

BEFORE THE  
GOVERNING BOARD OF THE  
PALOS VERDES PENINSULA UNIFIED SCHOOL DISTRICT  
STATE OF CALIFORNIA

In the Matter of the Reduction in Force of:

CERTIFICATED TEACHERS OF THE  
PALOS VERDES PENINSULA UNIFIED  
SCHOOL DISTRICT

Respondents.

OAH No. 2011031130

**PROPOSED DECISION**

Jennifer M. Russell, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Palos Verdes on April 19, 2011.

Sharon J. Ormond, Attorney at Law, represented Palos Verdes Peninsula Unified School District (District).

Kent Morizawa, Attorney at Law, represented respondents Jessica J. Ashenden, Paula H. Borstel, Curtis B. Chin, Sara L. Exner, Carla P. Ferrera, Lindsay Anne Gillman, Julie Anne Gingras, Kristy M. Giraud, Bryan D. Godhold, Adam D. Hamler, Brian S. Helmrich, Heidi J. Johannsen, Wendy Ann Keller, Phillip D. King, Suzanne M. Kipp, Allison Lehault, Michael B. Lehault, Christine M. Lopez, Ashley E. Maxwell, Amerika M. Mc Hugh, Livia A. McMullen, Andrea M. Pellicane, William J. Peterman, Jennifer L. Stoddart, Dana N. Tyson, Jacqueline A. Valerio, Karla Jeanne Vestal, Lilia Li Wang, and Adam D. Wolven, all of whom, with the exception of Ms. Exner, were present at the hearing.

Respondent Jessica F. Silberling appeared in propria persona.

Evidence was received by stipulation, testimony, and documents. The record was closed and the matter was submitted for decision on April 19, 2011.

FACTUAL FINDINGS

1. Walker Williams is the District's Superintendent. William Franchini is the District's Director of Human Resources. Their actions were taken in their official capacity. Mr. Williams made and filed the Accusations.
2. Respondents in this proceeding are certificated employees of the District.

3. On March 1, 2011, the District provided written notice to respondents pursuant to Education Code<sup>1</sup> sections 44949 and 44955 that their services would not be required for the 2011-2012 school year. Each written notice set forth the reasons for the District's decision and noted that 57.385 full time equivalent (FTE) positions would be reduced or discontinued.

4. On March 9, 2011, the District filed and thereafter served the Accusations and related documents on respondents. Each respondent appearing in this matter filed a Notice of Defense requesting a hearing for a determination of whether cause exists for not reemploying them for the 2011-2012 school year.<sup>2</sup> All prehearing jurisdictional requirements were met.

5. On February 24, 2011, the Board of Education (Board) of the District adopted Resolution No. 12-2010/11 (Resolution) reducing the following particular kinds of services (PKS) for the 2011-2012 school year:

K-5 Elementary Teaching Services	23.985 FTE
Secondary Art Teaching Services	1.60 FTE
Secondary English Teaching Services	4.00 FTE
Secondary Math Teaching Services	2.60 FTE
Secondary Physical Education Teaching Services	1.60 FTE
Secondary Physical Science Teaching Services	1.00 FTE
Secondary Life Science Teaching Services	.60 FTE
Secondary Social Studies Teaching Services	2.60 FTE
Secondary Chinese Teaching Services	1.00 FTE
Secondary Japanese Teaching Services	.20 FTE
Secondary Latin Teaching Services	.20 FTE
Secondary Spanish Teaching Services	1.20 FTE
Secondary French Teaching Services	.40 FTE

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<sup>1</sup> All statutory citations are to the Education Code, unless indicated otherwise.

<sup>2</sup> The District waived objections to several untimely Notices of Defense.

Adaptive Physical Education Teaching Services	.60 FTE
Special Education Teaching Services	4.00 FTE
Counseling Services	7.00 FTE
Nursing Services	1.00 FTE
Psychologist Services	1.00 FTE
Speech Therapist Services	2.80 FTE
<b>TOTAL CERTIFICATED POSITIONS:</b>	<b>57.385 FTE</b>

6. The Resolution exempts from layoff the services of certificated employees possessing credentials authorizing them to teach English Learner (“EL”) students. The Resolution states the following:

[T]his Board has determined that due to the population of English language learners with specialized educational needs within the District, a specific and compelling need exists to employ and retain certificated employees who have authorization to teach English Learner (“EL”) students, as determined by the California Commission on Teacher Credentialing, and the special training and experience that come therewith[.]

