

ESTHER GRANT

V.

ARLINGTON INDEPENDENT
SCHOOL DISTRICT

BEFORE THE

COMMISSIONER OF EDUCATION

THE STATE OF TEXAS

DECISION OF THE COMMISSIONER

Petitioner, Esther Grant, complains that Respondent, Arlington Independent School District, improperly terminated her term contract. Christopher Maska is the Administrative Law Judge appointed by the Commissioner of Education to hear this cause. Petitioner is represented by Helena Coronado-Salazar, Attorney at Law, Fort Worth, Texas. Respondent is represented by Frank Hill, Attorney at Law, Arlington, Texas.

Findings of Fact

After due consideration of the record and matters officially noticed, it is concluded that the following Findings of Fact are supported by substantial evidence and are the Findings of Fact that best support Respondent's decision¹.

1. The Findings of Fact which are found in the Recommendation of the Independent Hearing Examiner and which were adopted by Respondent's board are incorporated as if set out in full.
2. By letter of July 26, 2011, the parties were informed of the briefing schedule. Petitioner was directed to file her brief initial on or before August 18, 2011.
3. Petitioner did not file an initial brief.

¹ See 19 TEX. ADMIN. CODE § 157.1072(h); *Bosworth v. East Central Independent School District*, Docket No. 090-R1-803 (Comm'r Educ. 2003).

4. The Petitioner for Review makes no citation to statute, rule, district policy or case law as to issue of whether Respondent's new reduction in force policy could apply to her.

5. Petitioner made no argument before Respondent's board of trustees that indicated statute, rule, district policy or case law prohibited Respondent from applying its new reduction in force policy to her.

Discussion

Petitioner contends that Respondent improperly terminated her term contract. Respondent denies this claim and argues that Petitioner waived her arguments by not filing a brief.

Briefing

By letter of July 26, 2011, the parties were informed of the briefing schedule. Petitioner was directed to file her initial brief on or before August 18, 2011. Petitioner did not file an initial brief. Instead, Petitioner decided to rely on her Petition for Review. The Commissioner has established rules for briefing that requires particular elements. 19 TEX. ADMIN. CODE § 157.1058. The Commissioner considered the failure to file a brief in the case of *Mills v. Brownsville Independent School District*, Docket No. 012-R2-0960 (Comm'r Educ. 2006). In that case, the Commissioner indicated that while briefing is expected to be filed according to the Commissioner's rules that if "Petitioner more fully pled and supported her case [in her Petition for Review], the lack of an initial brief might have been mitigated." In the present case, the Petition for Review is twenty pages. While Petitioner's failure to file a brief as directed is in no way condoned, to the extent the Petition for Review properly makes arguments by citing the record and legal authority in the manner of a brief, Petitioner will be deemed to have filed a brief. However, there are portions of the Petition for Review that do not properly make arguments. For example, four pages of the Petition for Review are the exceptions Petitioner filed at the

local level to the Recommendation of the Independent Hearing Examiner. Here there is only one citation to the local record and no citations to statute, rule, or case law.

Standard of Review

The present case was heard by an Independent Hearing Examiner appointed by the Commissioner of Education. The Independent Hearing Examiner drafted a Recommendation that includes findings of fact and conclusions of law which found that the proposed termination of Petitioner's contract should be granted. Respondent's board voted to adopt the Independent Hearing Examiner's findings of fact and conclusions of law and to terminate Petitioner's term contract. The Commissioner is to uphold a school board's decision unless the decision is arbitrary, capricious, unlawful, or not supported by substantial evidence. TEX. EDUC. CODE § 21.303(a).

Termination for Financial Exigency

The Texas Education Code provides that a term contract may be terminated "at any time for a financial exigency that requires a reduction in personnel." TEX. EDUC. CODE § 21.211 (a)(2). This is very different from the statutory provisions for terminating a continuing contract due to financial pressures:

A teacher employed under a continuing contract may be released at the end of a school year and the teacher's employment with the school district terminated at that time because of a necessary reduction of personnel by the school district, with those reductions made in the reverse order of seniority in the specific teaching fields.

TEX. EDUC. CODE § 21.157. The termination of a continuing contract due to financial pressures requires a school district to identify specific teaching fields and make reductions in the reverse order of seniority. There are no such statutory requirements when a school district terminates a term contract due to a financial exigency. Under the Texas Education Code a school district that finds itself in a financial exigency that requires a reduction in personnel, is not required to identify teaching areas and then to make decisions based on seniority or any other standards. A school district in financial

trouble may terminate the term contracts which it believes will minimize the effect of layoffs on the children's education. The Texas Education Code grants a school district considerable flexibility in dealing with term contracts when faced with a financial exigency.

