Dance Ensemble met a fine arts entrance requirement for the University of California, and that persons merely holding physical education credentials would not be able to provide the required instruction.

While the board's resolution specifically mentioned its determination to maintain the highest level of excellence in its athletic programs, and found a specific and compelling need to retain certificated employees who served as head coaches within the district in the past year, Assistant Superintendent Arellano testified that, upon reflection, the administration concluded that skipping head coaches who had less seniority than other district employees who taught physical education was not necessary because other qualified persons could assume the role of head coaches and because skipping newly hired head coaches might be highly disruptive.

---

Education Code section 51210.2 provides:

“(a) The Legislature hereby finds and declares that the physical fitness and motor development of children in the public elementary schools is of equal importance to that of other elements of the curriculum.

(b) It is, therefore, the intent of the Legislature to encourage each school district maintaining an elementary school composed of any of grades 1 to 6, inclusive, to do one of the following:

(1) Employ a credentialed physical education teacher to provide instruction in physical education for each class of grades 1 to 6, inclusive, within any elementary school in the district for a total period of time of not less than 200 minutes each 10 schooldays, exclusive of recesses and the lunch period.

(2) Provide each teacher providing instruction in physical education to any of grades 1 to 6, inclusive, within any elementary school in the district with yearly theoretical practical training in developmental physical education, as set forth in the Physical Education Framework adopted by the State Department of Education pursuant to Section 33350, except that any teacher who has successfully completed one college level course in elementary physical education shall not be subject to this paragraph.”

Assistant Superintendent Arellano testified that a dozen administrative positions had been eliminated for purposes before the notices of recommendation were prepared for the 2009-2010 school year, and that notices were not required for the administrative positions already eliminated.

11. The particular kinds of services identified in the governing board's resolution were the kinds of educational services that could properly be reduced or discontinued. The elimination and reduction of those services was required to assist the governing board to balance the budget and, on that basis, the reduction in force was in the district's and the students' best interest. The governing board's reduction or elimination of the particular kinds of services was neither arbitrary nor capricious, but constituted a matter within the governing board's sound discretion. The statute governing the summer layoff proceeding – Education Code section 44955.5 – did not contain a specific formula the governing board was required to follow, but, instead, required only a finding that the revenue limit per unit of average daily attendance for the upcoming fiscal year had not increased by at least two percent and that, in opinion of the board, it became necessary to decrease the number of permanent employees. Those basic requirements were met.

#### *Identification of the Affected Employees*

12. Ms. Riccio, on behalf of the district, maintains a seniority list which contains the names of all district certificated employees, their status (permanent, probationary), their seniority date (first date of paid probationary service), their current assignment(s), the grade(s) taught, the credential(s) held by the employee, and whether the employee has CLAD, BCLAD, or other English language learner certification.

The seniority list is a living document that expands and contracts as employees come and go. The list is available to all employees to review, and employees are formally requested at least once a year to review the seniority list and to seek a correction if an error exists. Ms. Riccio acknowledged that errors can be made, and the seniority list is corrected whenever a legitimate error is brought to the district's attention.

13. A first date of probationary service occurs when under the employment contract between the teacher and the district, the teacher first renders paid service. In the Read 180 training, which occurs throughout the year, a teacher is paid for training, but not at the contract rate established under the collective bargaining agreement. Thus, an employee's seniority date cannot be based on the date Read 180 training began, even though the individual receiving the training obtained some compensation.

AB 472 training is optional, is not required under the collective bargaining agreement, and a stipend is paid for such training. Thus, an employee's seniority date cannot be based on the date AB 472 training began, even though the individual received some compensation if it was before the individual's first as a district employee.

A coach who comes early to campus to coach football, cross-country or some other sport is engaged in an “extra-duty” assignment outside his or her contract. Even though the coach may be paid a stipend for providing coaching services before the school year officially begins, such service does not establish a first day of paid service for seniority purposes.

14. Using the board’s layoff resolution, information related to positive attrition within the district (resignations, retirements and a death) and taking into consideration the skipping of the dance teachers, Ms. Riccio and her staff prepared a bumping list based on the seniority chart. An employee with qualifications and credentials whose position was being eliminated in the summer layoff process was able to “bump” or displace a more junior employee from a position that the more senior employee was qualified competent to fill.

15. Where employees had the same seniority date, Ms. Riccio determined seniority by using the district’s tie-breaking criteria was used. No complaint about the district’s tie-breaking criteria or the manner in which it was applied was raised.

