



Austin Independent School District

Office of the General Counsel

DATE: February 10, 2011

TO: Board of Trustees

THROUGH: Meria Joel Carstarphen, Superintendent

FROM: Mel Waxler, General Counsel
Dorcas Green, External Legal Counsel

RE: Reduction in Force Based on Existence of Financial Exigency

The declaration of a “financial exigency” is one component of an action taken to terminate or nonrenew an employment contract governed by Chapter 21 of the Texas Education Code. It is the first of many steps required before a school district can non-renew or terminate term contracts as part of a “Reduction in Force” (RIF). Just as employment contracts can be non-renewed or terminated based on employee performance, such actions may also be taken in order to address a school district’s financial needs. Note that under Austin ISD Board Policy DFF (Local), a RIF may also be based on a program change or reorganization, with the same procedural and legal steps required in a RIF based on financial exigency.

I. Reduction in Force: Applicable State Law and Board Policy

A term contract may be terminated, during its term, as the result of a RIF made necessary by a financial exigency. Section 21.211 of the Education Code provides for the termination of a term contract for:

- (1) Good cause [*meaning a performance-based reason*] as determined by the board; or
- (2) A **financial exigency** that requires a reduction in personnel.

A term contract may also be non-renewed, at the end of its term, as the result of a RIF made necessary by a financial exigency. Pursuant to Section 21.203(b), the Austin ISD employment policies set out the reasons for the non-renewal of a term contract in Board Policy DFBB (Local).

DFBB (Local) listed reason number 9: *Reduction in force because of financial exigency or program change*. Board Policy authorizes the nonrenewal of a term contract based on a RIF made necessary by a financial exigency. Districts also have the authority to determine, by policy, what is necessary for a RIF, and the proper procedures necessary to effectuate a RIF non-

renewal. Board policy DFF (Local) lays out the proper procedures for determining when a RIF is appropriate.

II. What are the benefits of declaring a financial exigency?

As discussed above, a financial exigency can serve as the basis for the termination of a term contract, during the term, or the non-renewal of a term contract, at the end of the term. The declaration of a financial exigency cannot provide any benefit to a school district unless and until the necessary steps to conduct a proper RIF are taken. A financial exigency is nothing more than a tool to enable a school district to terminate or non-renew one or more employees as necessary to address the district's financial situation. "Financial exigency" is not defined by state law; rather it is defined by Board Policy DFF (Local):

"Financial exigency" shall mean any event or occurrence that creates a need for the District to reduce financial expenditures for personnel including, but not limited to, a decline in the District's financial resources, a decline in enrollment, a cut in funding, a decline in tax revenues, or an unanticipated expense or capital need.

This definition of financial exigency is commonly seen in DFF (Local) policies across Texas, and has been examined by the Commissioner on multiple occasions. This definition will be used to determine whether a financial exigency truly exists.

Once a financial exigency is declared, a school district can move forward with a reduction in force action, with the goal of ultimately eliminating existing positions and terminating or nonrenewing the term contracts of the employees currently assigned to those eliminated positions.

III. When does the financial condition of a school district legally justify termination or nonrenewal of a term contract(s)?

The relevant question is at what point is a district's financial situation severe enough as to warrant the termination or nonrenewal of an employee's term contract. The Commissioner has consistently noted that a school district does not have to be bankrupt, nor does it have to be unable to pay its employees, in order to establish that a RIF is necessary because of a financial exigency. The existence of money in a district's fund balance does not preclude a finding of financial exigency; the Commissioner has stated that "the definition of financial exigency requires a decline in revenues which then requires a decrease in expenditures." *Camp v. Union ISD*, 084-R2-1293 (Comm'r Educ. 1996). The following are events which the Commissioner has found sufficient to support a school board's declaration of financial exigency:

- A decline in enrollment;
- A decrease in tax base / decline in appraisal values;
- A loss of funding / increase in costs;
- Efforts to conserve fiscal resources;
- Projected budget shortfall;
- Changes made in the district's internal organization designed to promote efficiency; or
- Decreases in tax revenue.

