

BEFORE THE BOARD OF EDUCATION
OF THE BEAR VALLEY UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Employment Status of:

SUZY CARPENTER, et al.,

Respondents.

OAH No. 2012031117

PROPOSED DECISION

Robert Walker, Administrative Law Judge, State of California, Office of Administrative Hearings, heard this matter in Blue Jay, California, on April 20, 2012.

Tod M. Robbins, Attorney at Law,¹ represented the complainant, the superintendent of the Bear Valley Unified School District.

The respondents are listed in exhibit A.

Michael Hersh, Staff Attorney, Department of Legal Services,² California Teachers Association, represented the respondents listed in exhibit B.

No appearance was made by or on behalf of Jana Roberts.

The matter was continued for 14 days to May 4, 2012, to provide the parties with an opportunity to submit briefs on the following issue: When teachers share a seniority date and all teachers with that date are given preliminary layoff notices, must the district, nevertheless, apply tie-breaking criteria in order to establish an order of termination? Complainant submitted a brief that was marked for identification as exhibit 19. Respondents submitted a brief that was marked for identification as exhibit A.

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²Michael Hersh, Staff Attorney, Department of Legal Services, California Teachers Association, P.O. Box 2153 Santa Fe Springs, California 90670-0153.

The continuance was granted for good cause pursuant to Government Code section 11524. Thus, pursuant to Education Code³ section 44949, subdivision (e), “the dates prescribed in [Code section 44949], subdivision (c), that occur on or after the date of granting the continuance and the date prescribed in subdivision (c) of Section 44955 that occurs on or after the date of granting the continuance shall be extended for a period of time equal to the continuance.”

DEFAULT

As to Jana Roberts, on proof of compliance with Government Code sections 11505 and 11509, this matter proceeded as a default pursuant to section 11520.

FACTUAL FINDINGS

General Findings Concerning Statutory Requirements

1. Code sections 44949 and 44955 provide for two notices to be given in connection with terminating certificated employees. The first notice, which will be referred to as the Preliminary Layoff Notice, is given by the superintendent. It is given to the governing board and to the employees the superintendent recommends for layoff. The Preliminary Layoff Notice gives the board and the employees notice that the superintendent recommends that those employees be laid off. The superintendent must give the Preliminary Layoff Notice no later than March 15. There is no requirement that a governing board take any action in March. But while it is unnecessary, governing boards usually adopt a resolution ratifying the superintendent’s recommendations.

2. The second notice is a notice of a governing board’s decision to terminate the services of an employee. That notice is provided for in Section 44955 and must be given before May 15. That notice advises a teacher that the district will not require his or her services for the ensuing school year. That notice will be referred to as a Termination Notice.

3. In this case, not later than March 15, the superintendent notified the governing board and the respondents that he recommended that the respondents not be retained for the ensuing school year.

4. The Preliminary Layoff Notice stated the reasons for the recommendation. The recommendation was not related to respondents’ competency.

³ All references to the Code are to the Code unless otherwise specified.

5. A Preliminary Layoff Notice was delivered to each respondent, either by personal delivery or by depositing the notice in the United States mail, registered, postage prepaid, and addressed to respondent's last known address.

6. The Preliminary Layoff Notice advised each respondent as follows: He or she had a right to a hearing. In order to obtain a hearing, he or she had to deliver a request for a hearing in writing to the person sending the notice. The request had to be delivered by a specified date, which was a date that was not less than seven days after the notice was served.⁴ And the failure to request a hearing would constitute a waiver of the right to a hearing.

7. Respondents either timely filed written requests for a hearing or obtained a waiver of their failure to file. An accusation was timely served on respondents. Respondents were given notice that, if they were going to request a hearing, they were required to file a notice of defense within five days after being served with the accusation.⁵ Respondents either filed timely notices of defense or obtained a waiver of their failure to file. All prehearing jurisdictional requirements were either met or waived.

8. The governing board of the district resolved to reduce or discontinue particular kinds of services. Within the meaning of Section 44955, the services are "particular kinds of services" that can be reduced or discontinued. The decision to reduce or discontinue these services was not arbitrary or capricious but constituted a proper exercise of discretion.

