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BEFORE THE GOVERNING BOARD OF THE
LONG BEACH UNIFIED SCHOOL DISTRICT

In the Matter of the Accusation Against:
Certificated Employees
By
Long Beach Unified School District

OAH No. 2011020278
DISTRICT'S CLOSING BRIEF
Hon. Vincent H. Nafarrete
Hearing Dates: April 4, 5, 6, 7, & 11, 2011

I.
INTRODUCTION

In the face of continuing reductions to public education funding, the Long Beach Unified School District determined to reduce its certificated staff by more than 700 full-time equivalent positions for the 2011-2012 school year. The matter was heard by the Honorable Vincent Nafarrete over five days in April 2011. Dozens of Respondents testified regarding various issues, including individual seniority dates, individuals' purported ability to bump less-senior employees, the District's decision to skip employees with particular training, and in some cases, claims of fairness. The District responds here to the arguments made at hearing by Respondents, both represented and unrepresented. The District addressed some of these issues in its prehearing brief, which is incorporated in its entirety by this reference.

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II.

ARGUMENT

The District submitted its certificated seniority list (District's Ex. 8), which indicates the seniority date of record as of the first day of hearing. A certificated employee is "deemed to have been employed on the date upon which he first rendered paid service in a probationary position." (Education Code § 44845.¹) Under the District's consistent practice, service in a probationary position coincides with a teacher's contracted dates of service as approved by the Board and documented in the contract of employment.

During the hearing, the District and Respondents represented by the Teachers Association of Long Beach ("TALB") reached a number of stipulations regarding changes to individual seniority dates and tiebreaking criteria. Additionally, the District dismissed the accusations against various Respondents on the record.

The District, through the testimony of Assistant Superintendent Ruth Perez Ashley, described the application of tiebreak criteria (such as specific training or credentials), bumping, and skipping. Ms. Ashley testified as to every individual for whom the District seeks a final layoff notice. On the final day of hearing, April 11, 2011, the District issued a final "bump chart" (District's Ex. 22) indicating the reason for every such notice; i.e, an individual was being laid off because he or she was within a service being reduced, such as elementary classroom teaching, or because he or she was being bumped by a more senior teacher. Accordingly, every Respondent had the opportunity to see and hear an explanation of the layoff and the reason that Respondent was being laid off or retained. Based on the evidence presented at hearing, at this time the District requests that each individual listed in Exhibit 22 as not having the ability to bump (listed as "cannot bump") be recommended for final layoff notice in the Proposed Decision. The District also requests the release of each temporary certificated employee identified in Exhibit 11.

A. The District Properly Credited Respondents who Attended Preservice Training.

Several Respondents testified about training they attended prior to their first day of teaching. As noted in the various stipulations, the District has granted or will grant seniority credit

¹ All statutory references are to the Education Code unless otherwise indicated.

1 for documented attendance at training such as the New Teacher Institute, Open Court, and training
2 that took place in Las Vegas in August 2001 for teachers at King Elementary School.

3 By contrast, some Respondents² argued they should receive seniority credit for attending
4 training that was part of an *internship* program. Interns are teachers in training. (*Welch v.*
5 *Oakland Unified School Dist.* (2001) 91 Cal.App.4th 1421, 1428 [internship program seeks to
6 “enhance the preparation of teachers so that their learning combines theory and practice”].) Prior
7 to entering the classroom as a fully trained teacher, an intern has provided no “paid service in a
8 probationary position.” Affording seniority credit for the training of interns who have yet to begin
9 service as interns would be akin to granting seniority credit to teachers for college coursework
10 toward their credentials.