District Policies

While school districts that find themselves in financial exigencies are not required by the Texas Education Code to identify teaching areas and then to make decisions to terminate term contracts based on seniority or any other standards, in many cases they do so. See *Dillon v. Texas City Independent School District*, Docket No. 073-R1-601 (Comm'r Educ. 2001); *Arredondo v. Brooks County Independent School District*, Docket No. 065-R1-0709 (Comm'r Educ. 2009). A school district may by its own policy place itself under additional limitations such as requiring all reductions in personnel to be district wide. See *Peevey v. Liberty Hill Independent School District*, Docket No. 417-R1-691 (Comm'r Educ. 1992). (While *Peevey* is a nonrenewal case, the district's general reduction in force policy required all reductions be made on a district wide basis.). The Commissioner requires school districts to abide by their reduction in force policies which limit reductions in force beyond the requirements of the Texas Education Code. However, it should be recalled that a school board's interpretation of its own policy is controlling so long as the board's interpretation is reasonable. *Davis v. Montgomery Indep. Sch. Dist.*, 34 S.W.3d 559, 565 (Tex. 2000).

Respondent's Policy

In the present case, Petitioner does not contest whether there was a financial exigency. The dispute between the parties centers on whether Respondent's policies for reductions in force allowed Respondent to terminate Petitioner's term contract. Respondent's reduction in force policy requires the Superintendent to recommend employment areas to the board. The board then determines which employment areas are to be subject to a reduction in force. Employment areas are broadly defined. They are

defined to include such things as "any administrative position(s), unit(s), and department(s)." Employment areas are not limited to those explicitly stated in the policy. Employment areas for a reduction in force are not pre-established prior to a reduction in force being proposed. Employment areas are to be established for the reduction in force. The Superintendent is to recommend the discharge of particular employees in an employment area by applying a performance criterion to the extent necessary to identify the employees who least satisfy the criterion in an employment area. If there is only one employee in an employment area there is no need to apply the criterion for decision to decide which employee in the employment area least satisfies the criteria. There is no requirement in Respondent's reduction in force policy that requires Respondent's board to specifically vote that there is only one employee in an employment area.

Compliance with Policy

Respondent fully complied with its reduction in force policy. The Superintendent recommended the elimination of Petitioner's administrative position. According to Respondent's policy, an administrative position is an employment area². Respondent's policy does not specify how the Superintendent is to determine which employment areas should be recommended. Hence, Respondent's reduction in force policy cannot be shown to be violated by showing how the Superintendent came to recommend an employment area in a particular manner. Employment areas are not required to be established prior to when a reduction in force is proposed. It is not a violation of Respondent's policy that Petitioner's employment area for the reduction in force was not called an employment area prior to the reduction in force being proposed. Under Respondent's policy, the district has great authority to craft employment areas when it is proposing a reduction in force. It is not a violation of Respondent's policy that additional administrators were not included in an employment area because they had job duties that

² The other reasons for why Petitioner was properly included in an employment area that are found in the Recommendation of the Independent Hearing Examiner are also correct.

are similar to an individual included in an employment area. Respondent could have included more individuals in an employment area that included Petitioner, but it was not required to do so. Whether or not it would have been better for Respondent to have crafted a larger employment area is not an issue that the Commissioner gets to decide.

Peevey

Petitioner contends that the case of *Peevey v. Liberty Hill Independent School District*, Docket No. 417-R1-691 (Comm'r Educ. 1992) stands for the proposition that "where a district is attempting to reduce the number of employees within the same field for purposes of a RIF, it cannot do so when it does not clearly differentiate through policy among the employees in said field." Petition for Review, p. 10. What is required in *Peevey* is that if a district's policy specifies the type of employment areas to be used for purposes of a reduction in force, the district must follow its policy to create employment areas. Respondent did that in the present case.

Purposely Altered Policy

In the Petition for Review, the argument is made that first Respondent targeted Petitioner's position and then Respondent altered its reduction in force policy so that it could eliminate Petitioner's policy. Assuming solely for the purposes of argument that this occurred, Petitioner has waived this argument. Petitioner had the opportunity in her initial brief to raise any objection she had to Respondent's decision to terminate her contract. TEX. EDUC. CODE § 21.301(c). The Petition for Review, which is deemed to be Petitioner's Brief, makes no legal argument as to why a reduction in force policy cannot be changed. Issues need to be raised in an initial brief to be considered. Otherwise, the other party would have no opportunity to respond. *Rayburn v. Pasadena Independent School District*, Docket No. 006-R2-1008 (Comm'r Educ. 2008).