Services the District Intends to Reduce or Discontinue

9. The governing board of the district determined that, because particular kinds of services are to be reduced or discontinued, it is necessary to decrease the number of permanent or probationary employees in the district.

10. The particular kinds of services the governing board of the district resolved to reduce or discontinue are:

⁴ Employees must be given at least seven days in which to file a request for a hearing. Code section 44949, subdivision (b), provides that the final date for filing a request for a hearing "shall not be less than seven days after the date on which the notice is served upon the employee."

⁵ Pursuant to Government Section 11506, a party on whom an accusation is served must file a notice of defense in order to obtain a hearing. Code section 44949, subdivision (c)(1), provides that, in teacher termination cases, the notice of defense must be filed within five days after service of the accusation.

Particular Kind of Service	Full Time Equivalent
Continuation High School Teaching Services	1
Continuation High School Special Education Teaching Services	1
High School Social Studies Teaching Services	1
High School English Teaching Services	1
High School Math Teaching Services	1
High School Science Teaching Services	0.4
High School Spanish Teaching Services	0.6
High School Freshman Studies Teaching Services	0.4
High School French Teaching Services	0.4
High School Physical Education Teaching Services	0.6
Teacher on Assignment - Elementary Instructional Coach	3
Teacher on Assignment - Middle School Instructional Coach	1
Teacher on Assignment - High School Instructional Coach	0.3
Elementary K-6 Classroom Teaching Services	6
Middle School P.E. Teaching Services	0.4
Middle School Math Teaching Services	0.2
Total	18.3 F.T.E.

Notices to be Rescinded

11. The district stipulated that it will rescind the Preliminary Layoff Notices served on the following respondents:

Carpenter, Suzy
Kendall, Diane

Use of Tie-Breaking Criteria Based on the Current Needs of the District and Students

12. Pursuant to Section 44955, subdivision (b), the governing board of the district adopted criteria for determining the order of termination as among employees who first rendered paid service on the same day. In the event a district terminates the services of some but not all of a group of teachers who first rendered paid service on the same day, section 44955, subdivision (b), requires a district to adopt criteria that are based on “needs of the district and the students thereof.” The district’s tie-breaking criteria are as follows:

[I]n the event of a certificated layoff the following criteria shall be applied in order based on information on file as of February 1, [2011], one step at a time until the tie is broken, to resolve ties in seniority between certificated employees:

1. Highly Qualified Status under NCLB in area of assignment.
2. Possession of an authorization to teach English Language Learners in order of priority:
 - a. Bilingual Cross Cultural Language and Academic Development (BCLAD)
 - b. Cross Cultural Language and Academic Development (CLAD), SB 1969 or SB 395 Certificate, Language Development Specialist Certificate, Supplemental Authorization for English as a Second Language, Specially Designated Academic Instruction in English (SDAIE), other
3. Credential status in area of assignment, in order of priority:
 - a. Clear, Life, Standard Secondary, etc.
 - b. Preliminary
 - c. Intern
 - d. Provisional, STC, other
4. Possession of a Clear or Preliminary Single Subject credential in the following areas, in order of priority:
 - a. Special Education
 - b. Math
 - c. Science
 - d. Social Science
 - e. English
5. Possession of a supplemental authorization to teach in the following areas, in order of priority:
 - a. Math
 - b. Science
 - c. Social Science
 - d. English
6. Total number of Clear or Preliminary credentials in different subject areas.

7. Total number of supplementary authorizations in different subject areas.
8. Number of years of credentialed teaching experience prior to employment with District, as indicated by initial salary schedule placement.
9. Possession of a Doctorate Degree, earliest date prevails.
10. Possession of a Masters Degree, earliest date prevails.
11. Total number of post-secondary credits on file with the District by February 1.
12. If ties cannot be broken by using the above criteria then order of seniority shall be determined by a random drawing among employees in the individual tie.
13. The district concluded that there was no need to apply the tie-breaking criteria.