11 Certain Respondents³ testified they should receive seniority credit for “make-up days”
12 worked prior to commencing the contract year. Such days are worked at the employee’s discretion
13 to maximize retirement credit for a full year of service. As discussed in the Prehearing Brief,
14 “make-up days” do not constitute probationary service, as (1) they are not mandatory but are
15 worked at the teacher’s discretion, and (2) this issue was resolved in the 2010 hearing and attempts
16 to resurrect it in 2011 are barred by the doctrine of collateral estoppel.⁴

17 Other Respondents⁵ sought seniority credit for service during summer school or
18 “intersessions” between school calendar tracks. Such service is not appropriately credited toward
19 seniority. (See § 44913 [summer school not counted toward attainment of permanent status]; *Long*
20 *Beach Unified School District* (Juarez 2010) OAH No. 2010020244, Factual Findings at ¶ 16,
21 Legal Conclusions at ¶¶ 17, 27; *Vineland School District* (Harman 2009) OAH No. 2009031201
22 [summer school service did not establish seniority date].)

23 Finally, the fact that year-round teachers are paid monthly commencing in July of each
24 year, even when they do not begin service until August or September, does not result in a July 1

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26 ² E.g., Alina Herrera-Gonzalez (#1129); Torrie Jean Baker (#1057).
27 ³ E.g., Sokvylay Kem (#1124); Kathleen Daley (#1045); Stacey Wills (#827).
28 ⁴ In 2010, Ms. Wills (#827) made an identical argument, which was rejected. (OAH No. 2010020244,
Proposed Decision at ¶ 94.) Iyaunna Towery (#1056) also sought to change her seniority date based on
make-up days. Her identical argument was rejected in 2010. (*Id.* at ¶ 93.)
⁵ E.g., Erin Boeglin (#1071); Georgia Gegenworth (#1281). In 2010 Ms. Boeglin made an identical
argument, which was rejected. (*Id.* at ¶ 60.)

1 seniority date. Monthly compensation benefits teachers by averaging their pay over 12 months; it
2 alone does not establish seniority. Seniority is calculated as of the first day of paid *service* in a
3 probationary position.

4 Respondent Gary Burg (#1419) argued for a June 19, 2001 or July 1, 2001 seniority date
5 based on unpaid work he purportedly performed in June 2001. However, Mr. Burg testified he
6 was still employed by the Los Angeles Unified School District through June 2001, and he did not
7 perform *any* paid service for the District in July 2001. Mr. Burg was credited with his attendance
8 at NTI training as of August 20, 2001. His sole objection to this seniority date appears to be his
9 late notice of the correction from July 1 to August 20. Mr. Burg did not establish he performed
10 any paid service prior to August 20, 2001.

11 **B. The Veterans' Preference Act Does Not Apply.**

12 Jack Murry (Seniority #422) testified he could not be laid off because a purported federal
13 law, the Veterans' Preference Act, applied to teachers and accorded preference to military veterans
14 in a layoff. Mr. Murry submitted a document (Ex. U) purporting to support this argument.
15 However, the Veterans' Preference Act applies only to employees of the Executive branch of the
16 United States or of the District of Columbia. (*Lohmann v. United States* (Ct.Cl. 1981) 229 Ct.Cl.
17 622, citing 5 U.S.C. §§ 2102, 7511(a)(1).) The authority cited by Mr. Murry for "expansion of the
18 veterans' preference law to teachers" is a Minnesota statute. (Minn. Stat. § 122A.40 et seq.)
19 California has no such preference that applies to teachers in a reduction in force.

20 "[I]n 1944, Congress enacted the Veterans' Preference Act, designed to codify, broaden,
21 and strengthen all preferences in regard to *Federal* service granted to veterans." (*Flanagan v.*
22 *Young*, 228 F.2d 466, 469 (Ct. App. D.C. 1955) (emphasis added).) The Veterans' Protection Act
23 (VPA) is codified in scattered sections of title 5 of the United States Code.

24 Notably, there are no cases in which the VPA is held to be, or even unsuccessfully argued
25 to be, applicable to state public employers in the absence of a *state* statute conferring similar
26 preferences and protections under state law. Though several states do provide statutorily-
27 mandated preferences for veterans in public employment occupations such as teaching, California
28 has no such statute with respect to teachers. (*Compare* Minn. Stat. § 197.455 subd. (1)(a); 51 Pa.

1 C.S.A. § 7104(a) [both Minnesota and Pennsylvania have expansive *state* VPAs.] However, the
2 California Constitution, at Article 7, section 6, authorizes the California Legislature to provide
3 preferences for veterans and their spouses should it so elect.

