

BEFORE THE
GOVERNING BOARD OF THE
CHICO UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Non-Reemployment of

CERTAIN CERTIFICATED PERSONNEL
EMPLOYED BY THE CHICO UNIFIED
SCHOOL DISTRICT,

Respondents.

OAH No. 2009030506

PROPOSED DECISION¹

Karl S. Engeman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 20, 2009, in Chico, California.

Kim Kingsley Bogard, Esq., of Kingsley Bogard Thompson, L.L.P., Attorneys at Law, and Bob Feaster, Assistant Superintendent, Human Resources, represented the Chico Unified School District (District).

Lesley Beth Curtis, Esq., of Langenkamp and Curtis, L.L.P., Attorneys, represented all named respondents who appeared at the administrative hearing.

Evidence was received and the parties informed the Administrative Law Judge that they had formulated a stipulated resolution of all issues except those relating to respondent De la Torre-Stewart. The written terms of the stipulated settlement were to be transmitted to the Administrative Law Judge on or before May 1, 2009, along with a stipulated factual statement regarding Ms. De la Torre-Stewart and legal argument relating to her status. The written stipulation was received on or before May 1, 2009, and is recited below. The documents and argument regarding Ms. Torre-Stewart were also received on or before May 1, 2009, and separate findings of fact and legal conclusions are included below.

¹ The stipulation recited below refers to this document as the Recommended Decision. They are one and the same.

FINDINGS OF FACT²

TERMS OF PARTIES' STIPULATIONS

1. The Board of Education of the Chico Unified School District adopted Resolution No.1059-09 on February 25, 2009. This Resolution reduced or discontinued the services set forth in Attachment A at the end of the 2008/2009 school year for the 2009/2010 school year.
2. Respondent's representative, Beth Curtis of Langenkamp and Curtis LLP, is the authorized representative of every individual indicated in Attachments B and C.
3. Attachments B and C (Summary of Procedural Status Chart) indicate those individuals who:
 - A. Were timely served with a Notice of Recommendation That Services Will Not Be Required; and
 - B. Timely filed Requests for Hearing; and
 - C. Were served with an Accusation; and
 - D. Timely filed a Notice of Defense (either individually or through appointed counsel).
4. Prior to this Stipulated Final Decision:
 - A. No Requests for Hearing were withdrawn.
 - B. The District has not rescinded any layoff notice or Accusation.
5. Employees that were given procedurally proper notice, but failed to appear for hearing on April 20, 2009, as noticed, are deemed to have waived their right to a hearing. Such names were read into the record.
6. Unrepresented employees that made a timely appearance at this layoff hearing were permitted to present evidence to the ALJ as to why they should not be laid off. No such employees requested to do so.
7. The District affirms that these proceedings are based solely on the grounds set forth in Education Code sections 44949 and 44955, and in no way relate

² The stipulations regarding factual issues recited below are adopted as findings in this matter, including the contents of the various attachments referenced. The latter are attached with the same alphabetical designations and are incorporated herein.

to any individual's ability or performance. All employees set forth in Attachments B and C acknowledge that:

A. They are the proper subject of a layoff; and

B. Cause exists for their layoff; and

C. They waive and relinquish their right to a hearing as provided by Education Code sections 44949 and 44955 and Government Code sections 11500, et seq.

8. Upon issuance of a Recommended Decision, and Approval thereafter by the Board of Education for the District, the District shall:

A. Rescind preliminary Notices of Layoff served upon the Respondents as designated in Attachment D (Balance Sheets) as "Rescind."

B. Issue final Notices of Layoff to those designated in Attachment D as "Layoff."

9. Certain individuals received a change in seniority dates. Such names and dates were read into the record.

10. Certain individuals received a change in employment status. Such names were read into the record.

11. Except as specifically noted below, and except for adjustments as set forth in paragraphs 5 and 6 above, all issues pertaining to the certificated layoff of any employee represented by Respondents' counsel of record who are laid off have been waived and are withdrawn with prejudice.

12. One remaining issue shall be determined by the Administrative Law Judge. That is, the proper seniority date for Respondent De la Torre-Stewart.

