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7
8 BEFORE THE GOVERNING BOARD OF THE
9 LONG BEACH UNIFIED SCHOOL DISTRICT

11 In the Matter of the Accusation Against:

12 Certificated Employees

13 By

14 Long Beach Unified School District.

OAH No. 2010020244

**DISTRICT'S REPLY BRIEF
TO ALL RESPONDENTS**

Hon. Daniel Juarez
Hearing Dates: April 12 & 15 and
May 3-4 and 24-26, 2010

16 **I.**

17 **RESPONDENTS REPRESENTED BY TALB¹**

18 Pursuant to the order of the Administrative Law Judge, the Long Beach Unified School
19 District submits this reply brief in response to the reply brief of certain Respondents represented by
20 the Teachers Association of Long Beach (TALB). As directed by the ALJ, this brief responds only
21 to new issues or arguments raised by Respondents.

22 **A. The District Has Acted In Good Faith at All Times.**

23 Respondents devote more than a page of their brief to gratuitous criticism of the District's
24 initial post-hearing brief. The accusation of "bad faith" is entirely unwarranted. At the hearing,
25 counsel discussed on several occasions, some in the presence of His Honor, the fact that
26 Respondents' opening brief would be far more detailed than that of the District. It was understood
27 by both parties' counsel that Respondents would enumerate the various individual issues in their

28 ¹ The District's reply to the three individual Respondents who submitted briefs follows in the next section.

1 initial brief, and the District would respond to those issues in its responsive brief. The accusation
 2 is grossly misleading as it ignores these discussions.

3 Respondents also ignore the fact that the District submitted a comprehensive *prehearing*
 4 brief, which anticipated many of the arguments made at the hearing. Moreover, the vast majority
 5 of issues raised by Respondents at the hearing involved (1) seniority dates and (2) skipping, the
 6 very topics the District addressed in its post-hearing brief. Respondents do not identify a single
 7 "issue" raised at the hearing that the District did *not* address in either its prehearing or post-hearing
 8 briefs. The District has consistently attempted to be up front and transparent with Respondents at
 9 every stage of this lengthy and complex matter.

10 **B. The District Applied the Proper Standard in Determining the Employees' First Date**
 11 **of Paid Service in a Probationary Position.**

12 The District acknowledges that not every ALJ drafting a layoff decision applies the same
 13 standard to pre-service training. The standard articulated in the District's prehearing brief and
 14 initial post-hearing brief is applied by a majority of ALJs, as noted by the multiplicity of citations
 15 to proposed decisions. (See District's Prehearing Brief at pp. 12-15; District's Opening Post-
 16 hearing Brief at p. 2.) The primary factors are whether attendance at the training was mandatory,
 17 whether it was paid, and whether the payment was part of the teacher's regular (i.e., contractual
 18 year) compensation. The 2010 proposed decision cited by Respondents does not deviate from
 19 these factors. In a portion of that decision not quoted by Respondents, Judge Hewitt noted the
 20 factors utilized by his fellow ALJs:

21 Administrative Proposed Decisions regarding what constitutes the "first date of
 22 paid service" for purposes of establishing seniority dates focus on evaluating the
 23 evidence to see if the training was mandatory or voluntary and whether the teachers
 24 were paid a per diem rate of pay based on their employment contract rate of pay.
 25 However, there is no statute, regulation, or case law that expressly states that the
 26 first date of paid service has to be at a per diem rate based on an employee's
 27 contractual rate of pay. Consequently, it seems that the rate of pay is *only one*
 28 *factor to be considered in evaluating whether the training was mandatory or*
voluntary. (Riverside Unified School Dist. (Hewitt 2010) OAH No. 2010030980,
Proposed decision at p. 10, emphasis added.)

Accordingly, the rate of pay is not a factor standing alone, as attendance at training that is
 not "paid" cannot conceivably constitute the "first day of paid service." Rather, the rate of pay is a

1 factor in determining whether the training was mandatory. The District's own literature indicated
 2 attendance at the New Teacher Institute (NTI) was *mandatory*; it was also *paid*. Without
 3 conceding the issue, the District stipulated that attendance at NTI would be considered the first day
 4 of paid service.² (Tr. Vol. VI, 206:22-25.)

5 Various Respondents testified as to other training activities that occurred prior to the
 6 beginning of the school year. As discussed in the District's initial post-hearing brief, Respondents
 7 failed to establish that attendance at *any* of these other activities was mandatory. Moreover, a
 8 large number Respondents testified as to "make-up days" they worked at their own discretion--
 9 quite the opposite of *mandatory*. Without establishing attendance at any of these activities was
 10 mandatory, Respondents have not demonstrated such attendance should be considered the
 11 employee's first day of paid service in a probationary position.

