

BEFORE THE
GOVERNING BOARD
OF THE
HESPERIA UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Reduction in Force
Involving 113 Certificated Employees of the
Hesperia Unified School District,

Respondents.

OAH No. 2010030961

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Hesperia, California, on April 27, 2009.

Dennis E. Wagner and Tiffany S. Woods, Attorney at Laws, represented the Hesperia Unified School District.

Carlos Perez, Attorney at Law, represented most of the respondents appearing at the reduction in force hearing, each of whom was identified in the list of individuals represented by Carlos Perez (Exhibit A).

Yadira Moreno and Lori Esparza represented themselves.

The matter was submitted on April 27, 2010.

FACTUAL FINDINGS

The Hesperia Unified School District

1. The Hesperia Unified School District (HUSD or the district) is located in the community of Hesperia, located in the High Desert area of San Bernardino County. The district encompasses about 240 square miles and serves approximately 22,000 Kindergarten through 12th grade students residing within the City of Hesperia, portions of the City of Victorville, and unincorporated areas of San Bernardino County. The district has 15 elementary schools, three middle schools, three comprehensive high schools, two alternative high schools and operates an adult education program. The district employs about 2,000 persons, approximately 850 of whom provide certificated services. The district's projected

budget for the 2010-2011 school year is \$145 million, far less than anticipated. Nearly 90 percent of the annual budget pays for the salaries and benefits of HUSD employees.

2. The district is governed by an elected five member Board of Education (the governing board). Mark A. McKinney is HUSD's Superintendent of Schools and Chief Executive Officer. He is assisted by an administrative staff that includes David McLoughlin, Assistant Superintendent of Business Services, and Alan Giles, Director of Personnel.

The Fiscal Crisis – Economic Layoffs

3. Proposition 13, a constitutional amendment enacted in 1978, limited the imposition of local property taxes and reduced a major source of assured revenue for public education. After Proposition 13 was implemented, public schools have looked primarily to the State of California and to other governmental entities for funding.

A school district cannot determine the level of state funding it will receive until the state budget is chaptered, an event occurring each year in late June but sometimes taking place much later. Before then, a school district's governing board must take steps to make certain that ends meet if the worst-case financial scenario develops.

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

Over the past three years, HUSD's administration (as well as the administrators of most other school districts) became aware of California's continuing budget deficit and its likely crippling impact on the district in the next school year. Declining student enrollment was not a factor. As a result of the crisis, the district projected the need to trim its budget by more than \$12 million for the 2010-11 school year. The district was required to look into ways to balance its budget, including the elimination or reduction of various educational programs and downsizing its staff.

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

The District's Response

4. Assistant Superintendent McLoughlin is responsible for analyzing the district's budget. According to Superintendent McLoughlin, the budget crisis for the 2010-

2011 exceeded projections. Without making further reductions, he projected a \$12 million deficit for the 2010-2011 school year. He met with Superintendent McKinney and others to discuss HUSD's fiscal situation. It was concluded that a reduction in force was required.

By memos dated January 25, 2010, Superintendent McKinney recommended that the board approve a resolution setting forth tie-breaking criteria related to a workplace reduction, that it approve a resolution reducing or eliminating 94 full time equivalent (FTE) positions related to the provision of particular kinds of services, and that it approve another resolution eliminating two FTE counseling positions and reducing 100 FTE administrative positions.

5. Following meetings on February 8 and 9, 2010, the governing board adopted Resolution No. 2009/10-24 [establishing tie-breaking criteria for employees with the same date of seniority], which is attached hereto as Exhibit A and is incorporated herein by reference. Following another meeting on March 8, 2010, the governing board adopted Resolution No. 2009-10-23 [reducing 94 FTEs provided by teachers] and Resolution No. 2009/10-25 [reducing administrative services and eliminating two counseling positions], attached hereto as exhibits B and C, respectively, and incorporated herein by this reference.

The Particular Kinds of Services

6. The services identified in the governing board's resolutions to reduce or discontinue particular kinds of services were the kinds of educational services that properly could be reduced or discontinued. The reduction or discontinuation of those services was not arbitrary or capricious and constituted a matter within the proper exercise of the governing board's discretion. No particular kinds of services were proposed to be lowered to levels less than those levels mandated by state or federal law.