Further, Petitioner has also waived this issue because she made no legal argument as to why a change in policy cannot be made before Respondent's board. A failure to raise an issue before a school board waives the issue. *Jeffery v. Fort Bend Independent*

School District, Docket No. 059-R1-0608 (Comm'r Educ. 2008). Petitioner had the opportunity to present any objections she had concerning the Recommendation of the Certified Hearing Examiner to Respondent's board. TEX. EDUC. CODE § 21.258. Petitioner could have claimed before Respondent's board that the wrong reduction in force policy was used in the Recommendation because for some legal reason the current policy could not be used. But Petitioner made no such legal claim. Instead, for the first time in this case, in Petitioner's Reply Brief, Petitioner makes a legal argument by citing case law that the old reduction in force policy became part of Petitioner's contract and the new policy cannot be applied to Petitioner. Respondent has never had an opportunity to respond to this argument. Petitioner has failed to exhaust administrative remedies by not raising this argument at the local level and not including this argument in her initial brief.

Program Change

Petitioner contends there was not a program change. Whether or not there was a program change is not significant in this case. Respondent's reduction in force policy does not require a program change to terminate a term contract. A financial exigency alone is sufficient under Petitioner's policy to be the basis for the termination of a term contract. But assuming solely for purposes of argument that a program change is required, a program change did occur. Respondent's definition of "program change" is very broad. It includes "any elimination, curtailment, or reorganization of a curriculum offering, program, or school or central office operation . . ." Eliminating Petitioner's administrative position meets this definition.

Property Interest

Petitioner properly states that she has a protected property interest in her term contract and that this means that she is entitled to due process. It has been held that the Texas Education Code chapter 21, subchapter F procedures meet the requirements for due process. *Rodriguez V. Ysleta Indep. Sch. Dist.*, 217 Fed. Appx. 294 (5th Cir Tex.

2007) citing *Coggin v. Longview Indep. Sch. Dist.*, 337 F.3d 459, 465 (5th Cir 2003).
Petitioner has received all the due process that she is due.

Conclusion

Respondent's decision to terminate Petitioner's position should be affirmed.

Conclusions of Law

After due consideration of the record, matters officially noticed, and the foregoing Findings of Fact, in my capacity as the Commissioner of Education, I make the following Conclusions of Law:

1. The Commissioner has jurisdiction over this case under Texas Education Code section 21.301.
2. The Conclusions of Law which are found in the Recommendation of the Independent Hearing Examiner and were adopted by Respondent's board of trustees are incorporated as if set out in full.
3. The Commissioner has established rules for briefing that require particular elements. 19 TEX. ADMIN. CODE § 157.1058. These rules are to be complied with. However, to the extent a petition for review meets the requirements for a brief, it can be considered a brief.
4. While Petitioner did not file an initial brief as directed, to the extent the Petition for Review meets the requirements for a brief under 19 TEX. ADMIN. CODE § 157.1058, it is deemed to be a brief.
5. The Texas Education Code provides that a term contract may be terminated "at any time for a financial exigency that requires a reduction in personnel." TEX. EDUC. CODE § 21.211 (a)(2). In such as case, the Texas Education Code does not require a school district to define employment areas or to apply a criterion for decision in order to determine which teachers' contracts will be proposed for termination.
6. If a school district creates policies that require standards and procedures to be followed for terminating a term contract as a result of a financial exigency, a school

district is required to follow such policies when it proposes the termination of a term contract due to a financial exigency.

7. A school board's interpretation of its own policy is controlling so long as the board's interpretation is reasonable.

8. Respondent complied with its policies when it proposed to terminate Petitioner's term contract and when it did terminate Petitioner's term contract.

9. A teacher has the opportunity to object to all potential errors in the Recommendation of an Independent Hearing Examiner in a hearing before a board of trustees. TEX. EDUC. CODE § 21.258.

10. A failure to object to a potential error in the Recommendation of an Independent Hearing Examiner in a hearing before a board of trustees, waives the claim that there is such an error in the Recommendation and in the Decision of the board of trustees if the Decision adopts the Recommendation. TEX. EDUC. CODE §§ 21.258, 21.301(c).

11. A teacher has the opportunity to point out in an initial brief before the Commissioner all potential errors in the Decision of a board of trustees. TEX. EDUC. CODE § 21.301(c).

12. The Commissioner has established briefing rules that require citations to the record and citations to authorities. 19 TEX. ADMIN. CODE § 157.1058(a).

13. A failure to brief an issue providing appropriate citations to the record and applicable authorities waives the issue.

14. Petitioner has waived the issue that the wrong reduction in force policy was used because the old reduction in force policy was incorporated into Petitioner's contract by failing to raise the issue in her initial brief.

15. Petitioner has a property interest in her term contract.

16. When a property interest is at stake, due process protections apply.

17. The procedures found in Texas Education Code chapter 21, subchapter F meet the requirements for due process.

18. Petitioner received all the process that she is entitled to.

19. Respondent's decision to terminate Petitioner's term contract is not arbitrary, capricious or unlawful.

20. Respondent's decision to terminate Petitioner's term contract is supported by substantial evidence.

ORDER

After due consideration of the record, matters officially noticed, and the foregoing Findings of Fact and Conclusions of Law, in my capacity as the Commissioner of Education, it is hereby

ORDERED that the Petitioner's appeal, be, and is hereby DENIED.