[C]ompliance with the provisions of the No Child Left Behind Act and the Williams Settlement require that EL students be served by certificated employees with appropriate EL authorizations. Thus, each failure to staff a classroom containing one or more EL students with a certificated employee possessing an appropriate EL authorization is a “mis-assignment” subject to sanction by the County Superintendent of Schools[.]

7. a. The Resolution authorizes the Superintendent or his designee to deviate from terminating certificated employees in order of seniority (“skip”) to retain a less senior employee possessing special training and experience to teach High School Drama.

[D]ue to the specific need of the District to hire and retain teachers who possess special training and experience to teach High School Drama, the Superintendent or designee is authorized to deviate from terminating certificated employees in order of seniority in instances where the less senior employee possesses special training and experience to teach High School Drama and will be assigned to teach Drama in the 2011-2012 school year.

b. Mr. Fanchini testified that Seth Cohen, number 576 on the District's seniority list, is a "Drama skip." Mr. Cohen's undisputed assigned first date of paid service is August 26, 2008. His undergraduate degree is in film and he has completed continuing education courses in theatre education. He holds a clear single subject credential in English. Mr. Cohen has experience in production, set design and cinematography. His active involvement in more than 25 stage productions and musicals since the summer of 1977 makes him a recognizable figure in the field. His professional affiliations include a board membership with the Drama Association of California. No other senior English teacher in the District possesses similar specialized expertise to manage and oversee the District's drama program.

c. The District properly skipped Seth Cohen pursuant to section 44955, subdivision (d) (1), set forth in Legal Conclusion 2. The manner in which the District chose to skip over its certificated employees to implement its layoffs was neither arbitrary nor capricious, but rather a proper exercise of its discretion.

8. The Resolution establishes tie-breaker criteria for determining the relative seniority of certified employees with the same date of first rendered paid service to the district. The criteria, which are set forth in Attachment 1 to the Resolution, provide that the order of layoff shall be determined according to the following criteria:

1. Possession of credentials, in order of priority:
  - (a) Clear professional, standard, life, or general teaching credential;
  - (b) Preliminary credential;
  - (c) Intern credential;
  - (d) Short-term staff permit (STSP), provisional internship credential (PIP);
  - (e) Waivers.
2. Breath of clear and preliminary credentials and authorizations, permitting assignment in the widest range of teaching or service areas, in order of priority:
  - (a) Multiple credentials, with the employee possessing the greatest number having greater seniority;
  - (b) A single credential with specific subject matter authorization(s), with the employee possessing the greatest number having greater seniority;

- (c) A single credential with introductory subject matter authorization(s), with the employee possessing the greatest number having greater seniority;
  - (d) A single credential with specific supplemental authorization(s), with the employee possessing the greatest number having greater seniority;
  - (e) A single credential with introductory supplemental authorization(s), with the employee possessing the greatest number having greater seniority;
  - (f) A single credential.
3. Possession of a clear or preliminary credential or subject matter authorization to teach or serve in the following areas, in order of priority:
- (a) Speech and Language
  - (b) RSP and SDC
  - (c) RSP
  - (d) SDC
  - (e) Math
  - (f) Sciences-including Health
  - (g) Foreign Languages
  - (h) Computer Applications/Business
  - (i) Fine Arts (Music, Art, Humanities)
  - (j) English-including Speech
  - (k) Social Studies/Social Science-including Psychology and Sociology
  - (l) Middle Subjects
  - (m) Early Childhood Education Specialist
  - (n) Librarian
  - (o) Pupil Personnel Services, Nursing