4 California does provide a veterans' preference in civil service positions under California
5 Government Code section 18970 et seq. Pursuant to California Government Code section 18973,
6 a veteran, as defined in that section, or the widow or widower of a veteran, is allowed a credit of
7 ten points to any passing score attained in an entrance examination for a civil service position.
8 "Civil service" is defined in Article 7 of the California Constitution, section 1(a). That section
9 provides that "[t]he civil service includes every officer and employee of the State except as
10 otherwise provided in this Constitution." Section 4(i) of Article 7 exempts "[t]he teaching staff of
11 schools under the jurisdiction of the Department of Education or the Superintendent of Public
12 Instruction[]" from the civil service classification. That school district employees are not civil
13 servants is further evidenced by the fact that they are not hired pursuant to the attainment of a
14 passing score on an entrance examination and therefore would receive no benefit from
15 Government Code section 18973, even if applicable.

16 Other benefits that California provides to veterans of the Armed Forces include college
17 tuition fee waivers for veterans' dependents, disabled veteran business enterprise opportunities,
18 housing benefits, DMV fee waivers, free veterans' license plates, veterans' cemetery benefits,
19 veterans' claim representation, fishing and hunting licenses, employment and unemployment
20 insurance assistance, CalVet home and farm loans, passes to state parks and state recreation,
21 business license, tax, and fee waivers, and property tax exemptions.
22 (<http://www.cdva.ca.gov/vetservice/overview.aspx>.) Thus, California provides numerous benefits
23 to its veterans, but does not provide a comprehensive veterans' preference in employment scheme
24 in contrast with other states such as Minnesota or Pennsylvania.

25 In Article 6 of the Education Code, entitled "Merit System", there is a provision for
26 veterans' preference. Education Code section 45294 defines a "veteran" as "any person who has
27 served in the United States armed forces in time of war, or national emergency declared by the
28 President of the United States of America, and who has been discharged or released under

1 conditions other than dishonorable, proof of which shall be submitted to the commission at the
2 time of the examination.” Section 45295 defines “disabled veteran”. Education Code section
3 45296 provides for additional credits on the veteran’s entrance examination. Only one published
4 case has been litigated under section 45296, which is not pertinent to Murry’s allegation. (See
5 *Allison v. Bd. of Educ. of City of San Bernardino Sch. Dist.* (1899) 125 Cal. 72 [petition for writ of
6 mandamus denied because petitioner did not make a sufficient showing that he was the only
7 veteran applying for a janitorial position].) Considering these statutory sections are found in the
8 context of classified employment and Merit Systems sections of the Education Code, an argument
9 that these statutes provide a preference for veterans in certificated positions is untenable.
10 Moreover, there are *no* California statutes, even under the Government Code, providing for a
11 veterans’ preference in *retention*. Thus, Murry’s VPA argument lacks merit under California law.

12 With respect to Mr. Murry, the District specifically requests a finding that his termination
13 is based solely on his relative seniority within his area of competence and qualifications.

14 **C. Respondents Must Have Appropriate Credentials and Qualifications to**
15 **Bump Less Senior Employees.**

16 **1. Dance Classes**

17 Two physical education teachers (Tito Ortiz #987 and Mario Morales #845) testified they
18 were credentialed and competent to teach the dance assignments currently taught by less senior
19 teachers (Johanna Knox #846,⁶ Jennifer Waters #741, and Keisha Clark-Booth #577). Ms. Knox,
20 Ms. Waters, and Ms. Clark-Booth testified as to their superior experience and abilities in teaching
21 dance. Specifically, testimony indicated the dance component of a physical education credential
22 program was rudimentary, including line dancing, salsa dancing, and “cowboy boogie.”⁷

23 According to Ms. Clark-Booth, who teaches six periods of Dance at Cabrillo High School,
24 the dance component of a middle school PE course, such as Mr. Ortiz teaches, is focused on
25 “social” dancing. By contrast, high school courses devoted entirely to dance or having a “dance
26 emphasis” focus on technique, coordination, choreography, and performance.