The Seniority List

7. HUSD maintains a seniority list, a constantly evolving document that is updated as new certificated employees are hired and as other employees resign or retire. The seniority list is a spreadsheet arranged from the most senior employee to the most recently hired employee. The spreadsheet contains each employee's name, site where that employee provides services, the employee's date of hire, the employee's seniority date (which is the employee's first day of paid service in a probationary capacity), the employee's status (permanent, probationary second year, probationary first year), current assignment, list of credentials, and English Language authorization (e.g., BCLAD, CLAD) if any.

8. In November 2009, when it became apparent that a reduction in force might be required, HUSD circulated a preliminary seniority list to all employees with the request that each employee review the seniority list and verify or update his or her seniority information. If an employee did not return the list with corrections, administrative staff concluded that the information that had been provided was correct. Administrative staff continued to accept new credentials and continued to update the seniority list through March 15, 2010, the date that preliminary layoff notices had to be served. If an employee submitted evidence of new

credentials after that date or other information, the new information was noted but it did not impact the issuance of the preliminary layoff notices.

The district's use of a March 15 cutoff date was not arbitrary, and the use of that date was reasonable because the district was required by the Education Code to serve preliminary layoff notices by that date.

A few employees were not aware of the need to advise the administrative staffs about concerns that they had about their seniority date or credential. Jason Kleber testified that he was unaware that his failure to promptly respond to the administrative staff's letter requesting verification of his status might result in his inability to establish a different seniority date. However, it was not established that Kleber or any other employee suffered any actual prejudice as a result of any misunderstanding regarding the need to promptly advise administrative staff of such concerns and to provide new information.

The Issuance of Layoff Notices

9. Using the updated seniority spreadsheets, Director Giles' staff began the painstaking process of identifying those certificated employees who should receive preliminary layoff notices as a result of the board's resolutions and those who should not. Whenever an employee was tentatively slated to receive a preliminary layoff notice as a result of the governing board's resolution, that employee's seniority and credentials were carefully examined to determine if that employee was eligible to "bump" into a position that was held by a more junior employee.

For those employees who first provided service on the same day, Director Giles' staff applied the governing board's tie-breaking resolution. The criteria set forth in that resolution were reasonable, and the application of the tie-breaking criteria was in the best interest of the district and the students.

Before issuing preliminary layoff notices, the district's administrative staff considered all known positively assured attrition to determine the number of layoff notices that should be served. More layoff notices were served than full time equivalents were proposed to be reduced to protect against the possibility of error and because many employees had the same seniority date. The extent to which more notices were served than number of positions were ultimately reduced and eliminated was not outrageous and it did not result in any prejudice.

10. Taking into account all known positive attrition, the district identified those individuals whose employment was impacted by the governing board's resolutions. The district timely served upon each of those employees a written notice advising that the superintendent had recommended that their services would not be required for the upcoming school year. The formal notice and accompanying documents set forth the reasons for the recommendation. The permanent and probationary employees served with the preliminary notice were advised of the right to a hearing, and each of them was instructed that the failure to submit a written request for a hearing by March 31, 2010, would constitute a waiver of the right to a hearing. All prehearing jurisdictional requirements were met.

The recommendation that respondents be terminated from employment was not related to their fitness or abilities as teachers.

113 certificated employees were served with the preliminary layoff notices. 81 of these employees requested a hearing.

All parties to this reduction in force proceeding stipulated that all prehearing jurisdictional requirements were met.

The Administrative Hearing

11. On April 27, 2010, the record in the layoff proceeding was opened. Jurisdictional documents were introduced and an opening statement was presented on the district's behalf. Opening statements were not provided on behalf of any respondent and were waived. Sworn testimony was taken, documentary evidence was received, several stipulations were reached, closing argument was given, the record was closed, and the matter was submitted.

The Reduction in Force Proceeding

12. Assistant Superintendent McLoughlin established that HUSD's proposed reduction in force was the result of a budgetary crisis and was initiated in good faith. Director Giles established that HUSD complied with all jurisdictional requirements under the Education Code and the Government Code in bringing the reduction in force proceeding, and that the reduction in force proceeding was in the best interest of the district and the students thereof. Director Giles and Michele Rush, an experienced credential analyst, established that HUSD used seniority and competence (as defined by the board's resolution and as used in the Education Code) as the basis for "bumping" employees to retain the services of the most senior, appropriately credentialed employee. Rush established that in every instance in which an employee was identified to receive a layoff notice as a result of the reduction or elimination of the particular kind of service that employee was providing, the seniority list was carefully reviewed to determine that the employee was capable of assuming a position being held by a more junior employee. The board's tie-breaking criteria were applied to determine seniority between employees providing the same kinds of services who were hired on the same day, and the application of the criteria was in the best interest of the district and its students.