13. Laid off employees shall be entitled to all the protections set forth in Education Code section 44957, including, but not limited to, placement (as appropriate) on either the 39-month or 24-month rehire list.

14. The District need not take the action specified in the Education Code (including the actions specified in Sections 44955 and 44949) in order to accomplish the layoff of employees; and, that in lieu thereof, this Stipulated Decision has been signed.

15. During the 24 or 39 month re-employment period:

A. Provided Employee is credentialed and competent to render the service, District shall offer any vacant probationary or permanent positions to laid off employees in order of original hire date (with same date of hire ties broken as shown on Attachment E to this Agreement, Seniority List).

1) Should any Employee be reappointed to a probationary or permanent position, the period of the Employee's absence shall not be treated as a leave of absence and shall not be considered a break in the continuity of service.

2) Except as otherwise provided in the Education Code, the Employee shall retain the classification and order of employment he/she had when his/her services were terminated as provided for in Education Code section 44957.

B. District shall offer any substitute positions of employment (for which a laid off employee is credentialed and competent to render service) to laid off employees in order of original hire date (most senior first).

16. The facts stipulated to in this Agreement are based upon the assumption that the Administrative Law Judge will rule that the District properly designated employment status and seniority dates for those people still at issue. Any ruling to the contrary, to the extent accepted by the Board of Education, may impact the stipulations as to final layoff notices/stipulations of rescissions as set forth above.

Respondent Idalia De la Torre-Stewart

17. Respondent De La Torre-Stewart began working for the District on August 15, 2005. She had two separate contracts. The first contract specified that she was hired for a term of employment beginning August 15, 2005, and terminating December 21, 2005. She was designated part time "0.4 Temporary Teacher." Her classification was a temporary long term replacement for a certificated employee on leave or illness and Education Code section 44920 was cited. The second contract was for the same time period and specified that she was part-time "0.1 Temporary Teacher." Her classification for this position was temporary, categorically funded program, and Education Code section 44909 was cited. New contracts were executed for the remainder of the 2005-2006 school year with the same terms of employment and classifications.

18. In the 2006-2007 school year, respondent De la Torre-Stewart was again hired as a temporary teacher for the two semesters. However, her contracts specified 0.2 part-time temporary teacher in the long term replacement category and 0.46 temporary, categorically funded. On June 27, 2007, respondent De la Torre-

Stewart signed a contract making her a full time temporary replacement teacher. She received a contract for the second semester under the same terms.

19. Respondent De la Torre was hired as a probationary teacher by the District for the 2008-2009 school year. She was given one year credit for the 2007-2008 service as a long term replacement teacher pursuant to Education Code section 44918. The District asserts that her seniority date is August 10, 2007. Respondent De la Torre counters that her correct date of first paid service should be August 15, 2005, when she signed her first contracts with the District.

LEGAL CONCLUSIONS³

1. Jurisdiction in this matter exists pursuant to Education Code sections 44949 and 44955. All notices and jurisdictional prerequisites required by those sections were satisfied. The District has the burden of proving by a preponderance of the evidence that the proposed reduction or elimination of particular kinds of services and the preliminary notices of layoff served on respondents is factually and legally appropriate. (Ed. Code, §§ 444949 and 44955.)

2. The services the District seeks to eliminate in this matter, as set forth in the attached Resolution 1059-09 are “particular kinds of services” that may be reduced or discontinued within the meaning of Education Code section 44955. Legal cause exists pursuant to Education Code sections 44949 and 44955 for the Chico Unified School District to reduce or discontinue particular kinds of services, as set forth in the District’s Resolution and identified in the Factual Findings. The reduction or discontinuation of these identified particular kinds of services relates solely to the welfare of the District and its pupils.

3. Legal cause exists pursuant to Education Code sections 44949 and 44955 to give respondents identified as “lay off” in the attachments final notice that their services will not be required for school year 2009-2010. Legal cause exists to sustain the Accusations. The Board may give those respondents final notices that their services will not be required by the District in the upcoming school year, in inverse order of seniority.