27
28 ⁶ Ms. Knox is more senior than Mr. Morales.
⁷ The testimony did not elaborate on the nature of “cowboy boogie.”

1 Mr. Ortiz testified he instructs eighth-grade students in square dancing and line dancing as
2 part of a PE framework. He has no choreography experience and no dance performance
3 experience. He has never been involved in a high school dance program or production. When
4 asked whether he could teach the Dance 3-4 or Dance 5-6 courses currently taught by Ms. Waters
5 and Ms. Clark-Booth, Mr. Ortiz testified he did not know what those courses were. Ms. Clark-
6 Booth testified both of these courses involve "upper level" dance instruction, in which students
7 may enroll only by auditioning. Dance 3-4 is an intermediate course in this upper-level
8 instruction, while Dance 5-6 is more advanced. Ms. Clark-Booth also teaches Dance 9-10, which
9 she testified is the highest advanced level offered in the subject. All of her classes are involved in
10 dance productions, and students in the upper-level classes receive both art and PE credit.

11 In a 2010 layoff, ALJ Ruiz was faced with similar arguments and concluded:

12 Joseph and Cutler both have a credential authorizing them to teach physical
13 education classes. Cutler's contention that he should bump into Joseph's .2 FTE
14 dance class was not convincing. In sum, the District "skipped" Joseph with respect
15 to her dance class, which requires specialized experience and knowledge regarding
16 dance. While Cutler has some gymnastics training and he took a few university
17 courses regarding dance, he has not taught dance at any high school. Thus, the
18 District established a specific need and reason for "skipping" Joseph as to her dance
19 class. (*Beverly Hills Unified School District* (Ruiz 2010) OAH No. 2010030101,
20 Proposed Decision at ¶ 14; see also *Chaffey Joint Union High School District*
21 (*Matyszewski* 2009) OAH No. 2009030481 [upholding district's decision to skip a
22 more junior physical education teacher to teach a dance class that counted as credit
23 toward fine arts class requirement for admission to University of California].)

24 Likewise, here, while Mr. Ortiz and Mr. Morales do possess PE credentials and may have
25 taken a few dance courses in preparation therefor, neither Mr. Ortiz nor Mr. Morales established
26 he has the necessary dance training, skills, or experience to teach Dance courses at the high school
27 level. The training, experience, and qualifications of the current Dance teachers cannot be
28 replaced by individuals with only a PE credential, without a severe negative impact on the high
school Dance programs.

2. AP/AVID Courses

Several Respondents testified they were qualified to bump into positions held by
employees who currently teach advanced placement (AP) or advancement via individual
determination (AVID) courses, even though the Respondents had inadequate or no training to

1 teach AP or AVID courses. These arguments must be rejected.

2 Ms. Ashley testified as to the District's criteria for receiving tiebreak credit for training in
 3 AP or AVID, and the criteria for bumping into a position that includes at least one AP or AVID
 4 assignment. Specifically, a teacher received credit for tiebreak purposes if he or she had AP
 5 training; but, having the requisite training to receive tiebreak credit does not mean an employee is
 6 both competent and qualified to bump into any AP course. Rather, bumping a less senior teacher
 7 with a current AP assignment also requires that the more senior teacher have created a syllabus for
 8 the AP course, or at least in the same subject, which syllabus must be approved by the College
 9 Board. Only with a teacher's College Board-approved syllabus in place do students receive AP
 10 credit for a particular course. In no case did any Respondent establish at hearing that he or she had
 11 both the necessary training *and* an existing syllabus in the course or subject as required to bump a
 12 less senior teacher with an AP assignment. On the other hand, the testimony and evidence
 13 established that each current AP teacher does have the requisite syllabus, without which the AP
 14 students could not receive AP credit for the course.