13. In preparing for the reduction in force proceeding, the district withdrew the preliminary layoff notices served upon employees Beril Artan, Stefanie McKean, Timothy McKean, Jeremy Sauer, and Paul Mog, as well as the dismissal of the accusations filed against those individuals. As to each employee other than Mog, the district's withdrawal and dismissal was based upon the retirement of more senior employees whose positions these employees were entitled to fill as a result of their seniority and credentials. As to Mog, the district discovered that it made an error in calculating his seniority date and that with the new seniority date, Mog should not have been served with a preliminary layoff notice.

There was no objection to the withdrawal of these preliminary layoff notices and the dismissal of the accusations against these employees.

14. As a result of the district's proper withdrawal of the preliminary layoff notice served and the dismissal of the accusation served on Mog as a result of its mistake, the district moved employee Darin Van Hulzen from the precautionary layoff list to the preliminary layoff list on April 1, 2010. Van Hulzen and other employees were placed on the precautionary layoff list for just this reason – to accommodate for the possibility of error. Since all jurisdictional requirements were met to include Van Hulzen in this proceeding, including his right to a hearing, moving Van Hulzen from the precautionary list to the preliminary layoff list is appropriate and lawful.

There was no objection to moving Van Hulzen from the precautionary list to the preliminary layoff list.

15. On April 2, 2010, Jeremy Sauer was advised that the district was reinstating the accusation that had been filed against him. Director Giles' letter advising Sauer of the reinstatement advised that due to an oversight in his office, it was determined that there was a teacher with more seniority who held a dual credential and was able to teach music. Director Giles provided Sauer with request for hearing and notice of defense forms, and advised that the district would accept these forms if they were turned in by April 9, 2010.

There was no objection to the reinstatement of the accusation that had been filed against Sauer, and it was not established that Sauer suffered any legal prejudice as a result of the reinstatement.

16. The district currently employs 25 counselors, each of whom must hold a pupil personnel services (PPS) credential. Yadira Moreno and Lori Esparza, each of whom provided services at Cedar Middle School, are the most junior counselors. Moreno has a seniority date of July 1, 2007, and Esparza has a seniority date of May 21, 2007.

Resolution No. 2009/10-25 eliminated two counselor FTEs. "Counseling" is a particular kind of service. In accordance with that resolution, Moreno and Esparza were served with preliminary layoff notices.

Esparza established that counselors are not members of the local teachers association and have a salary schedule that is different than the teachers' salary schedule. Esparza established that she and Moreno have served in counseling positions longer than some others who served last year as school counselors under the PPS credential. Esparza believed she and Moore should be skipped over persons who did not have as much counseling experience. Esparza also testified that the retention of middle school counselors was vital to the district's educational mission and that her services and Moreno's services should be retained.

Director Giles and Cindy Fortin, Director Giles' assistant, established that counseling was a particular kind of service, that counselors were treated in this reduction in force proceeding in the same fashion as teachers, that employee seniority dates were based upon an

employee's first date of paid service in a probationary capacity with the district, and that senior employees with a PPS credential were entitled to bump and/or retain counseling positions within the district even though their service as a counselor might be less than the service of others.

The service of the preliminary layoff notices on Moreno and Esparza was appropriate and lawful. Moreno and Esparza do not have the right to assert "skipping" rights and they do not, by reason of their seniority and credentials, have sufficient bumping rights to displace any junior employee.

17. After preliminary layoff notices were served, the board offered retirement incentives to senior employees. The district believes that approximately two dozen senior employees will take advantage of the retirement program that has been offered, but the board must approve the retirement of these employees before their retirement becomes effective. If and when the board does so, the positions vacated by the retirees will be considered by the district in rescinding final layoff notices, and the vacant positions will be filled on the basis of seniority and competency.