Legal Conclusions Relating to Respondent De La Torre Stewart

4. Respondent De La Torre-Stewart asserts that her correct seniority date is August 15, 2005, the date on which she was employed by the District in .1 FTE in a categorically funded position. She relies upon case law which characterizes categorically funded teachers as “probationary” for purposes of economic layoff if the funding for such specially funded projects has not terminated. Although the legal

³ The Legal Conclusions, apart from those relating to respondent De la Torre-Stewart, are based exclusively on the stipulation between the parties recited above.

principle asserted is essentially correct, it does not apply to respondent De la Torre Stewart for the reasons explained below.

5. Education code section 44909 reads, in pertinent part:

The governing board of any school district may employ persons possessing an appropriate credential as certificated employees in programs and projects to perform services conducted under contract with public or private agencies, or categorically funded projects which are not required by federal or state statutes. The terms and conditions under which such persons are employed shall be mutually agreed upon by the employee and the governing board and such agreement shall be reduced to writing. Service pursuant to this section shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee unless (1) such person has served pursuant to this section for at least 75 percent of the number of days the regular schools of the district by which he is employed are maintained and (2) such person is subsequently employed as a probationary employee in a position requiring certification qualifications. Such persons may be employed for periods which are less than a full school year and may be terminated at the expiration of the contract or specially funded project without regard to other requirements of this code respecting the termination of probationary or permanent employees other than Section 44918.

6. Education Code section 44909 does provide a method for "tacking on" additional time if a temporary certificated employee meets the two conditions set forth. There is no limit included for the number of years which may be added. However, respondent has failed to satisfy the necessary prerequisites for inclusion of her service as "probationary" (and an earlier first date of probationary service for seniority purposes). The agreed upon facts do not establish that she worked for at least 75 percent of the school days in either year. Her .1 FTE assignment as a categorically funded teacher in 2005-2006 makes that a virtual impossibility and her .46 FTE categorically funded portion in 2006-2007 makes it very unlikely that she met that condition in the second year at issue. She was also not hired the following year as a probationary teacher, as required by the second condition. While the statute uses the word "subsequent," case law suggests that this means the next year following employment in a categorically funded position (*Bakersfield Elementary Teachers Ass's v. Bakersfield City School Dist.* (2006) 145 Cal. App.4th 1260, 1286; *Zalac v. Governing Bd. of Ferndale Unified School Dist.* (2002) 98 Cal.App.4th 838, 842-846.) Here, respondent completed her categorically funded work at the end of school year 2006-2007 and worked exclusively as a long term replacement substitute in school year 2007-2008.

7. Respondent argues that she is entitled to credit for the two years in question because she was misclassified as a temporary teacher whereas she should

have been designated as probationary. She relies primarily on the *Bakersfield* which did specifically address the proper classification of teachers employed in categorically funded programs. The *Bakersfield* court concluded that such teachers were to be considered “probationary” for purposes of a lay-off proceeding under certain circumstances. The court explained that the language of Education Code section 44909 permits a school district to terminate such employees without according them the rights afforded probationary teachers, but only *if* the categorically funding project had expired. Otherwise, such employees are entitled to the protections afforded probationary teachers in an economic lay off. In this matter, the evidence did not establish whether the funding for respondent De la Torre-Stewart’s position had expired during the second year that she worked .46 FTE as a categorically funded teacher. It may be reasonably inferred that it did not, as respondent De la Torre-Stewart completed the school year in that capacity. In other words, had she been given a lay-off notice in school year 2006-2007 that her services would not be required in the ensuing school year, she would have been entitled to all of the procedural safeguards provided probationary teachers. This, according to *Bakersfield*, would include a seniority date based on her first date of paid service as a categorically funded teacher on August 15, 2005.