15 Ms. Ashley testified there are three levels of training in AVID, with a combination of two
 16 courses needed to complete the most basic training: Implementation and Refining *or*
 17 Implementation and Tutorology. Beyond this basic training are the additional levels of
 18 intermediate and advanced AVID training. According to Ms. Ashley:

19 The three levels that we have talked about since last year are implementation,
 20 tutorology, and refining. And they can be defined as particular courses that
 21 individuals are able to take. It shouldn't be confused with the basic level of
 22 training. And the basic level of training includes implementation and refining, or
 23 implementation and tutorology. So, there are two courses that are needed to get
 24 the basic training for AVID. In order to get the intermediate level for AVID, you
 25 need implementation, tutorology and refining. Those three levels, those are the
 26 same three levels that we have identified for an individual to be able to bump into
 27 another AVID program. There is a difference between receiving tie breaking
 28 criteria, which many of our teachers have received. If a teacher has received basic
 or intermediate or advanced level training, they were given the tie breaker code.
 However, we have also mentioned that in order for a teacher to bump into an
 existing AVID position, they need to be at least trained in the implementation,
 tutorology and refining level which meets the criteria for the intermediate
 certification. (Testimony of R. Ashley, Day 5.)

1 A teacher received tiebreak credit for AVID training if he or she had at least a portion of
2 the full AVID training. Yet, only with all three levels of training is a teacher qualified to bump a
3 less senior teacher out of an AVID assignment. In no case did any Respondent establish at hearing
4 he or she had all three levels of AVID training necessary to bump a less senior teacher, where the
5 District had not already identified the ability to bump.

6 **D. The District Does Not Desire to “Skip” Elementary or Middle Schools With**
7 **International Baccalaureate Training**

8 Respondents from three schools testified that the entire staffs at their sites should be
9 skipped based upon their schools’ participation in the International Baccalaureate program. The
10 District, however, does not believe this skip is justified and is not requesting these individuals be
11 retained. According to Ms. Ashley:

12 There are four schools in total which are certified as being an international
13 bachelorette schools. They’ve all received intensive training that MYP, the
14 middle years program, those two schools are Lindsey and Hudson. The
15 elementary school is Dooly Elementary School. Among those three schools, there
16 are at least 150 certificated positions that would be required to bump if we were to
17 allow that. The entire staffs at those three particular schools have been trained.
18 We do believe that if there were a couple or a few selected individuals who were
19 unfortunately laid off that their program would be able to continue.

20 The one position that we are requesting to deviate from the seniority list is
21 an art position at the high school level at Jordan high school and that's with the
22 diploma program.

23 The high school level as it is part of the diploma program, it also supports
24 the school district is mission of the academic and career success initiative to make
25 sure that our students are ready for college and career. (Testimony of R. Ashley,
26 Day 5.)

27 Only the District may exercise discretion to deviate from layoff in strict seniority order. In
28 this case, the District requests that only the one individual at the high school level be skipped, and
that no deviation from seniority order be applied for any other individuals based upon the
International Baccalaureate program.

29 **E. The Skip of “Intensive Reading Clinic” Is Appropriate.**

30 Ms. Ashley clarified that each time the Seniority List states an individual is performing the
31 service of “intensive reading clinic,” this means the person has specialized training and experience

1 in a course of instruction. According to Ms. Ashley:

2 Yes, the intensive reading clinic requires a teacher to be trained in Lindamood
3 Bell which is an entire program of teaching students who are at the remedial level
4 in how to read. It used to be called Lindamood Bell training but since that is a
5 copy righted name, we have changed that program. So that position requires
6 specialized training and skills. (Testimony of R. Ashley, Day 5.)

7 A limited number of individuals in the District possess this training and experience and are
8 properly retained.

9 **F. The Individual Respondents' Arguments Lack Merit.**

10 Certain unrepresented Respondents testified on their own behalf. Most of these individual
11 Respondents testified they should be skipped for various reasons, or argued against the District's
12 proposed skip of the Counselor who coordinates the Male Academy (Lionel Gonzales, Seniority
13 #250). As discussed in the District's Prehearing Brief, skipping is discretionary; individual
14 respondents have no authority to urge that they be skipped outside the District's criteria.