Skipping

18. The term "skipping" involves a school district's effort to retain the services of a junior employee to teach a specific course or course of study when that junior employee has special qualifications, training and/or experience required to teach that course or course of study that more senior employees do not possess.

Resolution No. 2009/10-23 proposed to reduce or discontinue 2 FTE for "Middle School P.E." teachers and 3 FTEs for "High School P.E." teachers.

The district sought to skip Jeremy Topete, currently serving as the varsity football coach at Hesperia High School, who has a seniority date of August 6, 2008. Topete holds second year probationary/intern status with a short-term staff permit (STSP) authorization in a single subject (Physical Education). The STSP authorization is the lowest credential a district employee can hold, and it signifies that the individual who holds the credential is not enrolled in a credential program and either needs exam or prerequisite coursework to obtain Internship eligibility.

Nine physical education teachers with more seniority than Topete were initially served with preliminary or precautionary layoff notices (Bethany Trojanowski, a physical education teacher with more seniority than Topete, successfully bumped another teacher and was retained; the layoff notice filed against Mog was withdrawn when it was determined that Mog's seniority date was incorrect). Seven of the nine physical education teachers initially served with layoff notices were permanent employees.

Varsity football is not a "course" or a "course of study." Academic credit is not given to students who participate in varsity football. A varsity football coach need not be a HUSD certificated employee, although that is customary and preferable. It is also preferable that a

high school's varsity football coach be employed on the campus where he provides services as the varsity football coach for a variety of reasons.

Director Giles testified that the district skipped Topete over more senior employees because Topete was recruited to be the head varsity football coach at Hesperia High School. He testified that the revenue generated by the football program helped fund all other athletic programs at Hesperia High School, and that the varsity football program needed to be protected. Jeff Hallett, the Vice Principal at Hesperia High School, testified that he is in charge of the athletic programs at Hesperia High, and that there was a need to retain Topete as the varsity football coach. Hallett established that Topete had more than five years of successful coaching experience at Chaffey Junior College and at Hesperia High School before he was skipped, that Topete was an extraordinary coach who obtained scholarships for student athletes at NAIA and Division II schools, and that no one else was qualified to hold the position. In addition to being the head football coach, Topete teaches two classes of football training, essentially weight lifting classes that are open to all students at Hesperia High for which credit is given. Other physical education instructors are qualified to teach this football training course. Robert Schnebeck, the Principal of Hesperia High School, testified that the school's athletic budget is, in large measure, dependent upon the success of the varsity football team and that Topete is the individual most qualified to hold that position. According to Principal Schnebeck, "He's the guy."

The district established that Topete had special qualifications, training and experience which others with more seniority did not possess, and was the most qualified employee to serve as varsity football coach, but the district did not establish that "varsity football" or "football training" was a legitimate "course" or "course of study" within the meaning of Education Code section 44955, subdivision (d). Accordingly, the preliminary layoff notice served on Topete is affirmed and district's attempt to skip Topete must be rejected.

Substitute and Temporary Service

19. Jason Kleber's seniority date with the district is August 8, 2007. Kleber asserted that his seniority date should be August 30, 2006, as a result of his providing long-term substitute services in four different classrooms that lasted 75 percent of the 2006-2007 school year. The district asserted that one of the substitute assignments was not long term in nature in that it did not last for 21 days or more and that Kleber was paid at a reduced (day-to-day) rate and was not paid the higher long-term substitute rate for services. In addition, the district observed that in order for temporary or substitute service to be tacked on for seniority purposes, it is required that the service be in one classroom.

Based on the decision in *Centinela Valley Secondary Teachers Assn. v. Centinela Valley Union High Sch. Dist.* (1974) 37 Cal.App.3d 35, 44, it is concluded that the district correctly assigned the August 8, 2007, seniority date to Kleber.

LEGAL CONCLUSIONS

Statutory Authority for Reduction in Force Proceedings

1. Education Code section 44944 provides in part:

“No later than March 15 and before an employee is given notice by the governing board that his or her services will not be required for the ensuing year . . . the governing board and the employee shall be given written notice by the superintendent of the district or his or her designee . . . that it has been recommended that the notice be given to the employee, and stating the reasons therefor . . .