SIGNED AND ISSUED this 8th day of September, 2011.

Robert Scott

ROBERT SCOTT
COMMISSIONER OF EDUCATION

DOCKET NO. 253-LH-0511

ARLINGTON INDEPENDENT SCHOOL DISTRICT, Petitioner	§	BEFORE THE
	§	
	§	
	§	CERTIFIED HEARING EXAMINER
VS.	§	
	§	
ESTHER GRANT, Respondent	§	THE STATE OF TEXAS

RECOMMENDED DECISION OF THE CERTIFIED HEARING EXAMINER

DATE FILED: 04/26/2011

DATE OF HEARING:OPEN: 06/08 and 06/09/2011

Hearing Vol. 1 6/8/2011 (5:9 - 5:11)

MR. LUNINGHAM: We request it be an open hearing.

60-DAYS: 06/24/2011

PRE-HEARING: 05/16/2011

BRIEFS: Pre-Submitted: 06/07/11
Post-Submitted: 06/16/11

CERTIFIED HEARING EXAMINER: Robert C. Prather, Sr.

HEARING LOCATION: Arlington Independent School District
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RECOMMENDED DECISION OF THE CERTIFIED HEARING EXAMINER

COURT REPORTER: Merit Court Reporters, LLC
(800) 336-4000
(817) 335-1203 Fax

BASIS OF HEARING: Appeal of Proposed Termination of administrator's Term contract for financial exigency or program change.

RECOMMENDATION: It is recommended that the District's proposed of termination of the contract of Esther Grant be approved and upheld and that Ms. Grant's appeal of the proposed termination be denied.

I.
INTRODUCTION

- A. The Hearing was held on 06/08/2011 – 06/09/2011 at AISD Administration Building.
- B. References are to the transcript which consists of 3 volumes, for example, "H.Tr. Vol. # (P12:L18)".
- C. Admission of Exhibits:

A = AISD Exhibit

G = Grant Exhibit

H = Hearing Examiner's Exhibit

- 1. Hearing Examiner's **Exh. H 1 - 6** were admitted into evidence at the beginning of the Hearing.
H. Tr. Vol. 1 6/8/2011 (5:12 - 6:12)
- 2. At the beginning of the Hearing, AISD **Exhs. A 1 - 99** were admitted into evidence.
H. Tr. Vol. 1 6/8/2011 (21:19 - 22:18)
- 3. During the Hearing, AISD's **Exhs. A 100 – 102, & 107** were admitted into evidence.
- 4. At the beginning of the Hearing, Grant's **Exhs. G 1 - 21** were admitted into evidence.
- 5. During the Hearing, Grant's **Exhs. G 22 – 29** were admitted into evidence.
- 6. During the Hearing, AISD **Exhs. A 103 – 106** were made a part of the Court Reporter's record only.
H. Tr. Vol. 2 (117 – 138).
- 7. See Transcript for any admission limitations and rulings.

D. References:

- 1. RIF = Reduction in Force.
- 2. DFF (LOCAL) = AISD 2209011 Termination of Employment Reduction in Force. **Exh. A 1.**
- 3. PPCD = Preschool Program for Children with Disabilities.
- 4. AISD or District = Arlington Independent School District.

II. FINDINGS OF FACT

A. After due consideration of and based upon the credible evidence, including the credibility of the witnesses and matters officially noticed, before me in my capacity as Certified Hearing Examiner, the following Findings of Fact (citations to evidence are not exhaustive or exclusive, but are intended to indicate some basis for the particular finding of fact) have been proven by a preponderance of the evidence.

Ms. Esther Grant

1. Ms. Esther Grant ("**Grant**" or "**Respondent**") has worked for Arlington Independent School District (the "**District**") for almost ten years.
2. Ms. Grant has been a Special Education curriculum coordinator with the District for nine years, beginning in the summer of 2002.
3. Ms. Grant is employed pursuant to an AISD Term Contract for 2010-2011 and 2011-2012 School Years, **Exh. A 53**.
4. The AISD Special Education Department had a Preschool Program for Children with Disabilities ("**PPCD**"), as one of its 13 special programs, for children with disabilities between the ages of 3 and 5.
5. The District has thirteen curriculum coordinator positions within the Special Education Department, including Ms. Grant.
6. One of those positions, Special Projects, was vacant.
7. Ms. Grant held one of these positions as Coordinator – Special Education/PPCD ("**PPCD Coordinator**").
8. Ms. Grant meets the qualifications for the thirteen Special Education curriculum coordinator positions, with the exception of the Speech Pathologist curriculum coordinator, which requires a specialized degree.
9. Ms. Grant has special experience and training in PPCD that the other coordinators do not have. Ms. Bushnell has similar PPCD experience and training.
10. Throughout her employment, Ms. Grant's evaluations reflected her excellent performance of her duties.
11. Ms. Grant's termination was not performance related.
12. Ms. Grant has more seniority than some (at least 2) of the other Special Education curriculum coordinators;
13. The vast majority of Respondent's duties, time, and responsibilities are dedicated to PPCD.

