

**BEFORE THE  
GOVERNING BOARD  
EL MONTE CITY SCHOOL DISTRICT**

In the Matter of the Accusations Against:

**The Certificated Employees Listed in  
Attachment 1,**

Respondents.

OAH No. 2009061004

**PROPOSED DECISION**

This matter was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, on July 15, 2009, in El Monte, California. The record was closed and the matter was submitted for decision at the conclusion of the hearing.

Sharon J. Ormond, Esq., Atkinson, Andelson, Loya, Ruud & Romo, represented the El Monte City School District (District).

Richard J. Schwab, Esq., Trygstad, Schwab & Trygstad, represented the Respondents.

**FACTUAL FINDINGS**

*Parties and Jurisdiction*

1. Jeff Seymour, the District's Superintendent, made and filed the Accusations in his official capacity.
2. Respondents are certificated District employees.
3. On June 22, 2009, the Superintendent gave written notice to the District's Governing Board of his recommendation that the number of certificated staff be decreased through a reduction in particular kinds of services and that notice be given to the affected individuals that their services will not be required for the 2009/2010 school year.
4. On June 22, 2009, the Governing Board adopted Resolution No. 08-09:37, in which the Governing Board resolved to reduce particular kinds of certificated services. The Governing Board further determined that it was necessary by reason of said reductions to decrease the number of certificated employees, no later than August 14, 2009, by a corresponding number of full-time equivalent positions, and directed the Superintendent or his designees to proceed accordingly and implement the Governing Board's determination.

5. On or before June 24, 2009, and after notification to the Governing Board, Respondents were given various written notices, pursuant to Education Code sections 44955.5, 44955 and 44949,<sup>1</sup> that it had been recommended that notice be given to them that their services will not be required for the 2009/2010 school year.

6. The Respondents listed in Attachment 1, section B, were provided with “precautionary notifications,” in order to permit them to participate and exercise arguable rights in the hearing process. However, the District asserted that those individuals did not possess any such rights to this hearing process because their position on the District’s seniority list would not result in their non-reemployment, unless challenges to application of tie-break criteria or other related issues resulted in a change in order of termination. During the hearing, however, the parties stipulated that no such disputes existed, and that the Accusation against the Respondents listed in Attachment 1, section B, should be dismissed.

7. Each Respondent timely submitted a Notice of Defense and a Request for Hearing, which contained a request for the hearing that ensued.<sup>2</sup>

*The Governing Board’s Layoff Resolution*

8. The Governing Board’s Resolution No. 08-09:37 determined that the total revenue limit per unit of average daily attendance for the 2009/2010 fiscal year has not increased by at least two percent. The Governing Board thus resolved to reduce 12.00 full-time equivalent (F.T.E.) positions in K-3 Classroom Teaching Services, no later than August 14, 2009.

9. The services identified in Resolution No. 08-09:37 are particular kinds of services as described in section 44955.

10. The Governing Board determined that cause exists for not re-employing Respondents for the following reasons:

A. On February 20, 2009, the Governor approved a 17-month budget, which included revisions to the 2008/2009 Budget Act and enactment of the 2009/2010 Budget Act. Pursuant to the 17-month budget, funding for 2008/2009 was cut, and additional cuts were proposed for the 2009/2010 fiscal year. The 17-month budget was contingent upon the passage of certain ballot propositions, which would provide financial relief to school districts in the state. The propositions failed to pass, meaning that the District was faced with additional funding decreases. There was a further decline in state revenues and the Governor gave notice that anticipated revisions to the 2009-2010 Budget Act would result in further reductions in education funding.

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<sup>1</sup> All further statutory references are to the Education Code.

<sup>2</sup> An individual who received a layoff notice, Ms. Emily Simon, did not submit a Request for Hearing and therefore is not a respondent in this matter.

B. After enactment of the Budget Act for the 2009/2010 school year, the District's total revenue limit per unit of average daily attendance for the 2009/2010 fiscal year has not increased by at least two percent;

C. The particular kinds of services of the District listed above will be reduced or eliminated no later than August 14, 2009;

D. In the opinion of the Governing Board, it is necessary to decrease the number of permanent and probationary certificated employees as a result of the reduction in services; and,

E. As a result of the above-listed reductions in services, Respondents will be terminated not later than August 14, 2009, because they are rendering services to be reduced, or because the resulting reassignments of more senior employees cause them to be terminated.

11. The District conducted layoffs of certificated personnel during the spring of 2009. The District implemented those layoffs due to the state budget crisis and massive spending cuts the District was facing at the time. In that matter, 30 certificated employees received notices of layoff, but only 14 certificated employees were given final notices of layoff. The spring 2009 layoff involved some, but not all, of the Respondents in this case. After the effective date of the Decision resolving the spring 2009 layoff case, the financial reductions discussed in Finding 10.A. occurred, meaning the District faced a worse financial situation after the spring 2009 layoff case.