(b) The employee may request a hearing to determine if there is cause for not reemploying him or her for the ensuing year . . . If an employee fails to request a hearing on or before the date specified, his or her failure to do so shall constitute his or her waiver of his or her right to a hearing . . .

(c) In the event a hearing is requested by the employee, the proceeding shall be conducted and a decision made in accordance with . . . the Government Code and the governing board shall have all the power granted to an agency therein, except that all of the following shall apply:

(1) The respondent shall file his or her notice of defense, if any, within five days after service upon him or her of the accusation and he or she shall be notified of this five-day period for filing in the accusation.

...

(3) The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof. The proposed decision shall be prepared for the governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition. None of the findings, recommendations, or determinations contained in the proposed decision prepared by the administrative law judge shall be binding on the governing board. Nonsubstantive procedural errors committed by the school district or governing board of the school district shall not constitute cause for dismissing the charges unless the errors are prejudicial errors. Copies of the proposed decision shall be submitted to the governing board and to the employee on or before May 7 of the year in which the proceeding is commenced. . . .”

2. Education Code section 44955 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.

(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) Notice of such termination of services shall be given before the 15th of May . . . and services of such employees shall be terminated in the inverse of the order in which they were employed, as determined by the board in accordance with the provisions of Sections 44844 and 44845. 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.

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 study¹, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess.

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

Jurisdiction

3. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied as to all respondent employees.

The Reduction of Particular Kinds of Services

4. A school board may determine whether a particular kind of service is to be reduced or discontinued, and it cannot be concluded that the board acted unfairly or improperly simply because it made a decision that it was empowered to make under the statute. (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 174.) A school board’s decision to reduce or discontinue a particular kind of service is not tied in with any statistical computation. It is within the discretion of a school board to determine the amount by which it will reduce or discontinue 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.)

Competence

5. The Education Code leaves to a school board’s discretion the determination of whether in addition to possessing seniority an employee is also “certificated and competent” to be employed in a vacant position. The term “competent” relates to an individual’s specific skills or qualifications including academic background, training, credentials, and experience, but it does not include evidence related to on-the-job performance. (*Forker v. Board of Trustees* (1984) 160 Cal.App.3d 13, 18-19.) In addition to seniority, the only limitation in placing a teacher in a vacant position is that the teacher selected be “certificated and competent” to render the service required by the vacant position. Among employees who meet this threshold limitation, there is no room in the statutory scheme for comparative evaluation. (*Martin v. Kentfield School Dist.* (1983) 35 Cal.3d 294, 299.) An employee

¹ Education Code section 51016 defines “course” as “an instruction unit of an area or field of organized knowledge, usually provided on a semester, year or prescribed length-of-time basis.”

Education Code section 51015 defines “course of study” as “the planned content of a series of classes, courses, studies, or related activities.”

holding a special credential or needed skill, if such credentials or competence are not shared by a more senior employee, may be retained when necessary and authorized under the Education Code even though it results in termination of a senior employee. (*Moreland Teachers Assn. v. Kurze* (1980) 109 Cal.App.3d 648, 655.)

Seniority, Bumping, and Skipping

The Statutory Scheme

6. Education Code section 44955, the economic layoff statute, provides in subdivision (b), in part, as follows: “Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while . . . any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.” Essentially this language provides “bumping” rights for senior certificated and competent employees, and “skipping” authority to retain junior employees who are certificated and competent to render services which more senior employees are not. Subdivision (d)(1) of section 44955 provides an exception to subdivision (b) where a district demonstrates specific need for personnel to teach a specific course of study and that a junior certificated employee has special training and experience necessary to teach that course that the senior certificated employee does not possess. (*Bledsoe v. Biggs Unified School Dist.* (2008) 170 Cal.App.4th 127, 134-135.)

Bumping

7. The district has an obligation under section 44955, subdivision (b), 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. (*Bledsoe v. Biggs Unified School Dist.*, *supra*, at pp.136-137.)

Skipping

8. Subdivision (d)(1) of section 44955 expressly allows a district to demonstrate its specific “needs” and there is nothing in the statute that requires that such needs be evidenced by formal, written policies, course or job descriptions, or program requirements. (*Bledsoe v. Biggs Unified School Dist.*, *supra*, at p. 138.)

