

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

In the Matter of the Layoff of:

CERTIFICATED EMPLOYEES OF THE
EAST SIDE UNION HIGH SCHOOL
DISTRICT,

Respondents.

OAH No. 2011030109

PROPOSED DECISION

Administrative Law Judge Steven C. Owyang, State of California, Office of Administrative Hearings, heard this matter in San Jose, California, on April 18, 2011.

Attorney Patricia R. McKernan, Rehon & Roberts, represented the East Side Union High School District.

Christopher E. Schumb, Attorney at Law, represented respondents Esther Diaz-Martin, Denise Eachus, Rebecca Hopkins, Tersie Ndon, Thao Nguyen, Nicole Piazza, Sergio Reyes, Michele Ryan, Ricardo Salgado, and Jill Schoopman.

The matter was submitted on April 18, 2011.

FACTUAL FINDINGS

1. Dan Moser, Superintendent, East Side Union High School District (District), issued the accusation in his official capacity.
2. Respondents are certificated employees of the District.
3. The parties stipulated that all of the jurisdictional requirements of Education Code sections 44949 and 44955 have been met in this proceeding.
4. On March 10, 2011, the Governing Board of the District (Board) adopted Resolution No. 2010/2011-29, entitled "Reduction of a Particular Kind of Service" (the PKS resolution), in which it determined that it shall be necessary to reduce the following particular kinds of services no later than the beginning of the 2011-2012 school year:

<u>Kind of Service</u>	<u>FTE¹ Positions</u>
Student Advisor	11.0
Children’s Center Instructor	2.0
Counselor	3.6
Program Improvement in an Alternative Setting (“PRIAS”) Teacher	6.6
Total FTEs	23.2

The Board further determined that it will be necessary to terminate at the end of the 2010-2011 school year the employment of certificated employees of the District in a quantity and kind equal to the FTEs specified above.

The Board further adopted tie-breaking criteria to distinguish among certificated employees who first rendered paid probationary service to the District on the same date. The tie-breaking criteria provided points for possession of credentials as follows:

4 points for each professional clear credential

3 points for each preliminary credential

2 points for intern credential

1 point for provisional internship permit or short-term staff permit

1 point for Cross-Cultural Language and Development certificate or its equivalent

1 point for Bilingual Cross-Cultural Language and Development certificate or its equivalent

5. The services set forth in the PKS resolution are particular kinds of services that may be reduced or discontinued within the meaning of Education Code section 44945. None of the reductions is of a mandated service.

¹ Full-Time Equivalent.

6. The District created a list of employees proposed to be laid off, “bumped,” or reassigned, taking into account the tie-breaking criteria, positively-assured attrition, leaves of absence, and non-reelections of temporary employees.

7. The District rescinded the accusation against respondent Jill Shoopman. Shoopman has agreed to transfer from her counselor position to a science position. She is not subject to layoff.

8. The District rescinded the accusations against Denise Eachus, Sergio Reyes, Michele Ryan and Ricardo Salgado. They are not subject to layoff.

9. Art teacher Rebecca Hopkins has a seniority date of January 13, 2011. The District seeks to retain her for .8 FTE of her position. She is subject to layoff for .2 FTE due to bumping by a more senior qualified employee.

10. Spanish teachers Esther Diaz-Martin, Denise Eachus, and Sergio Reyes (.6 FTE) have the same seniority date of August 16, 2010. Application of the tie-breaking criteria resulted in Diaz-Martin having the fewest tie-breaking points. Diaz-Martin is subject to layoff due to bumping by a more senior qualified employee.

11. Math teachers Thao Nguyen, Ricardo Salgado, Sergio Reyes (.4 FTE), and Michele Ryan have the same seniority date of August 16, 2010. Application of the tie-breaking criteria resulted in Nguyen having the fewest tie-breaking points. Nguyen is subject to layoff due to bumping by a more senior qualified employee.

12. Social Science teacher Nicole Piazza has a seniority date of October 7, 2010. Piazza is subject to layoff due to bumping by a more senior qualified employee.

13. Tersie Ndon’s seniority date is in dispute. On June 4, 2006, Ndon filed an application with the District to work as a substitute teacher, indicating that she would be available for employment on June 21, 2006. She worked at a District Children’s Center beginning in late June 2006. District records indicate that her fingerprint clearance information was sent on June 28, 2006; teachers cannot work before receiving fingerprint clearance. Other District records show that Ndon was paid at the substitute teacher rate of \$15 per hour in the summer of 2006. Ndon does not recall whether she signed a substitute teacher agreement with the District.

Children’s Center instructor Consuelo Deoniso was absent from work on June 12 through 16, July 25 and 31, and August 9 through 25, 2006. Catherine Giammona, Director of Human Resources maintains that Ndon served as a substitute for Deoniso. Ndon, on the other hand, recalled that Deoniso “was there everyday” and that she (Ndon) “was not doing Deoniso’s job.” Giammona’s testimony was more persuasive than Ndon’s testimony.

14. The District's seniority list shows Children's Center instructors Tersie Ndon and Rosalie Gietzen as having the same seniority date, August 28, 2006. Application of the tie-breaking criteria resulted in Ndon having fewer tie-breaking points than Gietzen.

15. A September 28, 2006, memorandum from then Superintendent Bob Nuñez (prepared by Director of Human Resources Giammona) sought board ratification of certificated personnel actions. The memorandum shows Rosalie Gietzen in a Probationary 1, .875 FTE Child Development position with an August 28, 2006, effective date. The memorandum shows Tersie Ndon in a Probationary 1, .875 FTE Child Development position with a September 1, 2006, effective date.

16. No permanent or probationary certificated employee with less seniority than a respondent is being retained to provide a service for which a respondent is credentialed and competent to render.

17. The reduction or discontinuation of services is related to the welfare of the district and of its pupils.

LEGAL CONCLUSIONS

1. The weight of the evidence demonstrated that Tersie Ndon did not become a probationary teacher until August 28 or September 1, 2006. Ndon applied for a substitute teacher position in June 2006 and was paid at a substitute teacher's hourly rate that summer. Her recollection of the events of summer 2006, for example that Consuelo Deonisio "was there everyday," was at odds with the testimony of Director of Human Resources Catherine Giammona as well as District records. Giammona's testimony was credible and persuasive.

Ndon's seniority date is August 28, 2006, at the earliest. That is the same seniority date as Rosalie Gietzen. Ndon has fewer tie-breaking points than Gietzen and is therefore subject to layoff.

It is possible that Ndon's seniority date is September 1, 2006. If that is the case, she is subject to layoff without resort to the tie-breaking criteria.

2. Because of the reduction or elimination of particular kinds of services, cause exists pursuant to Education Code section 44955 to give notice to respondents Rebecca Hopkins (for .2 FTE only), Esther Diaz-Martin, Tersie Ndon, Thao Nguyen, and Nicole Piazza that their services will not be required for the 2011-2012 school year. This cause solely relates to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949.

ORDER

1. The accusations against Denise Eachus, Sergio Reyes, Michele Ryan, Ricardo Salgado, and Jill Schoopman are dismissed.

2. Notice may be given to respondents Rebecca Hopkins (for .2 FTE only), Esther Diaz-Martin, Tersie Ndon, Thao Nguyen, and Nicole Piazza that their services will not be required for the 2011-2012 school year.

DATED:

STEVEN C. OWYANG
Administrative Law Judge
Office of Administrative Hearings

