

BEFORE THE
GOVERNING BOARD
OF THE
POWAY UNIFIED SCHOOL DISTRICT

In the Matter of the Reduction in Force of
Certain Certificated Employees of the
Poway Unified School District,

Respondents.

OAH No. 2009030719

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Poway, California, on April 23 and 24, 2009.

Clifford D. Weiler, Attorney at Law, represented the Poway Unified School District.

Michael Baranic, Attorney at Law, represented all of the respondents to this layoff proceeding other than Jebette Caterina.

The matter was submitted on April 24, 2009.

FACTUAL FINDINGS

The Poway Unified School District

1. The Poway Unified School District (PUSD or the district) is located in North San Diego County, California. PUSD encompasses an area of approximately 100 square miles, and district schools are located in suburban San Diego and throughout the City of Poway. PUSD operates 25 elementary schools (K-5th grades), six middle schools (6th-8th grades), four comprehensive high schools (9th-12th grades), and one continuation high school. PUSD serves the educational needs of approximately 33,000 students; it is the third largest school district in San Diego County. PUSD currently employs approximately 1,900 certificated employees, most of whom are teachers. The district has an annual operating budget of approximately \$250 million, about 85 percent of which is used to pay the salaries and benefits of certificated and classified employees.

2. PUSD is governed by an elected five member Board of Education (the governing board). Donald E. Phillips, Ed.D. (Dr. Phillips), the Superintendent of Schools, is

the district's Chief Executive Officer. Malliga Pholandi (Pholandi) is the district's Chief Financial Officer. William Chiment (Assistant Superintendent Chiment) is the Assistant Superintendent of Schools, Personnel Support Services, and he is responsible for personnel matters, including the implementation of this reduction in force.

The Fiscal Crisis – Economic Layoffs

3. Proposition 13 limited the imposition of local property taxes and reduced a major source of assured revenue for funding public education in California. Since the passage of Proposition 13, public schools have looked primarily to the State of California and to other governmental entities for funding.

A school district cannot determine the level of state funding it will receive until the state budget is chaptered, an event usually occurring in late June but sometimes taking much longer, as occurred in 2008 and 2009. Before then, a school district's governing board must take steps to make certain that ends meet if the worst-case financial scenario develops. If the budget cannot be balanced, then the district's operations will be taken over by the County Board of Education.

A school board's obligation to balance its budget often requires that some teachers, administrators and other certificated employees be given preliminary layoff notices, warning them that their services will not be required for the next school year. Under Education Code section 44949, these preliminary layoff notices must be given no later than March 15.

The economic layoff statutes found in the Education Code generally require the retention of senior employees over more junior employees and the retention of permanent employees over probationary employees and others with less seniority. A public school district may deviate from the general rule requiring termination in reverse order of seniority only if it can demonstrate that identifiable junior employees possess credentials, special training, experience or qualifications necessary to teach a course of study or to provide services which more senior employees do not possess.

The District's Response

4. In late 2008 and early 2009, PUSD's administration (as well as the administrators of most other school districts) became aware of the State of California's massive budget deficit and its probable fiscal impact. As a result of the financial crisis, the district projected the need to trim its budget by approximately \$20.8 million for the 2009-10 school year. The district was required to look into ways to balance its budget, including the elimination of various programs and the reduction of classified and certificated staff.

The district's administrative staff prepared a recommendation concerning the reduction and elimination of particular kinds of services provided by certificated employees.

5. On March 9, 2009, under Education Code sections 44949 and 44955, the Superintendent of Schools recommended to the governing board that the district discontinue

or reduce particular kinds of services, notify certain certificated employees that their services would not be required in the 2009-10 school year, and notify those employees of the reason for the reduction in force.

6. On March 9, 2009, the governing board passed the following resolution:

Board of Education of the
Poway Unified School District

Resolution Number 34-2009

RESOLUTION REGARDING DISCONTINUANCES AND REDUCTIONS OF PARTICULAR KINDS OF SERVICES (DISTRICTWIDE; SEE DETAILS IN RESOLUTION, EXHIBIT "A") AND COMMENCEMENT OF CERTIFICATED LAYOFF; COMPETENCY AND SENIORITY TIE BREAKING STANDARDS; IMPLEMENTATION OF EDUCATION CODE SECTION 44955, SUBDIVISION (d)(1); DIRECTION TO NOTIFY AFFECTED EMPLOYEES OF RECOMMENDATION OF LAYOFF; AND RELATED ACTIONS

WHEREAS, because of financial constraints resulting from revenue being insufficient to maintain current levels of programs and services, including particular kinds of certificated services, and it being necessary to commence implementing program changes in a timely fashion within the current structure of the law, this District's Governing Board determines that it is in the best interests of the District and the welfare of the schools and the pupils thereof, to commence certificated layoff proceedings to discontinue and reduce particular kinds of services ("PKS") as hereinafter enumerated and to reduce the corresponding number of certificated staff no later than the beginning of the 2009-2010 school year;