Information Filed with HUSD after March 15, 2010

9. A school district must issue and serve preliminary layoff notices no later than March 15. Before then a district must consider all information on file that assists the district in making assignments and reassignments based on seniority and qualifications. After March 15, the district has no authority to issue a layoff notice to an employee who has become junior by reason of another employee’s filing of proof of additional qualifications. Thus, a credential filed with a district after March 15 cannot be the basis for bumping. (*Degener v. Governing Board* (1977) 67 Cal.App.3d 689, 698.)

Substitute and Temporary Service

10. Under Education Code section 44917, governing boards must “classify as substitute employees those persons employed in positions requiring certification qualifications, to fill positions of regularly employed persons absent from service.” Under Education Code section 44953, substitute employees may be dismissed at any time at the pleasure of the board. As noted in *California Teachers Ass’n v. Vallejo City Unified School Dist.* (2007) 149 Cal.App.4th 135, 144-145 and *Balen v. Peralta Junior College District* (1974) 11 Cal.3d 821, 826, substitute and temporary teachers fill the short range needs of a school district and may be summarily released.

In specific situations, an employee’s position in something other than a probationary position may be credited retroactively as probationary employment. Thus, a certificated employee working in a temporary position as a long-term replacement teacher under Education Code section 44920 or in a categorically funded position under Education Code section 44909 may accrue credit toward permanent status under certain circumstances described in Education Code sections 44909, 44917, 44918 or 44920.

The Education Code recognizes two distinct types of substitute teachers: Long-term substitute teachers and day-to-day substitute teachers. Education Code section 44918 makes this distinction:

“(a) Any employee classified as a substitute or temporary employee, who serves during one school year for at least 75 percent of the number of days the regular schools of the district were maintained in that school year and has performed the duties normally required of a certificated employee of the school district, shall be deemed to have served a complete school year as a probationary employee if employed as a probationary employee for the following school year.

(b) Any such employee shall be reemployed for the following school year to fill any vacant positions in the school district unless the employee has been released pursuant to subdivision (b) of Section 44954.

(c) If an employee was released pursuant to subdivision (b) of Section 44954 and has nevertheless been retained as a temporary or substitute employee by the district for two consecutive years and that employee has served for at least 75 percent of the number of days the regular schools of the district were maintained in each school year and has performed the duties normally required of a certificated employee of the school district, that employee shall receive first priority if the district fills a vacant position, at the grade level at which the employee served during either of the two years, for the subsequent school year. In the case of a departmentalized program, the employee shall have taught in the subject matter in which the vacant position occurs.

(d) Those employees classified as substitutes, and who are employed to serve in an on-call status to replace absent regular employees on a day-to-day basis shall not be entitled to the benefits of this section.

(e) Permanent and probationary employees subjected to a reduction in force pursuant to Section 44955 shall, during the period of preferred right to reappointment, have prior rights to any vacant position in which they are qualified to serve superior to those rights hereunder afforded to temporary and substitute personnel who have become probationary employees pursuant to this section.

(f) This section shall not apply to any school district in which the average daily attendance is in excess of 400,000.”

In a very similar factual situation (a substitute teacher providing a full year’s service for two different teachers who worked at the same school) and involving the application of a nearly identical predecessor statute (Ed. Code, § 13336.5), the court held:

“In this context we are of the opinion that the statute in question and in particular the phrase ‘who teaches . . . any class or classes which would have been taught by one person absent from service . . .’ was intended to apply to the situation where a substitute teacher replaces one and the same permanent teacher for an entire school year regardless of particular class assignments. Stated another way, the statute only applies when a substitute fills a vacancy in teacher complement of one year duration, created by the absence of one permanent teacher and does not apply to a one year vacancy which results from the aggregate of several teachers being absent for shorter periods. This interpretation preserves administrative discretion while affording fair treatment of substitutes and thus achieves what we presume to be the overall objective of the statute.” (*Centinela Valley Secondary Teachers Assn. v. Centinela Valley Union High Sch. Dist.* (1974) 37 Cal.App.3d 35, 44.)

This holding applies to Kleber’s situation. Indeed, the failure to apply *Centinela Valley* might result in a claim that HUSD exceeded its authority.