Does a Teacher Have a Right to Know His or Her “Order of Termination” in Order to be Able to Anticipate the Likelihood of Being Rehired?

14. Code section 44955 concerns the rights of teachers regarding termination of their services because of a decline in average daily attendance (ADA) or because a particular kind of service (PKS) is to be reduced or discontinued. Generally, teachers have a right to have their services terminated according to their seniority. Code section 44955, subdivision (b), speaks in terms of the services of no permanent employee being terminated while a less senior employee is retained to render a service the permanent employee is certificated and competent to render.

15. Both permanent and probationary teachers whose services have been terminated pursuant to Code section 44955 have reappointment rights and rights to be preferred for substitute teaching positions. Pursuant to Code section 44956, permanent employees have those rights for 39 months, and pursuant to Code section 44957, probationary employees have those rights for 24 months. Generally, employees hold those rights “in the order of original employment” (Ed. Code § 44956, subd. (a)(1), and § 44957, subd. (a)(1).

16. Code section 44845 provides that an employee is deemed to have been employed on the date on which he or she *first rendered paid service in a probationary position*.

17. A group of teachers may have been employed on the same day so that, as among the members of the group, there is no order of employment and no one is senior to anyone else. With regard to seniority, the members of the group are tied.

18. Code section 44955, subdivision (b), provides for breaking ties with regard to termination. That subdivision provides, in part:

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. Upon the request of any employee *whose order of termination is so determined*, the governing board shall furnish in writing no later than five days prior to the commencement of the hearing held in accordance with Section 44949, 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. (Italics added.)

19. Code section 44846 provides for breaking ties with regard to reappointment. That section provides, in part:

As between two or more employees who first rendered paid service to the district on the same date, and who, following the termination of services, have a statutory preference to reappointment in the order of original employment, the governing board shall determine the order of reemployment solely on the basis of the needs of the district and the students thereof. Any terminated employee subject to the conditions of this section shall, upon request, be furnished in writing, no later than 15 days following such request, the reasons and basis of the needs of the district and the students thereof *utilized by the governing board in determining which employee or employees shall be reappointed*. (Italics added.)

20. In the present termination case, groups of employees share the same seniority dates, but everyone in each group is slated for layoff. For example, nine teachers share a seniority date of July 28, 2008, and all nine are slated for layoff. Thus, the district did not need to apply tie-breaking criteria in order to determine which teacher or teachers were to be laid off.

21. The respondents in each group contend that the district is not permitted to terminate the services of everyone in the group without determining each individual's "order of termination." They contend they have a right to be ranked in a particular order of termination so that they can make informed decisions about whether to look elsewhere for employment.

22. In the present case, the district stipulated as follows: If, during the period of preferred right to reappointment, the number of employees is increased or the discontinued services are reestablished, the district will apply tie-breaking criteria in order to establish the order in which teachers have a right to be rehired.

23. The teachers who are in the groups with the same seniority dates contend that the district's failure to apply tie-breaking criteria deprives them of information to which they have a right – information they need in order to be able to make informed decisions about their lives. Counsel for respondents points out that "Knowing where one stands specifically in an order of reinstatement permits an unemployed teacher to make critical life decisions: Do I move my family elsewhere? Accept employment elsewhere? Do I go back to school to obtain a new credential?"

24. Counsel for respondents infers that the tie-breaking provision in Code section 44955, subdivision (b), which concerns termination, somehow applies to reappointment. But that cannot be. The legislature set out two tie-breaking provisions – Code section 44955, subdivision (b), which concerns termination, and Code section 44846, which concerns reappointment. Both provide that a school board shall base its tie-breaking decisions solely on the needs of the district and the students thereof.

25. Nothing, however, assures that the needs of the district and the students will be the same at the time of a termination and the time when a district is in a position to reappoint some of the teachers whose positions were terminated. It is quite possible that a district would have one set of needs at the time of a termination and a different set of needs at a later time when it was in a position to reappoint.