15 Rosalind Bender (Seniority #2089), a probationary counselor, testified on April 7, 2011.
16 Although Ms. Bender has been employed since 1998, District records indicate she has never
17 worked more than 75% of the days in two consecutive school years. Accordingly, she remains a
18 probationary employee, as she has never met the service requirements for permanent status. (§§
19 44908, 44929.21.) Subdivision (b) of section 44955 provides:

20 Except as otherwise provided by statute, the services of no permanent employee
21 may be terminated under the provisions of this section while any probationary
22 employee, or any other employee with less seniority, is retained to render a service
23 which said permanent employee is certificated and competent to render.

24 Ms. Bender did not establish she ever worked 75% of the days in two consecutive school
25 years. The fact that she was unaware of a statutory requirement for attaining permanent status, or
26 the consequences of her part-time, flexible schedule, is irrelevant. (*1119 Delaware v. Continental*
27 *Land Title Co.* (1993) 16 Cal.App.4th 992, 1002 [persons are presumed to know the law].) The
28 fact that the District mistakenly classified Ms. Bender as a permanent employee at one time cannot
change her status when she has not met the statutory requirement for permanency. (*Fleice v.*
Chualar Union Elementary School Dist. (1988) 206 Cal.App.3d 886; see *Smith v. Governing Bd.*

1 of Elk Grove Unified School Dist. (2004) 120 Cal.App.4th 563, 568 [“Although in some cases a
2 public entity can be estopped, an estoppel cannot rewrite a statutory limitation on a benefit or
3 privilege.”]) Moreover, Ms. Bender testified that some of the time for which she believes she
4 should receive credit toward the attainment of permanent status she was actually classified as a
5 temporary certificated employee. (See Bender’s Exhibits at AA, sheet titled “Employee Statute
6 Summary of R. Bender). These are apparently within the time frame Ms. Bender contends she
7 worked more than 75% of school days; yet, because the service was as a temporary employee, it
8 cannot be credited toward her seniority date. Because she remains a probationary employee, Ms.
9 Bender must be laid off prior to the layoff of any permanent counselor.

10 It is anticipated individual Respondent Carlin Stein (#462) will submit a posthearing brief.
11 Ms. Stein attended the first two days of hearing only. She was not identified in Ms. Ashley’s
12 initial testimony as subject to layoff, and she did not attend the rest of the hearing.⁸ By the end of
13 the hearing, she had been added to the bump chart as an individual being displaced by a more
14 senior teacher. On the final day of hearing, the ALJ called Ms. Stein’s name several times to give
15 her an opportunity to testify.

16 Ms. Stein will likely argue a less senior teacher with the same single-subject English
17 credential she holds is being retained, so that Ms. Stein cannot be laid off. The less senior teacher,
18 Macy Jelinowicz (#374), did not receive a preliminary notice. The District has already cured the
19 lack of notice to Ms. Jelinowicz by dismissing the accusation of the most senior teacher who could
20 have bumped into her position. That individual is more senior than Ms. Stein. Ms. Stein may also
21 claim another less-senior teacher is being allowed to bump into an AP English assignment;
22 however, the District determined at the close of the hearing that Krystal Ortiz (#425) did not have
23 the requisite AP syllabus and could *not* bump into that position. Accordingly, Ms. Stein is
24 properly identified to receive a final layoff notice.

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28 ⁸ Ms. Stein sent correspondence to Ms. Ashley after the hearing stating she did not attend the other three
days due to “child care issues.” However, all Respondents were provided with substitutes to enable them
to attend the entire hearing, which occurred on regular work days.

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III.

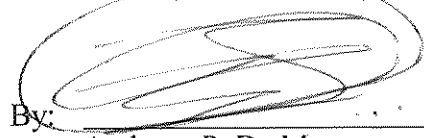
CONCLUSION

The evidence demonstrated the District met all procedural requirements in implementing this certificated reduction in force. Seniority dates were duly verified, and changed if supporting documentation came to light, up to and including during the hearing. Skipping criteria were appropriately considered and applied. As the hearing proceeded, accusations were dismissed if respondents demonstrated they met skipping criteria or were able to bump a less senior employee.

The Administrative Law Judge should find there is cause for not reemploying Respondents for the 2011-2012 school year and sustain the accusation as to each remaining Respondent.

DATED: April 20, 2011

ATKINSON, ANDELSON, LOYA, RUUD & ROMO



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