### *Economic Matters*

16. Assistant Superintendent Novak testified about the uncertainty that arose when California’s budget for the 2009-2010 fiscal year essentially became inoperative because it was based on the assumption that certain statewide ballot propositions would pass. Assistant Superintendent Novak and his staff prepared the district’s 2009-2010 fiscal year budget.

Although Assistant Superintendent Novak’s testimony was complicated, his credible testimony established that the district will experience around a \$12 million budget reduction in the 2009-2010 fiscal year. The salary and benefits paid to employees will remain about 86 percent (86%) for the 2009-2010 fiscal year; the level of funding for certificated employees will not be reduced in a significant amount. The elimination of 26.2 certificated employees (together with the positive attrition) will help the district to meet the budgetary shortfall, but other and more drastic measures must be taken, including the reduction or elimination of transportation services within the district, the suspension of deferred maintenance, the reduction and elimination of various certificated employee services, and the elimination of annual deep cleaning.

17. Following the adoption of the district’s 2009-2010 budget at the governing board’s meeting on June 23, 2009, the district was required to submit its budget to the Riverside County Office of Education for approval. After review at that level, the district’s budget will be submitted to the State of California Department of Education for approval. A letter containing warnings and recommendations from the Riverside County Office of Education regarding the district’s proposed budget had not been received by the date of the hearing in this layoff proceeding.

18. Tomas Martinez (Mr. Martinez) testified. Mr. Martinez was school teacher and who is currently employed by the California Teachers Association (CTA) as a union representative. Within 30 days of the hearing, Mr. Martinez obtained a list of persons who were employed by the district. Mr. Martinez compared this list to the CTA list of employees

for the district and determined that the district would not be paying a total of approximately \$9.4 million in salaries to employees who had retired or resigned and for employees whose employment was proposed to be terminated in these summer layoff proceeding.

19. Angela Su (Ms. Su) is a CTA representative and a finance specialist.<sup>4</sup> Less than two weeks ago, Ms. Su was asked to evaluate the district's financial situation and to determine the necessity for a reduction in force. To reach the opinions and conclusions she expressed in this matter, Ms. Su obtained financial data from the district, which she spent about a day and a half evaluating before giving her testimony.

Ms. Su agreed that the district would not receive a two percent (2%) increase in revenue in the 2009-2010 fiscal year and that the district would, in fact, experience an approximate 7.5 percent (7.5%) decrease in its ADA revenue based on the May Revise.

Looking solely at the data for the 2009-2010 fiscal year, and not taking into account any future budgetary predictions, Ms. Su calculated that the district would experience a 197 percent (197%) increase in its excess reserve (the amount of money in excess of the required reserve, which is calculated to be three percent of a district's total expenditures) in the 2009-2010 school year. She conceded that the three percent (3%) figure was the minimum required amount for an excess reserve under the law, and that having a greater amount in reserve was not unlawful. She based her projection on the district's receipt of one-time federal stimulus funds. Using the same data, Ms. Su concluded that the district would have a \$2.2 million gain in the 2009-2010 school year.

20. Based on Mr. Martinez's and Ms. Su's testimony, respondents argued that while there might be a budget crisis, the reduction and elimination of particular kinds of services that have been proposed by the district in the summer layoff proceeding was an overreaction and constitutes an unnecessary response to any financial crisis at this time. Respondents suggested that there was no need to reduce or eliminate 26.2 FTEs.

21. Assistant Superintendent Novak testified that while Ms. Su's figures were basically correct, their presentation was misleading. First, Ms. Su's data was based on a budget that was passed in January 2009, not the later budget. Second, on a one time only basis the district swept unused categorical funds into the general fund, an event that cannot be repeated. According to Assistant Superintendent Novak, the reduction and elimination of particular kinds of services set forth in the board's resolution was a necessary, but incomplete, method to cover the district's budgetary shortfall.

---

<sup>4</sup> Ms. Su holds a bachelor's degree in Accounting and a master's degree in Organizational Administration. She reviews 10 to 15 school district budgets per year.

## *Other Matters*

22. Larry Matthews (Mr. Matthews), an elementary school physical education instructor, provided eloquent testimony in an effort to show that the board's elimination of elementary school physical education instructors was unwise.