12 **C. The District Properly Skipped Employees Based on AVID, ID, and AP.**

13 Education Code section 44955(d)(1)³ refers specifically to "special training *and*
 14 *experience*" necessary to teach a course or course of study or provide certain services. The
 15 District's requirement that a teacher not only be trained, but also be *teaching* in the AVID program
 16 is a perfectly valid exercise of its discretion to determine whether a teacher has not only the
 17 "special training" but also the "experience" to provide the service. (See *Martin v. Kentfield School*
 18 *District* (1983) 35 Cal.3d 294, 299 [skipping involves "'discretionary decisions' which are within
 19 the 'special competence' of the school districts"].)

20 The District's standard has been consistently applied throughout this layoff and is anything
 21 but arbitrary. While Respondents may not agree with the skipping criteria, they have not
 22 demonstrated the criteria are invalid. Respondents' insistence that the District be ordered to skip
 23 *all* employees with AVID, IB, or AP training would result in the skips swallowing the layoff.
 24 Skipping is intended to leave intact certain services or courses of study according to the needs of
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26 ² Respondents incorrectly assert "the District stipulated that it would change the seniority dates of all
 27 teachers (roughly 4,600 individuals) to reflect their attendance at New Teacher Institute." The New
 28 Teacher Institute has not been in existence during the employment of every District teacher, and in more
 recent years has occurred after the school year begins. Accordingly, the task of verifying attendance at
 NTI and adjusting seniority dates accordingly will not involve reviewing the records of 4,600 individuals.

³ All statutory references are to the Education Code unless otherwise indicated.

1 the students. As the courts have recognized for decades, a school district is uniquely qualified to
 2 determine what those needs are and how they should be met:

3 School districts have broad discretion in defining positions within the district and
 4 establishing requirements for employment. (*Martin v. Kentfield School Dist.*
 5 (1983) 35 Cal.3d 294, 299-300, 197 Cal.Rptr. 570, 673 P.2d 240; *Duax v. Kern*
 6 *Community College Dist.*, *supra*, 196 Cal.App.3d at p. 565, 241 Cal.Rptr. 860.)
 7 This discretion encompasses determining the training and experience necessary for
 8 particular positions, so long as the district does not impose requirements for
 9 reemployment under section 44956 that are not imposed on other employees who
 10 have not been subject to layoff. (*Martin v. Kentfield School Dist.*, *supra*, at pp.
 11 300-301, 197 Cal.Rptr. 570, 673 P.2d 240.) Similarly, school districts have the
 12 discretion to determine particular kinds of services that will be eliminated, “even
 13 though a service continues to be performed or provided in a different manner by the
 14 district.” (*Campbell Elementary Teachers Assn., Inc. v. Abbott*, *supra*, 76
 15 Cal.App.3d at p. 812, 143 Cal.Rptr. 281; see also *id.* at p. 808, 143 Cal.Rptr. 281;
 16 *Gallup v. Board of Trustees* (1996) 41 Cal.App.4th 1571, 1582-1585, 49
 17 Cal.Rptr.2d 289.) (*Hildebrandt v. St. Helena Unified School Dist.* (2009) 172
 18 Cal.App.4th 334, 343.)

19 **D. Hugo Ehuan Cannot Bump Using His Board Authorization.**

20 As the District has made clear, a current Board Authorization entitles an employee to retain
 21 his or her assignment as to senior employees *without any current authorization* to teach in the
 22 assignment. By contrast, a Board Authorization does *not* entitle an employee to bump into an
 23 assignment he or she is not credentialed to teach absent the Board Authorization. This standard
 24 was consistently applied throughout the layoff process and explained in testimony. It is an
 25 objective and valid exercise of the District’s discretion and should be upheld.

26 The special circumstances of Hugo Ehuan (#613), who is currently serving in the military,
 27 were brought to the attention of the District’s counsel by TALB on or about June 11, 2010, after
 28 the hearing concluded and a month after final notices had been issued to non-respondents. Mr.
 Ehuan’s request for hearing, if he filed one, was never received by the District, timely or
 otherwise. Regardless, upon learning of the circumstances after the hearing, District counsel
 agreed to treat Mr. Ehuan as a respondent for purposes of this proceeding.