26. Moreover, the Legislature did not give teachers the same right to transparency concerning the two situations. With regard to termination, a teacher has a right to transparency only if his or her order of termination was determined by tie-breaking. Thus, with regard to a group of teachers who share a seniority date and who are all being laid off, there is no right to transparency. On the other hand, a teacher whose order of termination was determined by tie-breaking has a right to transparency – a right to detailed information about the tie-breaking. A district must provide that information no later than five days prior to the commencement of the hearing held in accordance with Section 44949. A teacher who intends to challenge the tie-breaking process as it was applied needs a few days before a hearing in order to prepare.

27. Teachers with reappointment rights have different rights regarding transparency. That right to transparency comes into play when a governing board determines

which employee or employees *shall be reappointed*. A teacher who was not one of those reappointed may make a request for the reasons and basis for the decisions and has a right to that information within 15 days.

28. Thus the tie-breaking provisions are discrete, and there is no reason to infer that the one the Legislature specified for termination has any application to reappointment.

29. Counsel for respondents contends that the board's resolution required application of the tie-breaking criteria whether or not it was needed to determine the order of termination. The board's resolution provided, in part, "[T]he following criteria shall be applied . . . until the tie is broken, to resolve ties in seniority . . ." The resolution should be read in the context of Code section 44955, which concerns "determining the order of termination." There is nothing about the board's resolution that suggests the board intended to go beyond what the code requires, and the requirement in the code concerns how and order of termination shall be determined. The code does not require that an order be determined when there is no need for one.

30. Counsel next contends that Code section 44955, subdivision (b), must be read as requiring application of tie-breaking criteria whether or not it is needed to determine the order of termination because there is no administrative proceeding in which teachers can challenge application of tie-breaking criteria in connection with reappointment rights. The Legislature chose to provide teachers with remedies in an administrative proceeding regarding termination. There are many matters, however, regarding which the Legislature has not chosen to provide a hearing at an administrative level. The fact that there is no administrative remedy concerning a matter is never a justification for expanding the scope of an administrative remedy concerning something else.

31. In *Karbach v. Board of Education* (1974) 39 Cal.App.3d 355, the Court of Appeal dealt with a circumstance in which teachers with relatively high seniority had been lulled into a false sense of security because it appeared that the superintendent had erred substantially on the side of being overly cautious in calculating how many notices to send.

32. In order to preserve a board's right to do ADA or PKS terminations in May, a superintendent must comply with preliminary notice procedures no later than *March 15*. Section 44949, which provides for the preliminary notice, does not require a governing board to do anything. No later than *March 15*, a superintendent must give notice to both the governing board and the employee that the superintendent recommends certain ADA or PKS terminations. After a superintendent serves a preliminary notice and before a final notice may be served, the employee is entitled to a hearing to determine whether there is cause not to reemploy him or her. A final notice of such termination, in order to be effective, must be given before the 15th of May.⁶

⁶ Ed. Code, § 44955(c).

33. *Karbach* concerned a circumstance in which a superintendent served a preliminary notice and specified *ADA layoffs* as the reason for his recommendations. On April 4 the board adopted a resolution in which it reported a 6.06% drop in average daily attendance. Six percent of the teachers equaled approximately 13 teachers. The superintendent had caused notices to be sent to 43 teachers – substantially more than six percent. Thus, many of the more senior teachers to whom notices had been sent had no real reason to think that they might be laid off – that is, they had no real reason to think that they needed to look for other jobs. The district then, pursuant to the drop in average daily attendance, sent final termination notices to 13 teachers. *But the district also sent final termination notices to an additional 30 teachers pursuant to a reduction in or discontinuation of particular kinds of services.* The teachers filed suit, and the Court of Appeal held that, because the superintendent had not specified PKS layoffs in the preliminary notices as a reason for his recommendation, the board could not terminate the services of teachers pursuant to a reduction in or discontinuation of services. After referring to the legislative history of the section that requires a preliminary notice (now section 44949), the court said:

This history is consistent with the board’s concession in its brief that a primary purpose of the notice of recommendation is “to notify the employee of the probability that his services will not be required for the ensuing year so that he may consider looking elsewhere for employment.”