8. Although the evidence does not suggest the termination of the categorically funded program in which respondent was employed at the end of school year 2006-2007, respondent terminated her employment in the program when she switched to a full time long term substitute replacement position. Her new position, as respondent concedes, is one of the statutorily recognized temporary positions in which teachers are *not* treated as probationary employees for purposes of an economic lay off. Thus, any protections that respondent had acquired the previous school year which attached to her status as a categorically funded teacher were extinguished, including her “seniority date” vis-à-vis other teachers involved in a lay off proceeding. *Bakersfield* does include language that categorically funded employees “accrue” seniority against other probationary teachers (*Bakersfield*, at page 1301.) However, that language is misleading since the “probationary” status accorded such employees is contingent upon continued funding for such categorical programs. If the funding ends, they lose those rights and are thereafter subject to termination in the same manner as statutorily recognized temporary employees. Thus, their accrual of seniority relative to other probationary employees depends upon their continued participation in the categorically funded program. Nothing in *Bakersfield* or Education Code section 44909 suggests that they retain that seniority when they are no longer in the program.⁴

9. Implicit in respondent’s contention that she is entitled to an August 15, 2005 seniority date is the underlying premise that her employment by the District for school year 2008-2009 as a probationary teacher somehow resurrected the rights she

⁴ The exception, of course, is their subsequent employment in a “real” probationary position discussed below.

once held during her employment as a categorically funded teacher. Respondent provided no support, either in the language of a statute or case law for this proposition, and the premise is rejected. Respondent's relatively new status was considered and legal mandates fulfilled when the district "tacked on" the year in which she was a full time long term replacement substitute.

10. This conclusion is consistent with that reached by the court in *Schnee v. Alameda Unified School Dist.* (2004) 125 Cal. App.4th 555. Schnee had taught in a categorically funded program for approximately eight years. In August of 2002, she was hired as a third grade teacher in the generally funded school program. The school district classified her as a second year probationary teacher, essentially crediting her with one year probationary service based on Education Code 44909. The school district gave timely notice to Schnee of non-reelection. She argued that as she had served more than two years in the categorically funded program, her employment in August of 2002 made her a permanent employee subject to dismissal for cause only. The court rejected this contention, holding that no matter how many years a teacher has served in a temporary categorically funded position before being employed as a probationary employee, such employee does not immediately attain permanent status and must complete at least one year of probation in the non-categorically funded position. The court acknowledged the ambiguity in the language of 44909, but observed:

Any doubts that one may entertain concerning the interpretation of section 44909 that best conforms with the evident intent of the Legislature-no illuminating legislative history having been brought to our attention-are resolved by reference to those provisions of the Education Code that deal with temporary employees as defined in section 44919. Under section 44920, '[a]ny person employed for one complete school year as a temporary employee shall, if reemployed for the following school year in a vacant position requiring certification qualifications, be classified ... as a probationary employee and the previous year's employment as a temporary employee shall be deemed one year's employment as a probationary employee for purposes of acquiring permanent status.' (See also, e.g., § 44918.) Regardless of the number of years that the employee may have served in a temporary status in a position with certification qualifications, the employee must serve one year as a probationary employee before acquiring permanent status. (See *Santa Barbara Federation of Teachers v. Santa Barbara High Sch. Dist.*, supra, 76 Cal.App.3d at pp. 237-240, 142 Cal.Rptr. 749.) We can perceive no reason for treating persons whose employment is temporary by virtue of section 44909 differently in this respect than temporary employees under section 44919. The Legislature has made unmistakably clear that the latter must serve for a year as a probationary employee before receiving credit for the prior period of temporary employment and acquiring permanent status.

Although the language in section 44909 is more opaque, we conclude that the same period of probationary employment is required before permanent status may be obtained.

Schnee v. Alameda Unified School Dist. 125 Cal. App.4th 555,564.

11. Having obtained “real” probationary status (as opposed to the use of that designation to accord categorically funded teachers the rights afforded such teachers in a lay off proceeding under *Bakersfield*), respondent was properly classified as a second year probationary teacher with credit for one year’s service as a long term replacement substitute. Her status thus matched that of Schnee of which the court approved.

ORDER

1. The Chico Unified School District action to reduce or eliminate designated particular kinds of services for the 2009/2010 school year is AFFIRMED.

2. The Accusations with respect to those certificated respondent employees of the Chico Unified School District identified in Attachment D as “Lay Off” are SUSTAINED. Final notice may be given to those identified respondents by the District that their services will not be required for the upcoming 2009-2010 school year. Notice shall be given in inverse order of seniority.

DATED: May 6, 2009


KARL S. ENGEMAN
Administrative Law Judge
Office of Administrative Hearings