12. Federal stimulus funds have been provided to the state pursuant to the American Recovery and Reinvestment Act (ARRA). The stimulus funds are a one-time benefit, to be used to avert layoffs of teachers and other personnel, and/or for further education reform in key areas of teacher quality, standards and assessments to improve instruction and support struggling schools. The District will receive \$2,587,697 in general stimulus funds. The total costs of retaining the Respondents in this case would be \$822,385, including their salary, health benefits and pension contributions. The District has decided to use the stimulus funds for reasons other than retaining the Respondents in this case.

13. None of the Respondents are administrators.<sup>3</sup> After the spring 2009 layoff case was completed, the District decided to close two schools. The two involved administrators were reassigned to special assignments within the District's Central Office. Those special assignments require an administrative credential.

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<sup>3</sup> Section 44955.5, subdivision (b), provides that in a Budget Act layoff case such as this, a school district may terminate the services of certificated staff "including employees holding a position that requires an administrative or supervisory credential." There is no language in this statute indicating that a school district *must* include administrators among certificated employees subject to layoff. It appears that the statute simply clarifies that a school district *may*, in its discretion, include administrators.

14. The California Department of Education requires school districts the size of the District to maintain a minimum three percent reserve of funds for economic uncertainty. For the 2007/2008 school year, the District maintained approximately \$4 million of reserved funds, which amounted to approximately 4.5 to 5 percent. For the 2008/2009 school year, the District reserved approximately \$4.5 million, which was 5.31 percent. For the 2009/2010 school year, the District plans to reserve \$4.9 million, which will be 5.6 percent. Therefore, the District has decided to retain for the 2009/2010 school year reserved funds that are 2.6 percent more than the minimum required by the state.

15. Resolution No. 08-09:37 acknowledges a specific need for personnel to teach specific courses, and therefore authorizes deviation from the order of seniority in the termination of employees in instances where the less senior employee possesses a currently valid preliminary or clear California teaching credential or certification authorizing instruction in Algebra and Science and will be assigned to teach in such specialties in the 2009/2010 school year, and a more senior employee does not possess such credential or certification.

16. Resolution No. 08-09:37 also adopted criteria to break ties in seniority for purposes of determining the order of termination among certificated employees with the same seniority dates.

17. Prior to adoption of Resolution No. 08-09:37, the District considered all known positively assured attrition as follows. During the 2008/2009 school year, attrition for the District amounted to 22 individuals. Much of that attrition was considered in relation to the spring 2009 layoffs. However, there were some teachers who formally tendered their resignations or retirements after the spring 2009 layoff case was completed. All of those individuals were considered by the District as positively assured attrition for purposes of this layoff case, with one exception. Ms. Carolyn Jansen's retirement from the District was formally approved by the Board on July 13, 2009. Her proposed retirement was not known previously to the District when it enacted Resolution No. 08-09:37. Under these circumstances, it cannot be concluded that her retirement constituted positively assured attrition that the District was required to consider for purposes of this layoff.<sup>4</sup>

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<sup>4</sup> Section 44955.5 authorizes a school district in a Budget Act layoff case such as this to utilize the provisions of section 44955 in terminating certificated staff. In turn, section 44955 authorizes school districts to terminate certificated staff in response to a determination to reduce particular kinds of service (known as a PKS layoff). Case law is clear that in a PKS layoff, a school board need only consider positively assured attrition that occurs prior to the deadline to provide preliminary notice of layoff to certificated staff, not thereafter. (See, e.g., *San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627, 635.) Since the District in this case has chosen to implement this layoff as a PKS pursuant to section 44955, the case law regarding positively assured attrition applicable to section 44955 should also apply to this layoff pursuant to section 44955.5.

18. The District will not retain any permanent or probationary employee or any other certificated employee with less seniority than each Respondent to render a service which a Respondent is certificated and competent to render.

### *Respondents*

19. Many of the Respondents previously have been subjected to one of more layoff notices by the District. Some were involved in the spring 2009 layoff case. Being involved in those prior layoffs, and the instant layoff case, has caused Respondents considerable economic uncertainty, emotional stress, and anxiety. Some of the Respondents who prevailed in the spring 2009 layoff case and were not given final layoff notices did not pursue other jobs or training because they felt they had jobs with the District for the ensuing school year. Obviously, in this economic climate, and with so many other school districts also laying off certificated staff, being subject to layoff in this matter presents a significant financial hardship. Many of the Respondents expressed their strong desire to remain employed with the District and teach the children of the community that the District serves.