- (p) Physical Education
  - (q) Home Economics
  - (r) Administrative Services
  - (s) Designated Subjects Vocational Education
4. Possession of a clear or preliminary authorization to teach English Language Learners, in order of priority:
    - (a) Bilingual Cross Cultural Language and Academic Development (BCLAD), Bilingual Certified of Competence (BCC), or Bilingual Specialist Credential (BCS) certification;
    - (b) Cross Cultural Language and Academic Development (CLAD), Language Development Specialist Certificate;
    - (c) Specially Designed Academic Instruction in English (SDAIE) certification pursuant to SB 1969 or SB 395.
  5. Number of verified years of certificated employee experience as determined by actual step placement on the Palos Verdes Peninsula Unified School District Certificated Salary Schedule(s), with the employee possessing the greatest number of years having greater seniority.
  6. Academic degrees from an accredited institution of higher education, in order of priority:
    - (a) Possession of a Doctorate Degree, earliest date prevails;
    - (b) Possession of a Masters Degree, earliest date prevails;
    - (c) Two bachelors degrees, earliest date prevails;
    - (d) A single bachelors degree, earliest date prevails.
  7. Number of undergraduate majors and minors, as indicated on employees' transcripts from accredited institutions of higher education, in order of priority:
    - (a) Double majors;
    - (b) Single major and two minors;

(c) Single major and single minor;

(d) Single major.

8. Number of total semester credits earned at an accredited institution of higher education after earning a Bachelors Degree, with the employee possessing the greatest number of credits having greater seniority.

9. Number of total semester credits earned at an accredited institution of higher education within the Bachelors Degree, with the employee possessing the greatest number of credits having greater seniority.

10. Assuming that the preceding paragraphs do not resolve all ties between employees having the same seniority date, the tie will be broken by drawing of lots with the employee drawing the highest number being regarded as most senior.

9. The services set forth in Factual Finding 5 are particular kinds of services which may be reduced or discontinued within the meaning of section 44955.

10. The Board took action to reduce the services set forth in Factual Finding 5 because of uncertainty surrounding future State funding. The decision to reduce services was not related to the capabilities and dedication of the individuals whose services are proposed to be reduced or eliminated. The decision to reduce the particular kinds of services is neither arbitrary nor capricious but is rather a proper exercise of the District's discretion.

11. Mr. Franchini was responsible for implementation of the technical aspects of Board's Resolution. He reviewed information in multiple personnel files as well as data from the California Commission on Teacher Credentialing to compile a tentative seniority list containing seniority dates, current assignments, and credentials and certifications. He distributed the list to certificated employees within the District for them to verify, update or correct pertinent information.

12. The District used the seniority list to develop a proposed layoff and "bumping" list of the least senior employees currently assigned in the various services being reduced. The District then determined whether more senior employees affected by the layoffs held credentials in another area and were entitled to "bump" other less senior employees. In determining who would be laid off for each kind of service reduced, the District counted the number of reductions not covered by the known vacancies, and determined the impact on incumbent staff in inverse order of seniority. The District then checked the credentials of affected individuals and determined whether they could "bump" other employees.

13. The District properly considered all known attrition, resignations, retirements and requests for transfer in determining the actual number of layoff notices to be delivered to employees by March 15, 2011.

14. The District rescinded layoff notices to Sabrina R. Besson, Guy Russell Gardner, Christina K. Hambel, Laura Christina Kawasaki, Leslie A. Rowe, and Christopher A. Wilson.

15. Amerika McHugh, number 561 on the District's seniority list, has an undisputed August 1, 2008 seniority date. She contends that the District failed to apply the tie-breaker criterion of possession of a clear or preliminary credential authorization to serve in Administrative Services to exempt her from the District's layoffs. Ms. McHugh holds a Certificate of Eligibility stating that she "has completed the college or university program and all other requirements for the preliminary Administrative Services Credential and is authorized to seek employment in an administrative position."<sup>3</sup> Although *authorized* to do so, Ms. McHugh is not currently employed in an administrative position. As a consequence, she holds only a Certificate of Eligibility and not, by contrast, a Preliminary Administrative Services Credential that would trigger an application of the above mentioned tie-breaker criterion. The District properly identified Ms. McHugh as an employee subject to layoff.