Cause Exists to Give Notice to Certain Employees

11. As a result of the governing board’s lawful reduction of particular kinds of service, cause exists under the Education Code for the Hesperia Unified School District to give final notice to those respondents who are identified hereafter 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 2010-2011 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 Hesperia Unified School District and its pupils. Other than in the case of Jeremy Topete, 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. No employee with less seniority than any respondent 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 withdraw the layoff notices served upon respondents Beril Artan, Stefanie McKean, Timothy McKean, and Paul Mog and that it dismiss the accusations filed against these respondents.

It is recommended that the governing board issue final notices to the following certificated employees: Afsari, Sahar; Alcalá, Dana; Alfieri, Amanda; Avila, Eric; Antle, Ryan; Bales, Matthew; Barnes, Stacy; Barnhardt, Jamie; Barrales, Jr., Arturo; Biskeborn, Libby; Booth, Willis; Bumpass-Russo, Danielle; Burdi, Dean; Burks, Amanda; Caballero, Barbara; Careno, Trevor; Carter, James; Chacon, Lucia; Chavez, Lisa; Checa, Lourdes; Chouinard, Jennifer; Clements, Jennifer; Clough, Heather; Cole, Tara; Copell, Candice; Cordero, Rafael; Cox, Ryan; DeCoursey, Jodie; Dix, Ricky; Doremus, Eugene; Duran, Christopher; Edwards, Monica; Esparza, Lori; Farrell, Leticia; Feinstein, Stephen; Ferrato, Cheryl; Gonzalez, Melaniel; Goode, Dustin; Goodrich, Anita; Graley, Amanda; Griffin, Mary; Haley, Nancy; Hall, Robert; Holden, Brian; Howard, Kristina; Howard-Stoddard, Lora; Jackson, Kristie; Johnson, Jeffrey; Jurkiewicz, Arlene; Kensley, Michelle; Kirby, Emily; Kirk, Carrie; Kleber, Jason; Kruger, Jillian; Lockie, Randy; Lovewell, Erin; Lueken, Krissy; Mady, Jennifer; McKechnie, Michelle; Mendoza, Leticia; Mendiza, Silvia; Mercado, Kristina; Meukow, Stephen; Miller, Ryan; Moc, Jennifer; Monroe, Marisa; Montgomery, Tommy; Moreno, Yadira; Morse, Victoria; Mosley, Tawnya; Mumey, Chance; Murdock, Kari; Myers, Corrie; Nagy, Bridget; Olsen, Christine; Omelina, Marsha; Orlando, Lisa; Ortega, Franco; Osterberg, Justin; Pardo, Sarah; Payne, Thomas; Portanova, Sean; Reynolds, Amy; Richardson, Brianna; Rincon, Darlene; Robledo, Jamela; Rousseau-Smith, Mark; Sandoval, Tammy; Sauer, Jeremy; Schippell, Christina; Seybert, Christopher; Seybert, Teresa; Shea, Katherine; Simmons, Brett; Smith, Alice; Smith, Cheryle; Smith, Sheena; Thacker-Gutierrez, Susan; Thomas, Robin; Topete, Jeremy; Torrez, Lauren; Van, Alysia; Van Hulzen, Darin; Vaughn, Billy; Ward, Shannon; Weisz, Stacy; Wilkinson, Donald; Wind, Nicole; and Yucelidag, Sarah.

DATED: _____

JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings

Exhibit A

HESPERIA UNIFIED SCHOOL DISTRICT

RESOLUTION No. 09/10-24

RESOLUTION TO SET CRITERIA FOR WORKFORCE REDUCTION

WHEREAS, the Board of Education of the Hesperia Unified School District has determined that the particular kinds of services within the District must be reduced or discontinued; and

WHEREAS, it is the opinion of the Board of Education that because of the aforementioned reason it is in the best interest of the District that the number of regular certificated employees of the District must be reduced; and

WHEREAS, in determining a seniority list, an order of workforce reduction tie breaking system and criteria must be developed.