WHEREAS, this action to reduce the services of regular certificated employees is not based upon a reduction of average daily attendance during either of the past two years;

WHEREAS, this discontinuance and reduction of certificated services shall result in layoffs of certificated personnel in accordance with Education Code sections 44949 and 44955 which provide a process whereby particular decisions, actions, and notifications must be undertaken beginning no later than March 15 of each school year regarding layoffs of certificated personnel in order to reduce the number of certificated staff, and this Board desires to reduce certificated staff as permitted by law;

WHEREAS, this Governing Board desires to discontinue and reduce the particular kinds of certificated services as listed in Exhibit "A", attached, and to that extent of full-time equivalents ("FTEs") not later than the beginning of the 2009-2010 school year;

WHEREAS, in the opinion of the Governing Board, it will be necessary as a result of the discontinuances and reductions of these particular kinds of services reflected in Exhibit "A" to decrease the number of certificated permanent and/or probationary employees by a corresponding number of full-time equivalent positions;

WHEREAS, Education Code section 44955, subdivision (d) authorizes a school district to deviate from terminating certificated employees in order of seniority based upon criteria as referenced in that statute;

WHEREAS, this Governing Board determines that there is a specific need for personnel to teach in this school district's dual language immersion classes which classes constitute a specific course or course of study within the meaning of Education Code section 44955, subdivision (d)(1) and that those employees currently serving or who have previously served in this school district as certificated employees in those classes possess special training and experience to teach in that course or course of study;

NOW, THEREFORE BE IT RESOLVED, DETERMINED, AND ORDERED by this Governing Board, as follows:

1. All of the above recitals are true and correct;
2. The particular kinds of services as listed in Exhibit "A" are hereby to be and will be discontinued and reduced and otherwise eliminated to the described extents no later than the beginning of the 2009-2010 school year within the meaning of Education Code section 44955, subdivision (b);
3. It is the opinion of this Governing Board, in view of the discontinuances and reductions of these particular kinds of services, that it is necessary to decrease the number of permanent and/or probationary employees serving in positions requiring certification qualifications within this school district at the close of this school year by a corresponding number of full-time equivalent positions as set forth within Exhibit "A" and that such decrease in number of certificated staff be implemented by the termination of employment of regular employees above, in addition to the termination of employment of temporary substitute employees and through attrition due to resignation, retirement and leave of absences;
4. For purposes of "bumping" (displacement) and reemployment rights and the determination of "competency" within the meaning of Education Code sections 44955(b), 44956(a)(1), and 44957(a) to the extent such might apply, "competency" shall be based upon all of the following conditions which will allow for bumping and reemployment:
 - (A) possession and current filing of a preliminary or clear credential for the subject matter into which the employee would bump for the 2009-2010 school year, and
 - (B) the employee is serving in or is on leave from a teaching position other than as an hourly compensated "impact teacher", and whose job performance was included within the scope of formal evaluation procedures of an applicable collective bargaining agreement, provided however that this condition subparagraph (B) shall not apply to restrict the bumping by or reemployment rights of any administrator or counselor who is serving in or on leave from such administrative or counseling position in this school district; the intent of this subparagraph (B) is that impact teachers do not possess the right to displace or serve as regular classroom teachers as a result of the discontinuances and reductions of certificated services; and
 - (C) if bumping for the 2009-2010 school year, and for purposes of rights to reemployment in the future, into a non-teaching position (such as a position outside the collective bargaining unit), the employee must have actively served in that particular kind of service for 50 (fifty) percent FTE (full-time equivalent) or more at least one complete school year (not cumulative) within the last three school years (2005-2006 and following).

5. Deviations from the order of seniority for purposes of terminating and for purposes of reemployment of certificated employees of this district may be made and are directed to be made in accordance with and as permitted by Education Code sections 44955, subdivision (d)(1), 44956(a)(3) and 44957 (b), as follows:

Teachers of dual language immersion classes constitute a special and specific need in this District and shall be considered for this purpose as personnel teaching a specific course or course of study and employees currently serving in dual language immersion classes shall be considered as having special training and experience necessary to teach dual language immersion classes for purposes of Education Code Section 44955 (d) (1); such teachers shall not be "bumped" or displaced by more senior employees unless such more senior employee has previously served in such classes in this school district;

6. For purposes of seniority tie-breaking criteria within the meaning of Education Code sections 44955, subdivision (b) (third paragraph) and section 44846 (second paragraph), the Governing Board determines that seniority ties shall be broken in accordance with the criteria listed within Exhibit "B", said criteria being based solely upon the needs of the District and the students thereof;

7. The Superintendent, or the Superintendent's designee(s), is/are instructed to take the steps necessary pursuant to the Education Code including, in part, sections 44955 and 44949, to implement the above and to reduce the certificated staff as set forth herein above;

8. The actions of this Governing Board will not, in any way, be considered to prejudice the rights of any certificated employee to whom notice will be given of the Superintendent's recommendations, should any employee request a hearing to contest this matter.