Early notification is more significant in relation to reductions in the number of employees of a school district than it is in case of individual dismissal for cause. Greater competition for alternate jobs is logically to be expected, and the pendency of the proceedings is no impediment to obtaining them, as it might be in the case of a dismissal for cause.

It is, therefore, appropriate to construe the provisions of the 1970 amendment to section 13447 [now 44955] as intending to insure that, before the March 15 date, the affected employee be informed of facts upon which he can reasonably assess the probability he will not be reemployed.

Under the facts of this case, it is easily demonstrated that the reason stated in the notice of recommendation did not inform many of the petitioners that their jobs were in jeopardy. A list of the first and second year probationary teachers, in order of seniority, was received in evidence by the hearing officer. [¶] . . . [¶] The teacher with highest seniority on said list is petitioner Judith Udsko; presumably, 42 teachers were subject to termination before she was. Since the reduction in average daily attendance was approximately 6 percent, which would justify

termination of only 13 teachers, petitioner Udko was not given any reasonable basis for seeking alternative employment.

Though the above example may not be typical, it serves to illustrate the fact that if the requirement of notice of recommendation is to have its intended effect, the subsequent proceedings must be limited to termination for a reason stated therein.⁷

34. The dilemma the teachers in the present case face is not the same as the dilemma Ms. Udko and others in *Karbach* faced. In *Karbach*, Ms. Udko and other teachers with relatively high seniority were lulled into a false sense of security because it appeared that the superintendent had erred substantially on the side of being overly cautious in calculating how many notices to send.

35. The present case is very different. Even if teachers knew their relative ranking within the group with whom they share a seniority date, they would not know whether the district was going to be able to reappoint some teachers.

36. In cases after *Karbach*, courts have held that, in a preliminary lay-off notice, nothing more is required than to say that the superintendent has recommended ADA or PKS layoffs or both ADA and PKS layoffs. *Santa Clara Federation of Teachers*⁸ was a case in which each respondent received written notice that it had been recommended to the board that his or her services would not be required for the ensuing school year because of a decline in average daily attendance and because of a decision to reduce particular services. The trial court found these notices invalid, “in that they failed to specify the specific reason for the recommendation for termination of the individual Petitioners.” The court of appeal reversed. The court acknowledged the holding in *Karbach*⁹ as follows:

Because the March 15 notice is intended to insure that the affected employee is informed of the facts upon which he can reasonably assess the probability he will not be reemployed, the notice must state the reasons for the recommendation. If the notice specifies only one of the two statutory reasons for dismissal, the Board may not later attempt to justify dismissal on the other ground.¹⁰

⁷ *Karbach*, 39 Cal.App.3d at p. 362.

⁸ *Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App3d 831.

⁹ *Karbach v. Board of Education* (1974) 39 Cal.App.3d 355.

¹⁰ *Id.* at p.p. 361-362.

37. But the court in *Santa Clara* held:

The March 15 notice is only the first step in the termination process. *Karbach* does not require that this preliminary notice specify the precise number of teachers to be terminated or the specific positions to be eliminated; those details emerge as the administrative hearing process progresses. It is enough that the Board specify in the March 15 notice the statutory grounds set forth in section 13447 (now section 44955) for staff reduction.

38. In *San Jose Teachers Association v. Allen*¹¹, the court followed *Santa Clara*. “The preliminary notice is sufficient if it specifies the statutory grounds set forth in section 44955.”¹²

39. Respondents failed to establish that the district’s failure to apply the tie-breaking criteria deprived the respondents of information to which they were entitled.

Deviation from Seniority (Skipping)

40. Pursuant to Section 44955, subdivision (d)(1), a district may deviate from terminating the services of employees in the order of seniority, i.e., a district may *skip* teachers with a particular qualification and terminate the services of more senior teachers who do not possess that qualification. In this case, the district did not engage in skipping.