Mr. Matthews observed that physical education is a mandated offering in elementary schools, that the district currently provides less instruction than mandated, and that he and his colleagues are highly trained and skilled in the delivery of effective and safe instruction in physical education. Mr. Matthews observed that there was no plan in place to teach physical education if the employment of credentialed physical education instructors was eliminated, and that no experienced individual would be available to administer fifth grade Physical Fitness Testing, and to train students before such testing. Mr. Matthews had never seen teachers with multiple subject teaching credentials providing the required instruction, training, and testing, and he suggested that Music was a more appropriate particular kind of service to be eliminated since it was not a mandated offering.

Mr. Matthews conceded in cross-examination that it was not illegal for persons holding multiple subject teaching credentials to provide physical education instruction.

Mr. Matthews also believed that the retention of junior dance instructors over more senior physical education teachers was arbitrary and capricious since physical education instructors could teach dance, at least the kind of dance he had seen Ms. Wallace teach.

Mr. Matthews' testimony did not establish that the board's elimination of the services being provided by certificated elementary physical education instructors was arbitrary or capricious, or that the retention of dance instructors was outside the governing board's exercise of discretion.

23. Matt Amrine, also an elementary school physical education instructor, echoed Mr. Matthew's observations and comments about the importance of credentialed physical education instructors, testifying, "We do more than just teach." In addition to his instructional responsibilities at the elementary school, Mr. Amrine is a football coach at Cathedral City High School after elementary school hours.

Mr. Amrine's testimony did not establish that the board's elimination of the services being provided by certificated elementary physical education instructors was arbitrary or capricious.

24. Kevin Hennessee (Coach Hennessee) is the head football coach at Desert Hot Springs High School. Before coming to the district, Coach Hennessee was employed for 15 years in the Bay Area, where he served as a head football coach. Coach Hennessee advanced a variety of grounds to support his claim that his services should be retained.

Coach Hennessee testified that he made the decision to come to the district in response to an advertisement for a "physical education instructor/head coach" and he

believed the positions “were intertwined.” He testified that he would not have come to the district if that were not the case. In addition, Coach Hennessee claimed that he was told in June 2009 not to worry about job security because the board passed a resolution that protected him and other head coaches.

Coach Hennessee claimed that he should be given seniority based upon the date he started coaching football, and he argued that if he were awarded a seniority date based upon the date he began coaching, then he would be senior to Ms. Dagul and Ms. Wallace. Coach Hennessee testified he could teach dance based what he had observed Ms. Wallace teaching, although he had never taught dance himself.

Coach Hennessee acknowledged that the employment contract he signed identified him solely as a teacher; it did not mention his position as a head coach.

Coach Hennessee did not establish that the elimination of his particular kind of service was arbitrary or capricious. Coach Hennessee did not establish that he had the seniority necessary to bump into an existing position.

25. Gregory Hunter (Coach Hunter) made a compelling argument about the value of retaining head coaches over more senior physical education instructors.

Coach Hunter is the head basketball coach at Desert Hot Springs High School. According to Coach Hunter, Desert Hot Springs High School has many at risk students and he and the other coaches mentor and counsel these students throughout the year. The head coaches hold an important position in these students’ lives and are in a unique position to provide a positive influence. Last year Coach Hunter was responsible for 45 players, and he kept after them to maintain their attendance and grades throughout the year.

Coach Hunter believed he could teach what Ms. Wallace teaches, which is one class of dance and several classes of physical education. Coach Hunter once taught a dance class.

Coach Hunter did not establish that the elimination of his particular kind of service was arbitrary or capricious. Coach Hunter did not establish that he had the seniority necessary to bump into an existing position.

26. Bekka Patton (Coach Patton) is the JV Volleyball Coach at Desert Hot Springs High School. Coach Patton believed that only coaches who were on campus throughout the school day realistically had the opportunity to help their students to become good citizens. Coaches who are employed away from the campus during the school day are not able to see how students actually behave throughout the day.

27. Ms. Dagul had been involved in dance since she was a child. She graduated from Palm Springs High School, where she studied dance and was inspired and highly motivated by her high school dance instructor. Ms. Dagul attended the University of Redlands, where she received a bachelor’s degree and a single subject teaching credential in

physical education. While she attended the University of Redlands, Ms. Dagul was involved in dance instruction and was a director of several dance classes.

During her brief career at Palm Springs High School, Ms. Dagul has taught a variety of classes including jazz, ballet, lyrical, modern, hip-hop, Afro-Caribbean, Latin, belly dancing, Hawaiian, and other dances. Her class members put on two 25 act shows per year. In addition, Ms. Dagul choreographs the musicals put on at Palm Springs High School.