14. Respondent's current position is an administrative position.
15. PPCD is funded by AISD general operating budget and supplemented by Federal grant funds.
16. PPCD is a District-wide program.
17. PPCD supports and/or serves children, ages 3 to 5, with disabilities.
18. The PPCD Coordinator does not provide direct instruction to students.
19. PPCD is a special program within the special education department.
20. The duties and responsibilities of the twelve Coordinators for the Special Education Department are not all homogeneous; rather, each Coordinator has specialized knowledge, skills, and duties appropriate for the particular program to which he or she is assigned.
21. The term "support and services" has replaced the term "programs" in common usage within the Special Education Department in order to facilitate the inclusion of special education students in general education programs and to avoid "pigeon-holing" or unduly labeling students on the basis of their disabilities.

Financial

22. The AISD Board of Trustees had previously adopted DFF (Local), **Exh. A 1**.
23. AISD carried a budget deficit for two years prior to 2010-2011.
H. Tr. Vol. 1 6/8/2011 (24:7 - 31:6)
24. The ending 2009-10 fund balance was less than the State recommendation
25. The AISD annual budget for 2010-2011 was \$443 Million.
26. AISD received information from the Texas Legislature and other reputable sources that its state and local funding would be cut significantly in 2011-12.
27. AISD reasonably calculated that it would have a multi-million dollar deficit in its budget for 2011-2012 due to losses in state and local funding.
28. Based on this and all information available to it, AISD Board of Trustees reasonably determined that it was in a state of financial exigency.
29. On March 10, 2011, AISD'S Board of Trustees ("**Board**") declared a financial exigency and the need for program changes. **Exh. A 43**.
30. The Board determined that financial exigency and/or program change required the discharge or nonrenewal of employees in accordance with Board Policy DFF (Local).
31. The Board implemented a reduction in force ("**RIF**") and program changes in order to reduce its projected deficit and confront its financial exigency. **Exh. A 43**.

32. In 2010, an outside consultant determined that the Special Education Department was over-spending grant funds and recommended that cuts be made in personnel of 25 professional staff and 60 teaching assistants with a 5 year savings of about \$12 Million. **Exh. A 35.**
33. The Board directed Superintendent McCullough to recommend employment areas to be affected by the RIF, in accordance with DFF (Local).
34. Superintendent McCullough conferred with his executive staff to seek input on how proposed cuts could be managed effectively with minimal negative impact on classroom instruction.
H. Tr. Vol. 1 6/8/2011 (55:11 - 59:21)
35. Superintendent McCullough sought input from key administrators but did not delegate the responsibilities with which the Board charged him to propose employment areas to be affected by the RIF, in accordance with DFF (Local).
36. It was proposed by staff to the Superintendent that the Special Education Department could absorb the duties of the Co-Coordinator – Special Education for the PPCD program with only minimal impact on classroom instruction.
H. Tr. Vol. 2 6/8/2011 (169:1 – 173:1)
37. It was proposed by staff to the Superintendent that the PPCD undergo a program change whereby it would no longer be supervised by a dedicated Coordinator; rather, supervision of the program and its activities would be absorbed by the Assistant Director of Special Education, by an existing employee with experience in PPCD.
H. Tr. Vol. 2 6/8/2011 (48:23 - 50:10; 189:2 – 190:21)
38. Superintendent McCullough identified and recommended to the Board that Coordinator – Special Education/PPCD (“**PPCD Coordinator**”) was an employment area pursuant to Board Policy DFF (Local) and was one of fourteen employment areas to be affected by the RIF.
H. Tr. Vol. 2 6/8/2011 (50:19 - 54:22)
39. The Superintendent’s recommendation of Coordinator PPCD as an employment area was based upon a uniform analysis of the information provided to him without regard to individual identities.
40. Individual names or identities had not been identified for purposes of the RIF prior to the time that the employment areas were recommended to the Superintendent to recommend to the AISD Board.
H. Tr. Vol. 2 6/08/2011 (170:3 – 172:25)
41. Ms. Grant’s name was not identified with **Exh. G 15** and in the discussions on or about 02/23/11.
42. On March 31, 2011, the Board approved the employment areas recommended by Superintendent McCullough, including PPCD Coordinator, and determined that these were the employment areas to be affected by the RIF, pursuant to Board Policy DFF (Local). **Exh. A 45.**