7. Exhibit A to the resolution provided:

EXHIBIT "A"

IDENTIFICATION OF PARTICULAR KINDS OF SERVICES (PKSs) AND FULL-TIME EQUIVALENCIES (FTEs) TO BE DISCONTINUED AND REDUCED NO LATER THAN THE BEGINNING OF THE ENSUING SCHOOL YEAR (2009-2010)

Particular Kind of Service	Discontinuance or Reduction	Full-time Equivalents
Principal on Special Assignment, Personnel Support Services	Discontinuance	1.00
Learning Support Services (LSS) Teachers on Special Assignment ("TOSAs") – Math/Language Arts teaching services	Discontinuance	2.00
Poway Professional Assistance Program ("PPAP") Consultants (Teachers on Special Assignment)	Reduction	5.00
Certificated Specialist services (Partners in Education)	Discontinuance	1.00
Counselors' services school site	Discontinuance	13.70
Counselors' services program	Discontinuance	6.70
Special Education Program Specialist services	Reduction	7.30
Kindergarten through Fifth Grade classroom teaching services	Reduction	140.00
Middle school Language Arts/Social Science teaching services	Reduction	13.00
Middle school Math teaching services	Reduction	7.00

Particular Kind of Service	Discontinuance or Reduction	Full-time Equivalent
Middle school Physical Science teaching services	Reduction	3.00
Middle school Life Science teaching services	Reduction	2.00
Middle school Physical Education teaching services	Reduction	6.00
Middle school Earth Science teaching services	Reduction	2.00
Middle school AVID teaching services	Reduction	1.00
Middle school English Language Development teaching services	Reduction	2.00
Middle school Wheel elective teaching services	Reduction	3.00
Middle school Band/Orchestra teaching services	Reduction	2.00
Middle school Choir teaching services	Reduction	1.00
Middle school Spanish teaching services	Reduction	1.00
Middle school Drama teaching services	Reduction	1.00
Middle school Art teaching services	Reduction	1.00
Middle school Journalism teaching services	Reduction	1.00
Middle school ASB teaching services	Reduction	2.00
Middle school "Raider Time" (Guided study hall) teaching services	Reduction	2.00
Middle school Industrial Technology teaching services	Reduction	1.00
Middle school Read 180 teaching services	Reduction	2.00
Middle school Spanish Academy teaching services	Reduction	1.00
High school English teaching services	Reduction	26.00
High school English Language Learners (ELL) teaching services	Reduction	2.00
High school Math teaching services	Reduction	25.00
High school Social Science teaching services	Reduction	11.00
High school Spanish teaching services	Reduction	7.00
High school French teaching services	Reduction	1.00
High school German teaching services	Reduction	1.00
High school Filipino teaching services	Reduction	1.00
High school Business teaching services	Reduction	4.00
High school Life Science teaching services	Reduction	5.00
High school Physical Science teaching services	Reduction	6.00
High school Physical Education/Health (ENS) teaching services	Reduction	1.00
High school Physical Education teaching services	Reduction	5.00
High school Health teaching services	Reduction	2.00
High school Choir teaching services	Reduction	1.00
High school Drama/Theatre teaching services	Reduction	1.00
High school Band/Orchestra teaching services	Reduction	1.00
High school Art teaching services	Reduction	2.00
High school/ROP Art teaching services	Reduction	4.00
High school Art History teaching services	Reduction	1.00
High school AVID teaching services	Reduction	2.00
High school ASB teaching services	Reduction	1.00
High school Industrial Technology teaching services	Reduction	1.00
High school Consumer Family/Home Economics teaching services	Reduction	5.00
High school Agriculture teaching services	Reduction	1.00
High school Yearbook teaching services	Reduction	1.00
High school Miscellaneous teaching services	Reduction	2.00
Assistant Director, Attendance and Discipline	Discontinuance	1.00
Home to School Liaison Counselor services	Discontinuance	1.00
Learning Support Services ("LSS") Director	Discontinuance	1.00
Learning Support Services ("LSS") Assistant Superintendent	Reduction	1.00

Particular Kind of Service	Discontinuance or Reduction	Full-time Equivalents
Assistant Principals	Discontinuance	32.00
Student Services Teacher on Special Assignment	Discontinuance	3.00
Deaf and Hard of Hearing Teacher	Reduction	1.00
Certificated Career Education Specialist	Discontinuance	1.00
ASES Teachers on Special Assignment	Discontinuance	5.00
Site Teachers on Special Assignment	Discontinuance	2.83
FLAP grant Teachers on Special Assignment	Discontinuance	1.00
Executive Director, Special Education	Discontinuance	1.00
Learning Support Services ("LSS") Director II	Discontinuance	1.00
Categorically funded hourly impact teacher services*	Discontinuance	[55.00]
TOTAL FTEs		457.53

*. Inclusion of categorically funded hourly impact teacher services within this Resolution is included as a precaution and is not intended to grant those individuals who are impacted any rights greater than provided by law.