When a RIF is based on a financial exigency, the school district should be prepared to put forth concrete evidence at the termination or non-renewal hearing, which will establish that the district is in fact experiencing financial problems. If challenged, the Commissioner will defer to the judgment of the board of trustees as to the steps necessary to adequately address the district's financial state, unless it is determined that the board's action in declaring financial exigency, or otherwise going forward with the RIF, was arbitrary or capricious.

The number of years that can and should be considered in shortfall projections is left up to the Board. However, the school years considered must be **reasonable and rational**. See *Brown v. Anahuac ISD*, No. 205-R2-687 (Comm'r Dec. March 9, 1990). A question regarding how long a financial exigency lasts also rests with the Board since any declaration only has impact as it relates to specific Board actions to identify employment areas to be affected and to non-renew and/or terminate specific contracts. For instance, in *Brown v. Anahuac ISD*, the Board requested advice from a school finance consultant who told them in November of 1986 that the District should reduce staff by eight to ten positions, in order to address a predicted enrollment shift of 33 students in 1987-88 and 100 students by 1990-91. *Brown*, No. 205-R2-687 (Comm'r Dec. March 9, 1990). The Commissioner determined these future projections to be relevant in assessing whether or not a financial exigency existed. *Id.* Accordingly, if the District wants to consider future shortfall projections to declare a financial exigency, there should be a rational basis for considering those particular school years. *Id.*; *Accord Brenna v. Southern Colorado State College*, 598 F.2d 475, 479 (10th Cir. 1978).

IV. Continuing the RIF Process After Declaration of Financial Exigency¹

A board's declaration of a financial exigency is the first step in the multi-step RIF process. The remainder of the RIF process, prior to the actual termination or non-renewal of the contract, is governed by Board Policy DFF (Local) and DFF (Regulation). The Board must take the following actions, on recommendation of the Superintendent, in the order listed below:

¹ Note that the process for conducting a RIF based on a financial exigency is identical to the process for conducting a RIF based on a program change or reorganization.

- The board declares either a financial exigency and/or the need for a program change and/or reorganization, which will require the termination or non-renewal of one or more term contract employees;
- The board identifies the employment area(s) that are the subject of a proposed RIF; and
- After applying the DFF (Local) and DFF Regulation) criteria to the term contract employees in the identified employment area(s), the board identifies the employees whose positions will be eliminated.

At the end of this three-step process, the board will have successfully eliminated the positions of the identified term contract employees. However, the contracts of those identified employees have not yet been terminated or non-renewed. Just as with any performance-based contract action, the procedures required under policies DFBA (termination) or DFBB (non-renewal), must be followed in order to end the contracts. Accordingly, and on the recommendation of the Superintendent, the board must take action to propose the term contracts of those identified employees for termination or non-renewal. Each employee must receive notice of the board's action at least 45 days before the last day of instruction for the 2010-2011 school year.

Agenda items and motion language for the board meeting should be prepared and reviewed well in advance of the meeting. The board's actions during this process, from financial exigency to proposed termination or non-renewal, must be clearly documented in the board minutes.

V. Important Points

- Any recommendation from the Superintendent regarding the existence of a financial exigency should be supported by sufficient documentation of the state of the District's financial resources, steps taken to cut spending, and remaining need for action.
- Great deference is given to the Board's decision to declare a financial exigency.
- The District must show that a financial exigency actually exists and is not a pretext to eliminate specific employees.
- Board Policy DFF (Local) and DFF (Regulation) must be followed to the letter and without exception. Any procedural error, at any step of the RIF or non-renewal process, can be fatal should the Board's action be challenged.
- Great care must be taken to properly identify the relevant employment area(s) in compliance with DFF (Local), ensuring that the stated employment area(s) accurately reflect the existing areas of employment within the District.

- Apply the criteria listed in DFF (Local) and DFF (Regulation) consistently and objectively, in determining which employees will be subject to the RIF.
- Follow Board Policy DFBB (Local) during the non-renewal process.
- Provide employees with due process of law, specifically timely notice and a hearing upon request.