43. In determining the employment area of PPCD Coordinator, neither the Board nor the Superintendent nor any employee or representative of AISD acted with any favoritism, discriminatory motive or bias and/or intent to discriminate against any person on the basis of race, nationality, age, gender, and/or any other protected characteristic and/or personal relationship or bias.
44. On March 31, 2011, the Board directed Superintendent McCullough to make recommendations to the Board concerning the proposed discharge or nonrenewal of employees within the affected employment areas because of the RIF, pursuant to Board Policy DFF (Local). See **Exh. A 45**.
45. Respondent Grant was the only employee in the employment area of Coordinator – Special Education/PPCD.
46. On April 7, 2011, Superintendent McCullough recommended that the Board propose terminating Respondent's contract as she was the only employee within an affected employment area because of the RIF due to the financial exigency and/or program change. **Exh. A 47**.

Notice.

47. Respondent was given proper notice of the proposed termination of her contract and of her right to a hearing. **Exh. A, 84 and 85**.
48. On 04/14/11, **Exh. A 85 and H 1**, the notice given to Respondent of the proposed termination of her contract included written notice of the proposed action, a statement of the reason(s) requiring such action, and notice that Respondent was entitled to a hearing stating:
"The proposed termination of your contract and your proposed discharge are for the following reasons:
 1. A financial exigency and need for program change due to financial exigency that requires a reduction in personnel."
49. On April 25, 2011, Grant, represented by attorneys David Lunningham and Helena Coronado-Salazar, timely requested the appointment of a Certified Hearing Examiner by the Texas Education Agency to hear this dispute. **Exh. H 2**.
50. On May 9, 2011, Jess Rickman was notified, of his selection as Certified Hearing Examiner to conduct a hearing in this dispute. He later withdrew from the assignment. **Exh. H 3**.
51. On June 2, 2011, Robert C. Prather, Sr., was notified, of his selection with agreement of the parties, as Certified Hearing Examiner to conduct a hearing in this dispute. The assignment was accepted on June 6, 2011. **Exhs. H 4 and 5**.
52. On May 16, 2011, a prehearing was held with counsel for the parties. **Exh. 6**.
53. On June 8, 2011, the hearing in this matter was commenced as an Open Hearing and was completed on June 9, 2011, with both parties in attendance represented by counsel.
54. **Exhs. H 1 – 6; A 1 – 102; and G 1 – 29** were admitted into evidence in the Hearing.

55. After the Board approved the proposed employment area of PPCD Coordinator as one to be affected by the RIF and gave Respondent notice of the proposed termination, AISD offered Respondent a position in the Special Education Department for which she was qualified.
56. Respondent declined the position she was offered in the Special Education Department, at least in part, because the new position would involve a reduction from her current salary.
57. After the Board approved the proposed employment area of PPCD Coordinator as one to be affected by the RIF and gave Respondent notice of the proposed termination, Respondent was considered for the vacancies for assistant principals.
58. Respondent applied for assistant principal positions within the AISD.
59. Respondent is qualified for assistant principal positions.
60. Respondent was interviewed for the assistant principal position at Pope Elementary.
61. Respondent was not the most qualified applicant for the assistant principal position(s) for which she applied.
62. AISD hired another person for the assistant principal position at Pope Elementary because the other person was the more qualified internal applicant for the position than Respondent and was also in the RIF pool.
63. AISD has not discriminated against Respondent on the basis of any protected characteristic, including but not limited to nationality, race, age, and/or gender.

III. DISCUSSION

A. Financial Exigency.

1. As a part of its responsibilities, the Board of Trustees of a School District has the responsibility to make financial decisions. Those are matters within its discretion. The determination of a financial exigency is a matter of discretion with the Board. This is not a case where the Board suddenly one day just said "we declare a financial exigency". To the contrary, as the evidence was produced in this case, the Board, along with its Superintendant and District staff, was aware of and had budget and financial shortages for a number of years. They had reports from consultants in the Special Education Department of the need to reduce expenditures and that there were and would be decreases in available grant funds. In the overall picture, the Board and District had evidence of its own conditions and budget shortfalls. In addition, in trying to look at the current and future situations, the Board and District had information projecting expenditures, revenues and shortages of funds from the State of Texas. The Board, having this information

to consider, then was within its discretion deciding how it was going to budget and use its funds both now and projecting the future needs and protection of assets.

2. Whether or not it is appropriate to ask for tax ratification, again, is a matter is within the discretion of the Board. There are no guarantees that a vote would be in favor of a tax ratification or increase. If the election failed, then what would the District be doing? The Board would still have a financial situation about which it had to make decisions, choosing from a number of options. More than sufficient evidence was presented in this Hearing of the evidence that was presented to the Board and the input, discussions and determinations by the Board in arriving at its decision to declare a financial exigency.