8. Exhibit B to the resolution provided:

EXHIBIT "B"

CRITERIA FOR BREAKING SENIORITY TIES

This Governing Board determines, based solely on the needs of this District and the students of this District, that seniority ties within the meaning of Education Code sections 44955, subdivision (b) (third paragraph) and section 44846, shall be resolved by applying the following criteria, to be applied in the following order, one step at a time. Such criteria shall be applied to rank the order of individuals for purposes of layoff and reemployment, subject to exceptions allowed by law. The criteria are as follows:

1. Individuals with preliminary or clear credentials or certificates authorizing services in classes for limited or non-English proficient students such as bilingual cross-cultural language and academic development (BCLAD) or cross-cultural language and academic development (CLAD) or the equivalent.
2. Current experience (this current school year) as an individual paid for extra/co-curricular service within PUSD Board Policies 4.212 and 4.213 in the following rank order:
 - AAA extra-curricular schedule
 - AA extra-curricular schedule
 - A extra-curricular schedule
 - High School Associated Student Body-co-curricular schedule
 - High School Yearbook - co-curricular schedule
 - High School Newspaper - co-curricular schedule
 - High School Drama - co-curricular schedule
 - High School Choral - co-curricular schedule
 - Schedule B extra-curricular
3. Prior PUSD counseling employment

4. Scope of clear or preliminary credentials as can be applied within the school district's current curriculum and as to which are on file as required by law.
5. Salary Schedule Column placement (Column E – greatest preference/Column B – least preference).
6. Placement on TLC Prime Column.
7. Possession of an earned doctoral degree from an institution accredited from an appropriate accrediting institution.
8. Certification from the National Board of Teaching Standards.
9. Other paid extra-curricular or co-curricular.
10. First date of paid service as a temporary certificated employee in this school district.
11. If a tie still exists, the tie would be broken by lot. Numbers would be drawn with the lowest number winning the tie and continuing similarly until all remaining tied individuals are ranked.

9. On and before March 15, 2009, each certificated employee who is a respondent in this proceeding was given written preliminary layoff notice that the Superintendent of Schools had recommended that his or her services be terminated at the conclusion of the current school year and that his or her services would not be needed for the 2009-10 school year, as well as the reason therefor. Each certificated employee was notified of his or her right to a hearing.

Most, but not all, certificated employees served with the preliminary layoff notice requested a hearing, although some did not.

Each respondent who requested a hearing was served with an accusation and other required jurisdictional documents. The names of the employees who did not request a hearing are listed in Exhibit 2, pages 5 and 6. Over PUSD's objection, it was concluded that any certificated employee who requested a hearing after receiving a preliminary layoff notice was entitled to have his or her seniority and qualifications determined in this layoff proceeding, even if that employee did not file a notice of defense.¹

¹ Government Code section 11506, subdivision (d) provides in part:

“(c) The respondent shall be entitled to a hearing on the merits if the respondent files a notice of defense, and the notice shall be deemed a specific denial of all parts of the accusation not expressly admitted. Failure to file a notice of defense shall constitute a waiver of respondent's right to a hearing, but the agency in its discretion may nevertheless grant a hearing . . .”

Government Code section 11520, subdivision a, provides in part:

“(a) If the respondent . . . fails to file a notice of defense . . . the agency may take action based upon the respondent's express admissions or upon other evidence and affidavits may be used as evidence without any notice to respondent . . .”

This conclusion was based on the district's overriding obligation to comply with the provisions of Education Code section 44955 requiring consideration of seniority and qualifications when conducting a reduction in force.

The Administrative Hearing

10. On April 23, 2009, the record in this layoff proceeding was opened. An opening statement was given on the district's behalf. The district's motion to not consider the status of those certificated employees who failed to file a notice of defense and to issue a final layoff notice to those employees based solely on their failure to file a notice of defense was denied. Jurisdictional documents were presented. On April 23 and 24, sworn testimony was received, documentary evidence was produced, and stipulations were recited. On April 24, the evidentiary record was closed. Each party was permitted to file written closing argument not later than midnight, May 1, 2005.

The Reduction of Particular Kinds of Services

11. Assistant Superintendent Chiment and his staff went through a careful process to identify the number of elementary school positions and the number and kinds of secondary teaching positions that needed to be eliminated or reduced. This involved determining and adjusting staffing ratios at the elementary school level, and meeting with site administrators at the middle school and high school levels to determine the probable staffing ratios and needs for the 2009-10 school year. Using this information, Assistant Superintendent Chiment and the staff determined the number of FTEs that needed to be eliminated or reduced, as set forth in Exhibit A. No particular kinds of services were lowered to levels less than those levels mandated by state or federal law.

Before issuing preliminary layoff notices, the district's staff considered all known positive attrition including resignations, retirements and probationary non-reelects in order to determine the number of layoff notices that needed to be served.