Ms. Dagul teaches Dance I, Dance II, Dance III, Dance IV and Dance Ensemble. A high school student cannot participate in Dance III, Dance IV or Dance Ensemble unless the student completes Dance I and Dance II. Ms. Dagul requires her students to research the background and culture where the particular dances being taught originated. Ms. Dagul's Dance III, Dance IV and Dance Ensemble classes meet the University of California's visual and performing arts entrance requirement.

28. Ms. Wallace taught at least one dance class. Ms. Wallace was not present to testify. However, and despite the comments from some of her colleagues that were critical of the manner in which she taught dance, it is concluded that the governing board did not act in an arbitrary or capricious fashion in determining to skip her over other more senior employees who had never taught dance within the district.

29. The heartfelt, painful testimony of those who testified in this reduction in force proceeding established respondents' love of teaching, their commitment to their students, and their desire to retain their employment. This testimony was insufficient to overcome the evidence establishing the district's need to meet budgetary demands and the manner in which difficult employment decisions were reached. More than anything, the testimony given in this reduction in force proceeding established the frustration, sorrow and inevitable loss that accompany the termination of bright, young, highly skilled, enthusiastic teachers.

## LEGAL CONCLUSIONS

*Education Code section 349.55.5:*

1. Education Code section 44955.5 provides in part:

“(a) During the time period between five days after the enactment of the Budget Act and August 15 of the fiscal year to which that Budget Act applies, if the governing board of a school district determines that its total revenue limit per unit of average daily attendance for the fiscal year of that Budget Act has not increased by at least 2 percent, and if in the opinion of the governing board it is therefore necessary to decrease the number of permanent employees in the district, the governing board may terminate the services of any permanent or probationary certificated employees of the district, including employees holding a position that requires an administrative or

supervisory credential. The termination shall be pursuant to Sections 44951<sup>5</sup> and 44955 but, notwithstanding anything to the contrary in Sections 44951 and 44955, in accordance with a schedule of notice and hearing adopted by the governing board.”

### *Jurisdiction*

2. Respondents argued that it was not “necessary” for the governing board to decrease the number of permanent employees within the district as a result of the budgetary crisis. This argument was not factually supported. Respondents further argued that a school district was entitled “to only layoff certificated personnel necessary to meet its financial necessity and no more,” asserting that Education Code section 44955.5 inferentially limited the number of positions a governing board could lawfully reduce or eliminate to the amount by which the ADA revenue was reduced. Respondents cited no appellate authority for this limiting interpretation.

The district’s governing board properly determined that its total revenue limit per unit of average daily attendance for the 2009-2010 had not increased by at least two percent (2%), thus satisfying the first jurisdictional requirement of Education Code section 44955.5. The district’s governing board, in exercising its sound discretion, also determined that it was necessary to decrease the number of permanent employees in the district, thereby satisfying the second jurisdictional requirement of Education Code section 44955.5.

All notice and jurisdictional requirements were satisfied as to all respondent employees.

Jurisdiction in this matter exists under Education Code section 44955.5

### *The Reduction and Elimination of Particular Kinds of Services*

3. Respondents argued that even though Education Code section 44955.5 specifically incorporated Education Code section 44955 by reference, Education Code section 44955.5 did not authorize the governing board to reduce or eliminate particular kinds of services, and that layoffs were to be made solely on the basis of seniority absent a showing of special need. This interpretation was not supported by any appellate authority.

4. Education Code section 44955 – specifically referenced in Education Code section 44955.9 – provides in part:

“(a) No permanent employee shall be deprived of his or her position for causes other than those specified in Sections 44907 and 44923, and Sections 44932 to 44947, inclusive, and no probationary employee shall be deprived of his or her position for cause other than as specified in Sections 44948 to 44949, inclusive.

---

<sup>5</sup> Education Code section 44951 provides for the termination of “a certificated employee holding a position requiring an administrative or supervisory credential.”

(b) Whenever . . . a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year . . . and when in the opinion of the governing board of the district it shall have become necessary . . . to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.

. . .

As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof . . .

. . .

(c) . . .

The governing board shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render. However, prior to assigning or reassigning any certificated employee to teach a subject which he or she has not previously taught, and for which he or she does not have a teaching credential or which is not within the employee's major area of postsecondary study or the equivalent thereof, the governing board shall require the employee to pass a subject matter competency test in the appropriate subject.