B. Employment Areas.

1. The DFF (Local) requires the Board to determine Employment Areas after recommendation from the Superintendent for purposes of a reduction in force. In the policy itself there is a broad range of matters that might constitute an employment area. That list is not exclusive. The Board received input from the Superintendent who had received input from staff throughout the District who then recommended the Employment Areas to be used in the reduction in force.

2. PPCD certainly falls within the list already in the DFF (Local) and may have qualified under other criteria that the Board used in making its determination. Once again that determination is a discretionary one and the evidence is that the Board had the recommendation of the Superintendent who likewise developed information upon which he based his recommendation. While one may not agree with the decision, it was a matter within the Board's discretion.

C. Program Change.

1. The elimination of the PPCD position and the transferring and absorption of activities to other personnel, basically supervisors, clearly falls within the definition of the DFF (LOCAL) in terms of a reduction in force and is "a consolidation of a function within a department" and part of the definition of "reorganization". The changes to PPCD were considered a "program change" within the definition of DFF (LOCAL) by AISD, including Ms. Hill and Ms. English.

2. Such activities were sufficient to support the Board exercising its discretions.

D. Summary

The District had budgetary problems for a number of years which it had been considering for some time and evaluating solutions. It had been developing information and analyzing what steps it might take to address budget problems. Again, part of that is evidenced by the study of the Special Education Program and the recommendation there for reductions and expenditures. The financial situation became even more critical when the matters with the Legislature and the State budgetary problems were being discussed and forecast. Therefore, the District continued in its evaluation and study as to what could be done with respect to its duty to educate a student versus how does it finance that responsibility and what is the scope of that responsibility. How many programs do they have? How many activities do they support and facilities do they either maintain or build new ones? All of this is an ongoing process. The Superintendent made it very clear that he had been studying and working on it for quite some time. Furthermore, he had as a main focus to minimize the loss of teachers and try to find other areas, i.e. administration, various programs and other expenditure areas to reduce or eliminate in order to keep teachers in the classroom.

The credible evidence is consistent with and supports the District and the Board acting in accordance with DFF (LOCAL) in identifying the financial exigency, program changes, employment areas and lastly, those persons who would then be affected by those determinations. The credible evidence does not support that Ms. Grant was first identified as an individual to be terminated and then the District backed into it by the steps that it took. The credible evidence is that her identification was the last step in the process. The Board declared the financial exigency and/or program change, determined employment areas and then received the names recommended for termination. It is an unfortunate situation. It is obvious from the testimony that the District does not want to lose a good employee. Even so, there is only so much money in which to finance the operation. Hard choices had to be made. The Board and District made them in accordance with their policies and law.

IV. CONCLUSIONS OF LAW

A. After due consideration of the record, of the evidence at the hearing, arguments of counsel, matters officially noticed, Briefs submitted, and the foregoing Findings of Fact, in my capacity as Certified Hearing

Examiner, I make the following conclusions of law:

1. Jurisdiction in this case is proper under Texas Education Code, Section 21.211(a)(2), "... a financial exigency that requires a reduction in personnel." and 21.251(a)(2).
2. Ms. Grant, is an "administrator" as defined in the Texas Education Code.
3. Ms. Grant, was employed as an administrator by the AISD pursuant to a term contract as defined the Texas Education Code. **Exh. A 53.**
4. Ms. Grant, was recommended for termination pursuant to the authority in Subchapter E, § 21.211(a) of the Texas Education Code, Ms. Grant's term contract and DFF (Local).
5. Pursuant to her contract, **Exh. A 53, Para. 8.1**, Ms. Grant. may be terminated for financial exigency or a program change as determined by the Board.
6. The appeal by the Respondent, Ms. Grant, was conducted pursuant to § 21.256 of the Texas Education Code, and the standard of review in determining the findings of fact was based on the "preponderance of the evidence."
7. Ms. Grant received proper written notice of her proposed termination and her right to request a hearing, in accordance with state law and District Policy.
8. The Board determined and declared the existence of financial exigency and/or of program changes which required the discharge or nonrenewal of employees, including Respondent's position and Respondent.
9. AISD's Board complied with DFF (Local) in determining the existence of a financial exigency after reviewing the financial information available to it and the history of the school's financial activities and its projected future financial needs and revenues.
10. AISD's Board complied with DFF (Local) by considering the recommendations of the Superintendent for program changes and the existence of program changes that were occurring or would occur.
11. AISD's Board complied with DFF (Local) in determining that Coordinator – Special Education /PPCD was an employment area, including that:
 - a. It was an "educational support program that does not provide direct instruction to students";
 - b. It was an "administrative position";
 - c. It was "other contractual positions";
 - d. It was "other district – wide programs";
 - e. It involved programs funded by State or Federal grants; and
 - f. It was a special program, involving pre-school, 3-5 year olds, based on recommendations from the Superintendent.
12. The District has shown that a program change has or will occur with respect to PPCD.