12. The services identified in the governing board's resolution were the kinds of services that could properly be discontinued or reduced. Assistant Superintendent Chiment testified quite frankly that the elimination or reduction of the particular kinds of services was not in the best educational interest of students within the district, but that the elimination and reduction of these services was required to enable the governing board to balance the district's budget and, on that basis, the reduction in force was ultimately in the district's and the students' best interest. The governing board's elimination or reduction of the particular kinds of services identified in Exhibit A to its resolution was neither arbitrary nor capricious, but constituted a matter within the governing board's sound discretion.

Education Code section 44955, subdivision (c), provides in part:

"The governing board shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render."

Impact Services

13. Within the district, some certificated employees were employed on an hourly basis, serving less than half time, providing services at elementary schools for students in need. These “impact” employees received categorical funding. These employees did not have a fixed assignment, did not receive a formal evaluation, did not meet with parents, did not prepare lesson plans, and were not directly responsible for grading. The collective bargaining agreement between PUSD and the teachers’ association mentioned the hourly rate of pay for these employees; however, it did not provide these impact employees with any other rights or responsibilities.

While PUSD served these employees with precautionary notices out of an abundance of caution, these impact employees were not probationary or permanent employees and they were not involved in this layoff proceeding.

Dual Language Immersion Teachers

14. PUSD provides dual language immersion classes at Valley Elementary School and Meadowbrook Middle School. A dual immersion classroom consists of native English-speaking and native Spanish-speaking students. The teachers providing instruction in these classrooms are highly qualified and certified to instruct in two languages. The dual language immersion classroom teachers use the same curriculum, standards, and assessments as other teachers in within the district. The focus of instruction in dual immersion classrooms is not in learning two languages, but rather in learning academic content by using two languages.

In connection with its reduction in force resolution, the governing board determined:

“Teachers of dual language immersion classes constitute a special and specific need in this District and shall be considered for this purpose as personnel teaching a specific course or course of study and employees currently serving in dual language immersion classes shall be considered as having special training and experience necessary to teach dual language immersion classes for purposes of Education Code Section 44955 (d) (1); such teachers shall not be ‘bumped’ or displaced by more senior employees unless such more senior employee has previously served in such classes in this school district. . . .”

The governing board’s skipping of the dual language immersion class teachers, based on the special education, training, experience and qualifications of these certificated employees, was not arbitrary, capricious, or otherwise improper.

The Seniority List and the Implementation of Resolution No. 34-2009

15. For purposes of this layoff proceeding, PUSD gathered and inputted data related to each certificated employee including the employee’s name, seniority date (first paid date of probationary service), assignment (e.g., Elementary School, Art, Basic Education, English, Math, etc.), credentials and others authorizations, school site where

services were currently provided, and whether the employee was a dual language classroom immersion teacher. Relevant data was obtained from personnel files, the San Diego County Board of Education, and the California Commission on Teacher Credentialing website. An effort was made to ensure that the data was valid by providing each certificated employee with the data being used and inviting a response if the certificated employee disputed any information or believed additional information needed to be added. Using this data, the district prepared several spreadsheets that organized the information; one was a seniority list identifying employees by the date of seniority; another was a spreadsheet listing the certificated employees in alphabetical order; yet another was a spreadsheet listing the employees by their respective assignments.

Using these spreadsheets, Assistant Superintendent Chiment's staff began the laborious and painstaking process of identifying those certificated employees who should receive preliminary layoff notices and those who should not. Whenever an employee was tentatively slated to receive a preliminary layoff notice as a result of the elimination or reduction of a particular kind of service, that employee's seniority and qualifications were considered to see if that employee was qualified to "bump" into a position held by a more junior employee. The staff attempted to ensure that an employee's seniority date was based on the employee's first date of paid service with the district in a probationary position.²

In addition to permanent and probationary employees, PUSD also retained the services of temporary and substitute certificated employees. Throughout each school year, Assistant Superintendent Chiment and his administrative staff made certain that the number of temporary employees did not exceed the number of probationary and permanent employees who were on leave.

The evidence established that several certificated employees had served from year to year on temporary contracts of employment. Before their initial employment, PUSD made an effort to provide these temporary employees, and others serving in a temporary status, with written notice that their employment status was temporary.

As new full time equivalent positions became available within the district, a temporary teacher might be offered a probationary position if the temporary teacher held an appropriate credential, obtained CLAD or BCLAD certification, had acquired experience as a temporary teacher, had completed certain professional training, and had successfully provided service in a temporary position. There were no criteria in the district's collective bargaining agreement with the teachers' association concerning the criteria a temporary employee needed in order to make the transition from temporary to probationary status. Some of the respondents in this proceeding had served the district for years as temporary employees before attaining probationary status.

² Education Code section 44845 provides:

"Every probationary or permanent employee employed after June 30, 1947, shall be deemed to have been employed on the date upon which he first rendered paid service in a probationary position."

16. A teacher who worked as a substitute or temporary employee for PUSD for at least 75 percent of the school days during the previous school year and who had performed the duties normally required of a certificated employee was deemed to have served a complete school year as a probationary employee if that person was employed by PUSD as a probationary employee the following school year. That employee's earlier year's service was counted as a year of probationary service and was "tacked" on for seniority purposes.³ The evidence established that not all temporary employees who served 75 percent or more of a year in a temporary position automatically received probationary status the following year, however.