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

In the event of a District wide reduction in force, layoffs shall be conducted in the order of reverse seniority (least senior laid off first). The following specific criteria, between employees who first render paid service to the District on the same date, based solely on the needs of the District and the students' thereof, listed in order of importance, shall be applied in the order listed;

- A. Possession of a credential authorizing service in the assignment to be named;
- B. District teaching experience within the last three (3) years in the assignment to be made;
- C. Teaching experience at different grade levels;
- D. Teaching experience in different subject areas;
- E. Teaching experience at more than one school site;
- F. Multiplicity of credentials;
- G. Possession of: 1) a graduate degree, 2) a major, 3) a minor in the field to be assigned. Majors and minors are defined as those listed on the credential and recorded at the County Office of Education;
- H. Special training in the area to be assigned;
- I. Persons engaged in authorized student, professional, and/or leadership activities; both school and District (beyond the classroom), will be considered the more valuable to the District;
- J. Number of majors, minors or graduate degrees in subject areas within the District curriculum out of the area to be assigned. Majors and minors are defined as those listed on the credential and recorded at the County Office of Education;
- K. Receipt of a satisfactory rating on the most recent evaluation contained in the personnel file;
- L. Lottery

Exhibit B

HESPERIA UNIFIED SCHOOL DISTRICT

RESOLUTION No. 09/10-23

REDUCTION OR DISCONTINUANCE OF SERVICES

WHEREAS, the Board of Education of the Hesperia Unified School District has determined that the particular kinds of services set forth herein must be reduced or discontinued; and

WHEREAS, it is the opinion of the Board that because of the aforementioned reason it is in the best interest of the District that the number of regular certificated employees of the District must be reduced or discontinued; and

WHEREAS, the State budget crisis has forced the District to implement cost saving measures; and

WHEREAS, this Board does not desire to reduce or discontinue the services of regular certificated employees based upon reduction of average daily attendance during the past two years.

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

- A. That the particular kinds of services set forth below be reduced or discontinued commencing in the 2010-2011 school year.

Elementary Intervention Teachers (Title I Funded)	14	F.T.E.
Data Analysis Teacher on Assignment (Title I Funded)	1	F.T.E.
Elementary Classroom Teachers	23	F.T.E.
Elementary Music	3	F.T.E.
Middle School Math/Science Core	4	F.T.E.
Middle School Reading/Language Arts Core	2	F.T.E.
Middle School English	1	F.T.E.
Middle School Math	1	F.T.E.
Middle School Social Science	1	F.T.E.
Middle School Home Ec	1	F.T.E.
Middle School P.E.	2	F.T.E.
High School English	7	F.T.E.
High School Social Science	6	F.T.E.
High School Intro Physical Science	3	F.T.E.
High School Math	7	F.T.E.
High School P.E.	3	F.T.E.
High School Spanish	1	F.T.E.

Exhibit C

HESPERIA UNIFIED SCHOOL DISTRICT

RESOLUTION No. 2009/10-25

REDUCTION OF SERVICES

WHEREAS, the Board of Education of the Hesperia Unified School District has determined that the particular kinds of services set forth herein must be reduced or discontinued; and

WHEREAS, the State budget crisis has forced the District to implement cost saving measures;

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

- A. That the eliminations and/or reductions implemented during the 2009-2010 school year for the particular kinds of services set forth below be re-implemented in the same manner as set forth in the corresponding 2009-2010 resolution. That the particular kinds of services set forth below be eliminated or reduced commencing in the 2010-2011 school year in addition to the 2009-2010 work day reductions.

Eliminate Counselors	2	F.T.E.
Reduce Athletic Director work year by 1-8 days	1	F.T.E.
Reduce Counselor work year by 1-8 days	23	F.T.E.
Reduce Psychologist work year by 1-8 days	9	F.T.E.
Reduce Alt. Educ. Asst. Prin. work year by 1-8 days	2	F.T.E.
Reduce Alt. Educ. Vice Prin. Work year by 1-8 days	1	F.T.E.
Reduce Alt. Educ. Principal work year by 1-8 days	2	F.T.E.
Reduce Asst. Superintendent work year by 1-8 days	1	F.T.E.
Reduce Coordinator work year by 1-8 days	3	F.T.E.
Reduce Director work year by 1-8 days	5	F.T.E.
Reduce Elementary Asst. Principal work year by 1-8 days	12	F.T.E.
Reduce Elementary Principal work year by 1-8 days	15	F.T.E.
Reduce High School Principal work year by 1-8 days	3	F.T.E.
Reduce High School Asst. Principal work year by 1-8 days	3	F.T.E.
Reduce High School Vice-Principal work year by 1-8 days	10	F.T.E.
Reduce Superintendent work year by 1-8 days	1	F.T.E.