13. AISD and the AISD Board followed AISD's Policies, specifically DFF (LOCAL), in determining the employment areas to be eliminated as a part of the reduction in force and subsequently the identification of the specific employees and in this case, the employment area Coordinator – Special Education/PPCD, and Ms. Grant, whose contract was recommended for termination.
14. The Board, pursuant to the DFF (Local), upon recommendation from the Superintendent, may identify employment areas for purposes of implementation of a RIF in addition to those listed at Page 2 of DFF (Local) employment areas. The list is not an exhaustive list as stated in DFF (Local).
15. AISD's Board complied with DFF (LOCAL) in declaring the financial exigency and program change resulting in the need for the reduction in force and a basis for the proposed termination of Ms. Grant and her Term Contract.
16. AISD's financial exigency and/or program change, as determined by the Board, requiring a reduction in force constitutes sufficient cause for the proposal of a discharge and/or termination of Respondent's Term contract.
17. Due to its financial exigency, AISD implemented program changes and a reduction in force.
18. Superintendent McCullough did not delegate his duty of proposing to the Board employment areas to be affected by the RIF, in accordance with DFF (LOCAL).
19. Neither DFF (LOCAL) nor Commission precedent prohibits a Superintendent from seeking input from administrators in carrying out the Superintendent's duty to propose employment areas to be affected by the RIF, in accordance with DFF (LOCAL).
20. The Preschool Program for Children with Disabilities ("PPCD") is a "program" within the meaning of Board Policy DFF (LOCAL).
21. The Preschool Program for Children with Disabilities ("PPCD") is a "special program" within the meaning of Board Policy DFF (LOCAL).
22. Coordinator – Special Education/PPCD constitutes a separate employment area, within the meaning of Board Policy DFF (LOCAL) as recommended by the Superintendent and determined by the Board.
23. AISD Board's determination of Coordinator – Special Education/PPCD as an employment area, within the meaning of Board Policy DFF (Local), complies with DFF (Local) and all applicable law.
24. Because Respondent was the only employee in the employment area of Coordinator – Special Education/PPCD, it was not necessary to apply the criteria identified on page 3 of Board Policy DFF (Local).

25. The proposal to terminate Respondent's contract did not involve bias, favoritism or discrimination on the basis of any protected characteristic, including but not limited to race, nationality, age, and/or gender.
 26. The proposed termination of Respondent's contract due to financial exigency is in compliance with DFF (Local) and applicable law.
 27. The proposed termination of Respondent's contract due to reduction in force is in compliance with DFF (Local) and applicable law.
 28. The proposed termination of Respondent's contract due to program change is in compliance with DFF (Local) and applicable law.
 29. The AISD Board was not required by policy DFF (Local) to declare Coordinator-Special Education/PPCD as unique.
 30. AISD has met its burden of proof by preponderance of the evidence.
 31. AISD's decision to propose termination of Ms. Grant's Term Contract of Employment as the only employee in an identified employment area is supported by the evidence and is not unlawful, arbitrary, capricious, discriminatory, biased or the result of favoritism.
 32. A financial exigency existed in AISD at the time of the proposed termination of Ms. Grant's Term Contract.
 33. Financial exigency, as defined by AISD's policies, constitutes cause for dismissal.
 34. A program change was made in AISD's district at the time of the proposed termination of Petitioner's contract.
 35. A program change, as defined by AISD's policy DFF (Local) constitutes cause for dismissal.
 36. Respondent Grant's Contract was properly proposed for termination by AISD for reasons of reduction in force as a result of the financial exigency and/or program change.
 37. AISD properly considered Respondent for assistant principal positions and interviewed Respondent for the assistant principal position at an elementary school.
 38. In hiring a more qualified applicant who was also subject to the reduction in force for the elementary school assistant principal position, AISD complied with DFF (Local).
 39. AISD's decision to hire a more qualified applicant for the elementary school assistant principal position did not involve any bias or discrimination on the basis of any protected class, including but not limited to race, nationality, age, and/or gender.
- B. All findings of fact should be interpreted, where appropriate, as conclusions of law and vice versa.

V.
RECOMMENDED RELIEF

RECOMMENDED DECISION OF THE CERTIFIED HEARING EXAMINER

IT IS RECOMMENDED that the Board of Trustees of Arlington ISD adopt the foregoing Findings of Fact and Conclusions of Law and enter an Order consistent therewith; and

IT IS FURTHER RECOMMENDED that the District's proposed termination of the contract of Esther Grant be approved and upheld and that Ms. Grant's appeal of the proposed termination be denied.

SIGNED AND ISSUED this 22nd day of June, 2011.



ROBERT C. PRATHER, SR.
CERTIFIED HEARING EXAMINER

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