17. For a discrete period of time, probationary teachers who were totally new to the district (i.e., teachers who had never worked for the district in a temporary position) were first employed under a 190 day contract. On the other hand, experienced temporary teachers who became probationary employees were hired under a 188 day contract.

By virtue of the collective bargaining agreement that once was in place, new probationary teachers with no prior teaching experience employed under the 190 day contract were required to attend a new teacher orientation, a training that occurred several days before other teachers reported to work, including the new probationary employees with previous PUSD experience as temporary employees. PUSD paid the new probationary teachers working under the 190 day contract for the two days of required training at the contract rate specified in the collective bargaining agreement, in accordance with PUSD's agreement with the teacher's association.

PUSD has taken the position that if the 190 day contract employee attended required training before the start of the school year, then that new employee's seniority date related back to the first day the employee attended the required training and was paid for it, because that date was the first date that the new employee provided service in a probationary position.

Under this practice, a seniority problem exists for teachers with prior temporary teaching experience hired as probationary teachers on a 188 day contract; they were not required attend the new teacher training and, thus, lost several days of seniority to teachers who were new to the district and required to attend the new teacher orientation. This inequity surfaced in layoff proceedings taking place in years before this layoff proceeding. To address this inequity, PUSD and the teachers' association modified the collective bargaining agreement this past year so that temporary teachers who became probationary employees were employed under a 190 day contract and were required to attend the new teacher orientation (even if they had taken the orientation before) so that those teachers shared the same seniority as other new probationary employees. While this contractual modification may have resolved the problem in the long run, there remain, as demonstrated in this layoff proceeding, several instances in which temporary teachers who became probationary employees have less seniority than new probationary

³ Education Code section 44918 provides in part:

“(a) Any employee classified as a substitute or temporary employee, who serves during one school year for at least 75 percent of the number of days the regular schools of the district were maintained in that school year and has performed the duties normally required of a certificated employee of the school district, shall be deemed to have served a complete school year as a probationary employee if employed as a probationary employee for the following school year.”

employees based “on the date upon which [the employee] first rendered paid service in a probationary position.”

18. Under Assistant Superintendent Chiment’s supervision, a master seniority list with layoff and dual immersion teachers was finalized for use in this reduction in force proceeding (Exhibit 13). No temporary employees or substitute employees were involved in this layoff proceeding.

For certificated employees who first rendered service in a probationary position on the same date, PUSD staff used information in its possession to determine the order of layoff for those individuals using the governing board’s tie-breaking criteria, which was based solely on the needs of the district and its students. A lottery was used to determine the order of layoff when several employees with the same seniority date possessed the same number of tie breaking points.

Service under Temporary Contracts

19. The district employed several certificated employees under temporary employment contracts. PUSD’s practice was to interview prospective employees, then to have the new temporary employee sign a form. There were three forms.

- The short version of the form stated:

Date

I have been informed that my contract will be a temporary contract, effective _____.

- The longer version of the form stated:

Date

I have been informed that my employment contract will be a temporary contract, effective _____ and will remain a temporary contract unless or until otherwise notice in writing. I understand that this contract is contingent upon passage of a pre-employment physical and that I must submit my credential, social security card and a negative TB test.

Signature

- A form used for long-term substitutes stated:

Date

I have been informed that if a contract assignment results from this long-term substitute assignment, that the contract will be a temporary contract, unless otherwise noticed in writing.

In some instances, an acknowledgement also included as a last line stating:

“ . . . including temporary contract employment in subsequent school years.”

20. After an acknowledgement was signed, PUSD directed a temporary to sign an Agreement for Temporary Certificated Employment. That agreement contained the employee’s name, a job title that usually stated “Temporary” under the certifications section, and a box that was checked to show that the employee was being hired as a temporary teacher.⁴ The agreement set forth a specific period of employment. For persons who were beginning service under the temporary agreement, PUSD staff made an effort to have the agreement set forth the actual date on which paid services were to begin. For temporary teachers who were returning to continuing employment as temporary teachers, the temporary employment agreement stated that the period of employment commenced on July 1, even though the employee’s first paid date of service under the agreement might not occur until August or September of that calendar year. All of the temporary employment agreements provided that employment could be terminated for the failure to render satisfactory service, at the conclusion of the temporary assignment, for the loss of any credential, or the end of the current fiscal year.

Section D of the temporary employment agreement stated:

⁴ Usually the box for Education Code section 44920 was checked. Education Code section 44920 provides:

“Notwithstanding the provisions of Sections 44917 and 44919, the governing board of a school district may employ as a teacher, for a complete school year, but not less than one semester during a school year unless the date of rendering first paid service begins during the second semester and prior to March 15th, any person holding appropriate certification documents, and may classify such person as a temporary employee. The employment of such persons shall be based upon the need for additional certificated employees during a particular semester or year because a certificated employee has been granted leave for a semester or year, or is experiencing long-term illness, and shall be limited, in number of persons so employed, to that need, as determined by the governing board.