Respondents stretch the Uniformed Services Employment and Reemployment Rights Act
 (USERRA) far beyond its limits. The USERRA statute does not insulate an employee from being
 laid off for economic reasons during the course of military service. (See *Maxfield v. Cintas Corp.*
No. 2 (8th Cir. 2005) 427 F.3d 544, 551 [an employer violates USERRA “when a person's

1 membership in the uniformed services is a *motivating factor* in the employer's action, 'unless the
2 employer can prove that the action would have been taken in the absence of such membership, ...
3 or obligation for service'"], quoting 38 U.S.C. § 4311(c)(1), emphasis in original.) As Mr. Ehuan
4 was among more than 1,000 employees who received preliminary notices of layoff, the
5 unsupported contention he was treated differently because of his military service is frivolous and
6 must be disregarded.

7 Moreover, the accusation that "the District did not honor his right to challenge the issuance
8 of" a layoff notice to Mr. Ehuan is absolutely false. Mr. Ehuan received exactly the same rights as
9 every other employee who received a layoff notice, and he received special consideration after the
10 District was notified of his circumstances.⁴ The District cannot rescind Mr. Ehuan's final notice as
11 urged by Respondents, without losing altogether the right to lay him off pursuant to section
12 44955(c), which requires final notice before May 15. Rescinding his final layoff notice at this
13 stage could disadvantage hundreds of more-senior teachers who received or will receive final
14 notices.

15 Nonetheless, the District reviewed Mr. Ehuan's situation as though he was a respondent in
16 this hearing. Mr. Ehuan holds a multiple subject teaching credential. He does not, as asserted by
17 Respondents, hold a "current Board Authorization in English K-8." The seniority list clearly
18 indicates his Board Authorization is for 2009. (Ex. 9 at p. 120.) Moreover, even if he did hold a
19 current Board Authorization, under the District's consistently applied criteria, he could not use it to
20 bump a less senior employee. Similarly, his *eligibility* for another Board Authorization does not
21 enable him to bump another employee. Accordingly, Mr. Ehuan was properly issued a final layoff
22 notice.⁵

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⁴ The District accepted at face value TALB's assertion that Mr. Ehuan attempted to submit a request for hearing. No evidence has been offered that Mr. Ehuan received his Preliminary Notice of Layoff late or that he ever submitted a request for hearing.

⁵ If for some reason the ALJ determines Mr. Ehuan should not be laid off, the District will treat him as any other respondent as to whom this determination is made.

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II.

INDIVIDUAL RESPONDENTS

Three individual Respondents submitted written post-hearing briefs or statements. The District briefly responds to those submissions, noting at the outset they raise no new facts or issues related to these Respondents.

A. Linda Gant.

The issues raised by Ms. Gant related to the No Child Left Behind Act are, as noted in the District's opening post-hearing brief, outside the jurisdiction of this proceeding. Moreover, Ms. Gant confuses the discrete issues of bumping and skipping addressed in section 44955. The District has identified specific types of "special training and experience" it seeks to skip, namely, advanced placement, international baccalaureate, and AVID. Ms. Gant is not specially trained or experienced in any of these areas.

Rather, she asks to be skipped based on her combination of credentials and skills, asserting no senior teacher is competent to fill her position. (Gant Response to District's Opening Post-Hearing Brief at pp. 2-3.) Ms. Gant misstates the law by claiming "the more senior replacing employee must match the criteria of the current certificated employee, not just meet the requirements of the teaching position." (*Id.* at p. 3.) To the contrary, statutory "bumping privileges allow a senior teacher whose teaching services are being terminated to move into the teaching position of a junior teacher whose services the senior teacher is *certificated and competent to perform*, thus necessitating the layoff of the junior teacher and protecting seniority rights." (*Duax v. Kern Community College Dist.* (1987) 196 Cal.App.3d 555, 563-564.) There is no requirement that the senior teacher possess the exact same combination of credentials, certifications, and experience as the teacher he or she is assigned to bump.

As demonstrated by the District's seniority list, a great number of more senior teachers are credentialed to fill Ms. Gant's position, holding multiple subject teaching credentials and certification to teach English language learners. Those individuals therefore are "credentialed and competent" to teach kindergarten in Avalon. Ms. Gant should be issued a final layoff notice based on her relative seniority.