16. a. Michael Lehault, number 569 on the District's seniority list, and Allison Lehault, number 575 on the District's seniority list, dispute their assigned August 26, 2008 seniority date. The District originally hired both Lehaults on August 28, 2002. After five years of service, the Lehaults requested leave from the District to relocate to New Jersey to teach in a public school so that they could "fulfill [their] financial obligations of a mortgage and other bills." They contend that Mr. Francini advised them that a District policy prohibited them from retaining their employment with the District while simultaneously teaching elsewhere. They further contend that the District's policy was implemented in a discriminatory manner to permit others to take leave to teach at private schools, but prevented them from taking leave to teach at another public school. They contend that such discriminatory implementation of District policy forced their resignation from the District in June 2007.

b. On August 26, 2008, the District re-employed the Lehaults and restored their tenure status, but not their original August 28, 2002 seniority date. The Lehaults contend they are entitled to their original August 28, 2002 seniority date, which would result in a change of their relative seniority on the District's seniority list. The District asserts that the Lehaults are precluded from challenging their assigned August

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<sup>3</sup> The Commission On Teacher Credentialing's *Administrative Services Credential for Administrators Prepared in California* indicates that "California has a two-tier credential structure. A five-year preliminary credential is the first credential issued after an individual meets basic requirements. A clear credential is issued when all credential requirements have been completed." There are five requirements, including actual verified employment in an administrative position, which a candidate must satisfy for the Five-Year preliminary Credential.

26, 2008 seniority date because they unsuccessfully raised the same issue in a prior layoff proceeding.

c. In the prior layoff proceeding, the Lehaults relied on section 44931 to support their argument that they were entitled to a restoration of their original August 28, 2002 seniority date. The Administrative Law Judge found the Lehaults' reliance on section 44931 misplaced because their seniority date after re-employment is determined by section 44848, which does not restore a re-hired employee's original date of employment. The Lehaults additionally argued that they should have been allowed to take a leave of absence, rather than resign. The Administrative Law Judge found this contention "was not established by the evidence." The Administrative Law Judge determined that the "District properly assigned a seniority date of August 26, 2008 to Michael Lehault and Allison Lehault, which was their first day of paid service after their reemployment." See *In the Matter of the Accusation Against Certain Certificated Employees of the Palos Verdes Peninsula Unified School District*, No. 2010030325 (April 26, 2010). On May 3, 2010, the Board adopted the Administrative Law Judge's Proposed Decision. The Administrative Law Judge's factual findings and legal conclusions in the prior layoff proceedings were either not challenged in court or no evidence of any such challenge were introduced. For reasons set forth in Legal Conclusions 6 and 7, the Lehaults' challenge to their assigned August 26, 2008 seniority date is rejected. The District correctly identified Michael Lehault and Alison Lehault as employees subject to layoff.

17. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render.

#### LEGAL CONCLUSIONS

1. Section 44949 provides in pertinent part as follows:

(a) 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 for the reasons specified in Section 44955, 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 therefore.

2. Section 44955 provides in pertinent part as follows:

(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 in any school year the average daily attendance in all of the schools district for the first six months in which school is in session shall have declined . . . , 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 by reason of any of these conditions 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 certified 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 on needs of the district and the students thereof. Upon the request of any employee whose order of termination is so determined, the governing board shall furnish . . . a statement of the specific criteria used in determining the order of termination and the application of the criteria in ranking each employee relative to the other employees in the group . . . .

(c) [S]ervices 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 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. . . .

(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 demonstrated a specific need for personnel to teach a specific course or course of study . . . 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.

3. All notice and jurisdictional requirements set forth in sections 44949 and 44955 were met.

4. The services set forth in Factual Finding 5 are particular kinds of services which may be reduced or discontinued within the meaning of section 44955. The Board's decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion. Cause for the reduction or discontinuation of services relates solely to the welfare of the District's schools and pupils within the meaning of section 44949.

5. A school district may reduce services within the meaning of section 44955, subdivision (b), "either by determining that a certain type of service to students shall not, thereafter, be performed at all by anyone, or it may 'reduce service' by determining that proffered services shall be reduced in extent because fewer employees are made available to deal with the pupils involved." (*Rutherford v. Board of Trustees* 91976) 64 Cal.App.3d 167, 178-179.)

6. Collateral estoppel precludes re-litigation of issues argued and decided in prior proceedings. (*Zapata v. Department of Motor Vehicles* (1991) 2 Cal.App.4th 108.) The following five threshold requirements must be satisfied to establish collateral estoppel: (a) the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding, (b) the issue must have been actually litigated in the former proceeding, (c) the issue must have been necessarily decided in the former proceeding, (d) the decision in the former proceeding must have been final and on the merits, and (e) the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.