Any 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 by the governing board 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.

For purposes of this section ‘vacant position’ means a position in which the employee is qualified to serve and which is not filled by a permanent or probationary employee. It shall not include a position which would be filled by a permanent or probationary employee except for the fact that such employee is on leave.”

D. STATUS OF EMPLOYMENT: Employee specifically acknowledges that this contract does not establish any right to probationary or permanent employment status. Employee further specifically acknowledges that the District may terminate the temporary employment on any basis specified in paragraph B above, without any obligation to provide a statement or reasons, evidence of cause, or a right to a hearing.

The employee signed and dated the agreement, which was ultimately subject to the governing board's approval.

PUSD took the position that after a period of initial employment under a temporary employment agreement or as a result of the lapse of time in returning a contract, the district was not required to provide the employee with written notice that the agreement he or she was signing involved the employee's temporary status, and that the failure to provide such notice did not result in the employee becoming a probationary employee.

21. Several respondents argued that the timing of their employment and the specific information contained in the acknowledgments they signed were legally insufficient and that they should have been classified as probationary employees and not as temporary employees.⁵

All new employees who are respondents in this layoff proceeding were specifically informed of their temporary status before they began work. Written acknowledgments of their temporary status were signed by these respondents before they commenced employment with the district. The written acknowledgments varied in detail (some simply stating, "my contract will be a temporary contract"; others expanding and stating, "and will remain a temporary contract unless or until otherwise noticed in writing", and some referring to future employment beyond long term substitute status as a temporary employee). Not one of the written acknowledgments included the amount of salary the employee was to be paid or the ending date for the employment agreement.

The written contracts of employment respondents signed were far more specific. These contracts were signed before a respondent actually began providing paid services for the district, even though the dates set forth on the contract (in the cases of rehires) may have included dates the employees were not paid.

No respondent in this proceeding reasonably believed that his or her employment was anything but of a temporary nature, and no respondent stated he or she misunderstood or was misled concerning the level of pay or when the contract ended. PUSD did engage in any subterfuge in offering temporary employment to respondents and it made no attempt to frustrate the purpose of the statutes.

⁵ The legal basis for this argument is the California Supreme Court's opinion in *Kavanaugh v. West Sonoma County Union High School District* (2003) 29 Cal.4th 911, discussed at length at Legal Conclusions 14 and 15.

No respondent established any prejudice arising out of the district's failure to provide that respondent an acknowledgment that included salary information and a termination date for the agreement.

Specific Respondents

22. Courtney Craig: Exhibit 13 stated Craig's seniority date was July 15, 2005, and that she held a single subject teaching credential in Spanish.

Craig signed an acknowledgment on July 12, 2004, that stated "I have been informed that my contract will be a temporary contract, effective 7/12/04." On September 3, 2004, Craig signed an Agreement for Temporary Certificated Employee which stated that she was being hired by PUSD as a temporary teacher under Education Code section 44920 for a period to commence on July 13, 2004 and to terminate on June 30, 2005, the end of the current fiscal year. (Exhibit 14.)

Craig worked at Abraxis High School in the 2004-05 school year. Craig testified that she knew she was hired as a temporary employee for the 2004-05 school year.

Craig's status and seniority date was correctly set forth in Exhibit 13.

23. Dorra Duensing: Exhibit 13 indicated Duensing's seniority date was August 24, 2004, and that she held a single subject teaching credential in Physical Education.

Duensing signed an acknowledgment on August 22, 2003, stating, "I have been informed that my contract will be a temporary contract, effective 9/22/03." Duensing testified she signed this acknowledgment before she began her employment. On August 22, 2003, Duensing signed an Agreement for Temporary Certificated Employee which stated she was being hired by PUSD as a temporary teacher under Education Code section 44920 for a period to commence on August 22, 2003 and to terminate on September 30, 2003. While she expected to be hired as a probationary employee the following school year, on October 20, 2003, Duensing signed an Agreement for Temporary Certificated Employee which stated Duensing was being hired by PUSD as a temporary teacher under Education Code section 44920 for a period to commence on September 30, 2003 and to terminate on June 30, 2004. On August 10, 2004, Duensing signed an Agreement for Temporary Certificated Employee which stated she was being hired by PUSD as a temporary teacher under Education Code section 44920 for a period to commence on an unspecified date and to terminate on June 30, 2005. On August 15, 2005, Duensing signed an Agreement for Temporary Certificated Employee which stated she was being hired by PUSD as a temporary teacher under Education Code section 44920 for a period to commence on July 1, 2005 and to terminate on June 30, 2006. (Exhibit 15.)

Duensing spoke with her principal about her temporary status and she was given probationary status retroactive to August 24, 2004, her first date of paid probationary service with the district. Although Duensing attended summer trainings and the district paid for those

trainings, Duensing was not personally compensated by the district for the time she spent attending the trainings.