1 **B. Brenda Hoefs.**

2 Ms. Hoefs seeks reinstatement of her 1998 seniority date, despite her undisputed resignation
 3 and subsequent reemployment in 2008. "If a certificated employee resigns and is thereafter re-
 4 employed, his date of employment is normally deemed by section 44848 to be the date of re-
 5 employment." (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 641.) Nothing in the
 6 Education Code suggests this provision can be waived by a school district, as doing so would
 7 prejudice the rights of employees who continued working without a break in service.⁶

8 Ms. Hoefs asserts she was led to believe by District staff that her 1998 seniority date would be
 9 restored, and that even the District's governing board understood it would be restored. (Closing Brief
 10 for Respondent Brenda Hoefs at pp. 2-3.) However, not even the governing board has the authority to
 11 supersede mandatory requirements of the Education Code. (See *Fleice v. Chualar Union*
 12 *Elementary School Dist.* (1988) 206 Cal.App.3d 886.) Accordingly, despite any
 13 misunderstandings held by Ms. Hoefs, District staff, or even the governing board, the law
 14 mandates her seniority date remain September 2, 2008.

15 **C. Joseph Posard.**

16 Mr. Posard's argument rests on a number of inaccuracies. Initially, he attempts to claim
 17 that his employment for 2009-2010 was not under a "temporary" contract but was rather pursuant
 18 to a "special" contract. He falsely asserts, "There is no indication that the special assignment is
 19 temporary." (Closing Statement: Joseph Posard at p. 1.) The inaccuracy of this assertion is
 20 demonstrated by the District's Exhibit 13, a sample of the "special contract" used for Mr. Posard
 21 and other temporary employees. This document clearly states it is a contract for *temporary*
 22 employment. Ms. Ashley testified to the purpose and use of this document, and it was admitted
 23 without objection. (Tr. Vol. I, 153:3-9; 159:21-25.) Mr. Posard admits he signed a special
 24 contract; there is no special contract other than the one used by the District, of which Exhibit 13 is
 25 a true and correct exemplar.

26 Mr. Posard's 2009 layoff is not at issue in this proceeding. Because none of the certificated

27 _____
 28 ⁶ Ms. Hoefs's fleeting reference to "equal opportunity" has no relevance in this situation. She has not
 asserted she is a member of any recognized protected class. In fact, she seeks *preferential treatment*,
 rather than equal opportunity, in having her seniority date adjusted to ignore her break in service.

1 employees who received preliminary layoff notices in 2009 (including Mr. Posard) requested
2 hearings, there was no decision by an ALJ, and all of the employees received final notices. Mr.
3 Posard's assertion that he "continued [his] employment without a break in service" is incorrect.
4 Mr. Posard was laid off at the end of the 2008-2009 school year. (Tr. Vol. VII, 90:1-18.)

5 While he returned to service under a temporary contract for 2009-2010, Mr. Posard did
6 indeed have a break in service. Moreover, he retained, and continues to retain, all of his restoration
7 rights pursuant to section 44956 based on the 2009 layoff. He has not been deprived of any
8 reinstatement rights; the District has not restored the services he formerly performed, or increased
9 the number of employees in the services he is credentialed and competent to perform. Rather, the
10 District has continued to reduce services. The novel argument that Mr. Posard, who was on a
11 reemployment list due to an earlier layoff, should have been put back into the seniority pool, and
12 allowed to bump a current employee who would then be laid off, lacks any legal support.

13 It cannot be disputed that Mr. Posard signed a contract for temporary employment for the
14 2009-2010 school year. His frivolous attempts to revise history and assert rights to which he is not
15 entitled lack merit and are undeserving of any further consideration by the ALJ. Mr. Posard was
16 appropriately laid off in 2009, did not contest that layoff, agreed to a temporary period of
17 employment for 2009-2010, and retains reemployment rights should the District restore the service
18 from which he was laid off or increase the number of employees in a service area in which he is
19 entitled to serve. He has no rights beyond those the District has afforded him.

20 **III.**

21 **CONCLUSION**

22 The District proceeded in good faith and met all jurisdictional and procedural requirements
23 in this matter. Each Respondent received notice as required by law and the opportunity to
24 challenge his or her status, seniority date, qualifications, and ultimate layoff. In several cases, the
25 District adjusted its records to reflect changes to seniority dates, application of tiebreak criteria,
26 and certain Respondents' ability to be skipped or to bump other employees. In this manner, the
27 lengthy layoff hearing was successful in refining the process to ensure compliance with the layoff
28 statutes.

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The remaining arguments proffered by Respondents are not supported by the applicable law. The Administrative Law Judge should find there is cause for not reemploying Respondents for the 2010-2011 school year and sustain the accusation as to each remaining Respondent.

DATED: June 21, 2010

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