### LEGAL CONCLUSIONS

1. All notice and jurisdictional requirements of sections 44949, 44955, and 44955.5 were met. (Factual Findings 1-7.)

2. The services identified in Resolution No. 08-09:37 are particular kinds of services that can be reduced or discontinued pursuant to Education Code section 44955. (Factual Findings 8-9.)

3. A. The Governing Board's decision to reduce or discontinue the identified services was neither arbitrary nor capricious, but was reasonable and a proper exercise of its discretion. (Factual Findings 8-14.)

B. There are no reported cases interpreting section 44955.5. However, since section 44955.5 refers to section 44955, and both statutes contain virtually identical wording authorizing school boards to make discretionary decisions regarding layoffs (e.g., "if in the opinion of the governing board it is therefore necessary to decrease the number of permanent employees in the district . . ."), cases interpreting section 44955 can be used by analogy to interpret section 44955.5. Cases decided under section 44955 provide that a school board may consider its financial difficulties when determining the need for reduction of particular kinds of services. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 638-639.) Such a decision may be overruled if proven to be arbitrary or capricious, but a motivation to maintain flexibility in light of financial uncertainty is neither; a school board's action is simply measured by reasonableness, bearing in mind that "such a standard may permit a difference of opinion on the same subject." (*Campbell Elementary Teachers Association v. Abbott* (1978) 76 Cal.App.3d 796, 808.)

C. In this case, Respondents argue that the Governing Board has not acted reasonably in determining to layoff certificated staff. For example, Respondents argue that the decisions to increase the District's reserve funding well above the mandated minimum amount and to not use the federal stimulus funds to avert layoffs demonstrate unreasonableness because the money involved instead be used to retain teachers. Respondents also argue that the decision to not layoff administrators is unreasonable in light of the statutory authority allowing the Governing Board to do so. Finally, Respondents argue that the current financial circumstances are no different from when it implemented the spring 2009 layoffs, and that the current layoffs are simply a second attempt to terminate staff who did not receive a final layoff notice as a result of the prior layoff case.

D. Respondents raise arguable points. However, the District presented credible reasons for each decision. For example, the federal stimulus funds can be used in several different ways; averting teacher layoffs is not the exclusive use intended for the funds. The District cannot be faulted for raising its reserve funds in these times of great economic uncertainty. The District exercised its discretion in not laying off administrators. The two administrators who were reassigned from closed schools are currently in positions which cannot be filled by non-administrators. Finally, it was established that the District's financial situation has significantly worsened since the spring 2009 layoff case. In sum, these are all financial decisions which the Governing Board had wide discretion to make. As was stated in the *Campbell Elementary Teachers Association* case, these are all decisions over which reasonable minds can disagree. In this case, it was not established that the Governing Board's decision to reduce certificated staff in light of the current economic circumstances was arbitrary or capricious, no matter how painful that decision is to the certificated staff affected. The members of the Governing Board are elected by their community to make just these kinds of painful decisions. In the absence of arbitrary action or capriciousness, such decisions should not be subject to second-guessing by those who are not accountable to the District's community.

4. Pursuant to stipulation between the parties, the Accusation against the Respondents listed in Attachment 1, section B, who were provided with "precautionary notifications," should be dismissed. (Factual Finding 6.)

5. No junior certificated employee is scheduled to be retained to perform services that a more senior employee is certificated and competent to render. (Factual Findings 1-18.)

6. Cause exists, pursuant to sections 44955.5, 44955 and 44949, for not reemploying the Respondents listed in Attachment 1, section A, for the ensuing 2009/2010 school year. (Factual Findings 1-19.)

7. Cause for not reemploying the remaining Respondents relates solely to the welfare of the schools and the pupils thereof within the meaning of sections 44955.5, 44955 and 44949. (Factual Findings 1-19.)

ORDER

1. The Accusations against the Respondents listed in section B of Attachment 1 are dismissed. Those Respondents shall not be given notice that their services are not required for the 2009/2010 school year.

2. The Accusations are sustained against the remaining Respondents listed in Attachment 1. Notice shall be given to those Respondents that their services will not be required for the 2009/2010 school year, and such notice shall be given in inverse order of seniority.

Dated: August 3, 2009

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ERIC SAWYER  
Administrative Law Judge  
Office of Administrative Hearings

**ATTACHMENT 1**: List of Respondents

*Section A*- Respondents who received layoff notices:

1. Aviles, Michelle
2. Bahena, Angelica
3. Jasso, Laura
4. Ortiz-Salazar, Monica
5. Peterson, Brenda
6. Redenbaugh, Stella
7. Rodriguez, Bertha
8. Rodriguez, Rina
9. Sandoval, Jessica
10. Sandoval, Sonia
11. Suen, Bernice

*Section B*- Respondents who received precautionary layoff notices:

1. DeBelius, Kara
2. Ha, Jeff
3. Hall, Demetria
4. Morris, Nicole