Collateral estoppel is applicable to administrative agency decisions when the agency acts in a judicial capacity resolving disputed issues of facts presented for its adjudication. The agency adjudicatory proceeding should be conducted in an impartial manner and afford the parties an opportunity to examine and cross-examine witnesses under oath and to offer evidence and argument. A record of the proceedings should be maintained. (*People v. Sims* (1992) 32 Cal.3d 468.)

7. The issue of the Lehaults' assigned August 26, 2008 seniority date is the "identical" issue previously decided in *In the Matter of the Accusation Against Certain Certificated Employees of the Palos Verdes Peninsula Unified School District*, No. 2010030325 (April 26, 2010). The Administrative Law Judge determined that the "District properly assigned a seniority date of August 26, 2008 to Michael Lehault and Allison Lehault, which was their first day of paid service after their reemployment." The

issue was unquestionably “actually litigated.” Judicial economy does not permit the Lehaults to proffer now, in the present proceedings, in piece meal fashion, purported evidence of discriminatory application of an alleged District policy in support of their challenge to their assigned August 26, 2008 seniority date. Enforcing repose requires resolving all issues and controversies surrounding their assigned August 26, 2008 seniority date once, not more than once.

The issue was “necessarily decided” because the assigned August 26, 2008 seniority date was the basis upon which relative seniority was determined for implementation of the District’s layoffs, which in turn was determined to be a lawful exercise of the District’s discretion. The Administrative Law Judge’s decision in *In the Matter of the Accusation Against Certain Certificated Employees of the Palos Verdes Peninsula Unified School District*, No. 2010030325 (April 26, 2010) was “final” in the absence of any subsequent judicial review in accordance with the provisions of the Code of Civil Procedure. The decision was “on the merits” of the assigned August 26, 2008 seniority date. Michael Lehault and Allison Lehault, the parties against whom preclusion is sought, were the same parties who actually litigated the assigned August 26, 2008 seniority date issue in *In the Matter of the Accusation Against Certain Certificated Employees of the Palos Verdes Peninsula Unified School District*, No. 2010030325 (April 26, 2010).

The threshold requirements for application of collateral estoppel are met in this case. No public policy consideration precludes application of collateral estoppel herein. Each time the District wishes to layoff permanent and probationary employees it must do so according to the strict requirements of the Education Code. Moreover, in determining whether they are properly identified in any future layoffs, the Lehaults have a continuing right of assurance that their *relative position* on the District’s seniority list is correct. The Lehaults cannot, however, re-litigate over and over their assigned August 26, 2008 seniority date.<sup>4</sup>

8. Cause exists pursuant to sections 44949 and 44945 to reduce the number of certificated employees of the District due to the reduction or discontinuation of the particular kinds of services set forth in Factual Finding 5. The District properly identified the certificated employees providing the particular kinds of services that the Board directed be reduced or discontinued.

#### ORDER

The Palos Verdes Peninsula Unified School District may give notice to respondents Jessica J. Ashenden, Paula H. Borstel, Curtis B. Chin, Sara L. Exner, Carla P. Ferrera, Lindsay Anne Gillman, Julie Anne Gingras, Kristy M. Giraud, Bryan D. Godhold, Adam D. Hamler, Brian S. Helmrich, Heidi J. Johannsen, Wendy Ann Keller,

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<sup>4</sup> Nothing in this Legal Conclusion precludes the District from assigning a new and different seniority date to the Lehaults should they again resign and the District again re-employs them at another time.

Phillip D. King, Suzanne M. Kipp, Allison Lehault, Michael B. Lehault, Christine M. Lopez, Ashley E. Maxwell, Amerika M. Mc Hugh, Livia A. McMullen, Andrea M. Pellicane, William J. Peterman, Jessica F. Silberling, Jennifer L. Stoddart, Dana N. Tyson, Jacqueline A. Valerio, Karla Jeanne Vestal, Lilia Li Wang, and Adam D. Wolven, that their services will not be required for the 2011-2012 school year.

Dated: May 6, 2011

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JENNIFER M. RUSSELL  
Administrative Law Judge  
Office of Administrative Hearings