(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 . . . .”

5. A statute should be interpreted with reference to the whole system of law of which it is a part. The provisions in two sections should be read together and applied consistently if reasonably possible. (*Hildebrandt v. St. Helena Unified School Dist.* (2009) 172 Cal.App.4th 334, 342-343.)

The purpose of Education Code 44955.5 is to provide a governing board with authorization to implement a reduction in force that is reasonably believed by the board to be necessary to balance the school district's budget while, at the same time, preserving statutory preferences afforded qualified employees based upon their relative seniority consistent with the provisions of Education Code section 44955. The two statutes should be interpreted and applied with those goals in mind.

*Relevant Appellate Authority*

6. A school district may reduce its certificated staff by reducing or discontinuing particular kinds of services as long as mandated services do not fall below the statutory minimum. (*Campbell Elementary Teachers Assn., Inc. v. Abbott* (1978) 76 Cal.App.3d 796, 810-811 [upholding a governing board's discretion to reduce and eliminate certain kinds of services following the defeat of a local tax measure].)

7. School districts have broad discretion in defining positions within the district and establishing requirements for employment. This discretion encompasses determining the training and experience necessary for particular positions. Similarly, school districts have the discretion to determine particular kinds of services that will be eliminated, even though a service continues to be performed or provided in a different manner by the district. (*Hildebrandt v. St. Helena Unified School Dist.*, *supra*, at p. 343.)

8. A school board's decision to reduce or discontinue a particular kind of service is not tied in with any statistical computation. Where a governing board determines to discontinue or reduce a particular kind of service, it is within the discretion of the board to determine the amount by which it will reduce a particular kind of service as long as a district does not reduce a service below the level required by law. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 635-636.)

9. A school district has the obligation to determine whether any permanent employee whose employment is to be terminated in an economic layoff possesses the seniority and qualifications which would entitle him/her to be assigned to another position. Education Code section 44955, subdivision (d)(1) expressly allows a district to demonstrate its specific "needs" but does not require that such needs to be evidenced by formal, written policies, course or job descriptions, or program requirements. (*Bledsoe v. Biggs Unified School Dist.* (2008) 170 Cal.App.4th 127, 136-138.)

10. The elements which must be present in order to invoke equitable estoppel are: (1) The party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury. (*Warner v. North Orange County Community College Dist.* (1979) 99 Cal.App.3d 617, 627.)

In this proceeding, neither Coach Hennessee nor any other employee established that anyone from the district represented that if he or she accepted employment as a high school

physical education instructor and head coach, his or her continuing employment was secure and that he or she would not be terminated in any reduction in force proceeding.

*Cause Exists to Give Notice to Certain Employees*

11. As a result of the governing board's lawful reduction of particular kinds of services, cause exists under the Education Code for the district to give notice to the respondents identified hereafter that their employment will be terminated at the close of the current school year and that their services will not be needed for the 2009-10 school year.

*Determination*

12. The charges set forth in the accusation were sustained by the preponderance of the evidence and were related to the welfare of the Palm Springs Unified School District and the pupils thereof. The district's administrative staff made necessary assignments and reassignments in such a manner that the most senior employees were retained to render services which their seniority and qualifications entitled them to render, except as otherwise noted herein. No employee with less seniority than any respondent identified in the recommendation that follows will be retained to render a service which any respondent is certificated, competent and qualified to render.

This determination is based on all factual findings and on all legal conclusions.

RECOMMENDATION

It is recommended that the governing board give final notice to the following persons that their employment will be terminated at the close of the current school year and that their services will not be needed by the district for the 2009-2010 school year: Cindy Aguilar-Munoz; Matt Amrine; Kylie Antinucci; Jessica Becerra; Jennifer Cameron; Deborah Collier (0.2 FTE only); Ursula Fabiano; Krista Fleischner; Kevin Hennessee; Gregory Hunter; Kandace Hunter-Brock; Samuel Lopez; Ryan Ludwin; Wilfred Martin; Marlon Martinez; Larry Matthews; Amber Moser, Leigh-Ann Nisco; Bekka Patton; Veronica Pena-Silva; Elizabeth Robinson; Ericka Rodriguez-Sheehan; Kenneth Stagg; Christina Velazquez-Romero; Michael Verhasselt; Timothy Walker; and Kristin Wells.

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

\_\_\_\_\_  
JAMES AHLER  
Administrative Law Judge  
Office of Administrative Hearings