Right to be Retained According to Seniority and Qualifications – (Bumping)

41. The second paragraph of section 44955, subdivision (c), does not add to teachers’ seniority rights. It does, however, make it clear that governing boards must make assignments in such a way as to protect seniority rights. Employees must be retained to render any service their *seniority* and qualifications entitle them to render. Thus, if a senior teacher whose regular assignment is being eliminated is certificated and competent to teach a junior teacher’s courses, the district must retain the senior teacher and reassign him or her to render that service. This is commonly referred to as bumping. The district must either reassign or terminate the services of the junior employee.

42. In this case the district identified teachers who had a right to bump into positions held by less senior employees and either reassigned or sent layoff notices to those less senior employees.

¹¹ *San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627.

¹² *Id.* at p. 632.

Mandated Services

43. State and federal laws mandate that certain services be provided at or above mandated levels. There was no evidence that the district is reducing those services below mandated levels.

Summary of Findings Regarding Retention of Employees

44. Pursuant to the district's stipulation, the district shall rescind the Preliminary Layoff Notices served on the respondents listed in Finding 11.

45. With regard to respondents who are permanent employees, the district will not be retaining any probationary employee to render a service that such a respondent is certificated and competent to render.

46. With regard to respondents who are permanent employees, the district will not be retaining any employee with less seniority than such a respondent has to render a service that the respondent is certificated and competent to render.¹³

47. With regard to respondents who are either permanent or probationary employees, the district will not be retaining any employee with less seniority than such a respondent has to render a service that the respondent's qualifications entitle him or her to render.¹⁴

LEGAL CONCLUSIONS

General Conclusions

1. Jurisdiction in this matter exists under Sections 44949 and 44955. All notice and jurisdictional requirements contained in those sections were satisfied.

2. Within the terms of Sections 44949 and 44955, the district has cause to reduce or discontinue particular kinds of services and to give Termination Notices to certain respondents. The cause relates solely to the welfare of the schools and the pupils.

¹³ Section 44955, subdivision (b), provides seniority protection for a permanent employee in terms of the services *the employee is "certificated and competent to render."*

¹⁴ Section 44955, subdivision (c), provides seniority protection for both permanent and probationary employees in terms of the services *an employee's "qualifications entitle [him or her] to render."*

Cause Exists to Terminate the services of Certain Respondents

3. Cause does not exist to terminate the services of the respondents listed in Finding 11. With that exception, cause exists to give notice to the respondents that their services will not be required for the ensuing school year.

ORDER

1. Pursuant to stipulation, the district shall rescind the Preliminary Layoff Notices served on the following respondents, and the district shall not give Termination Notices to them:

Carpenter, Suzy
Kendall, Diane

2. As to those respondents, the accusation is dismissed.

3. The district may give Termination Notices to the remaining employees who were served with Preliminary Layoff Notices.

Dated: May 10, 2012

ROBERT WALKER
Administrative Law Judge
Office of Administrative Hearings

EXHIBIT A

EMPLOYEES WHO SUBMITTED A REQUEST FOR HEARING

BEAR VALLEY UNIFIED SCHOOL DISTRICT

2012

Carter-Sokolowski, Deneece
Edwards, Rachel
Ellis, Amy
Hahn, Michael
Jaeger, Dottie
Kent, John
Little, Jeremy

Maybin, Jennifer
McLinn, Andrea
Meagher, Sharon
Oberneder, Susan
Parks, Karin
Pierce-Estes, Lynda
Roberts, Jana
Ward, Shauna
Williams, Katherine
Wright, Joy

Carpenter, Suzy
Kendall, Diane

EXHIBIT B
 RESPONDENTS REPRESENTED BY MR. HERSH
 BEAR VALLEY UNIFIED SCHOOL DISTRICT
 2012

Carter-Sokolowski, Deneece
Edwards, Rachel
Ellis, Amy
Hahn, Michael
Jaeger, Dottie
Kent, John
Little, Jeremy

Maybin, Jennifer
McLinn, Andrea
Meagher, Sharon
Oberneder, Susan
Parks, Karin
Pierce-Estes, Lynda
Ward, Shauna
Williams, Katherine
Wright, Joy

Carpenter, Suzy
Kendall, Diane