Duensing's status and seniority date was correctly set forth in Exhibit 13.

24. Tiffany Castillo: Exhibit 13 stated Castillo's seniority date was August 16, 2007, and that she held a multiple subject teaching credential.

Castillo (nee Slocomb) contended her seniority date was August 14, 2007. Castillo took part in a professional growth day that took place on August 14, 2007. She was never told to attend the new teacher commencing on August 14, 2007.

Castillo signed an acknowledgment on August 21, 2006, that stated "I have been informed that my contract will be a temporary contract, effective 8/22/06 and will remain a temporary contract unless or until otherwise noticed in writing, including temporary contract employment in subsequent years." On September 8, 2006, Castillo signed another acknowledgment that stated she was informed her employment was under a temporary contract effective September 11, 2006, and that it would remain a temporary contract until otherwise noticed in writing. On September 27, 2006, Castillo signed an Agreement for Temporary Certificated Employee which stated that she was being hired by PUSD as a temporary teacher under Education Code section 44920 for a period to commence on September 8, 2006. On September 31, 2006, Castillo signed an Agreement for Temporary Certificated Employee which stated that she was being hired by PUSD as a temporary teacher under Education Code section 44920 for a period to commence on September 11, 2006 through June 30, 2007. On July 20, 2007, Castillo signed an Agreement for Temporary Certificated Employee which stated that she was being hired by PUSD as a temporary teacher under Education Code section 44920 for a period to commence on July 1, 2007 and extend through June 30, 2008. On July 16, 2008, Castillo signed an Agreement for Temporary Certificated Employee which stated that she was being hired by PUSD as a temporary teacher under Education Code section 44920 for a period to commence on August 12, 2008 and extend through June 30, 2009. (Exhibit 16.)

Payroll records established that Castillo worked one-half day in the third week of September 2007 and PUSD compensated her for work on that date at a rate that was less than her contracted rate. (Exhibit 16.) Castillo conceded the training she attended was not mandatory training.

Castillo's status and seniority date was correctly set forth in Exhibit 13.

25. Karen Degrandmont: Exhibit 13 stated Degrandmont's seniority date was August 23, 2005, and that she held a multiple subject teaching credential.

Degrandmont signed an acknowledgment on August 18, 2003, that stated "I have been informed that my contract will be a temporary contract, effective 8/18/03." On August 27, 2003, Degrandmont signed an Agreement for Temporary Certificated Employee which stated that she was being hired by PUSD as a temporary teacher under Education

Code section 44920 for a period to commence on August 18, 2003, through September 30, 2003. On July 27, 2005, Degrandmont signed an Agreement for Temporary Certificated Employee which stated that she was being hired by PUSD as a temporary teacher under Education Code section 44920 for a period to commence on July 1, 2005 and extend through June 30, 2006. On August 11, 2006, Degrandmont signed an Agreement for Temporary Certificated Employee which stated that she was being hired by PUSD as a temporary teacher under Education Code section 44920 for a period to commence on July 1, 2007 and extend through June 30, 2008. On July 16, 2008, Castillo signed an Agreement for Temporary Certificated Employee which stated that she was being hired by PUSD as a temporary teacher under Education Code section 44920 for a period to commence on July 1, 2006, and extend through June 30, 2007. (Exhibit 17.)

Degrandmont was employed under a temporary contract at Creekside Elementary School in the 2003-04 school year. Jeanne Demules, an employee in the district's human resources division, established that in 2003, the district's practice was to mail an existing temporary employee a new temporary employment agreement after the last agreement expired, with a request that the employee date and sign the agreement. Demules would have mailed Degrandmont's contract sometime in August 2004, before the 2004-05 school year began. Degrandmont shared a contract for the 2004-05 school year, when she was a temporary teacher at Highland Ranch Elementary School.

Degrandmont's status and seniority date was correctly set forth in Exhibit 13.

26. Christina Horne: Exhibit 13 stated Horne's seniority date was August 22, 2006, and that she held a multiple subject teaching credential.

Horne (nee Erlenbusch) signed an acknowledgment on August 19, 2003, that stated "I have been informed that my contract will be a temporary contract, effective 8/19/05 and will remain a temporary contract unless or until otherwise noticed in writing." On August 22, 2005, Horne signed an Agreement for Temporary Certificated Employee which stated that she was being hired by PUSD as a temporary teacher under Education Code section 44920 for a period to commence on September 2, 2005, and extend through June 30, 2006 (Exhibit 18). Horne was puzzled that she was not a probationary employee, but did not complain. On August 11, 2006, Horne signed an Agreement for Temporary Certificated Employee which stated that she was being hired by PUSD as a temporary teacher under Education Code section 44920 for a period to commence on July 1, 2006 and extend through June 30, 2007. On August 20, 2007, Horne signed an Agreement for Temporary Certificated Employee which stated that she was being hired by PUSD as a temporary teacher under Education Code section 44920 for a period to commence on July 1, 2007 and extend through June 30, 2008 (Exhibit 18).

In response to the requested for corrected or updated seniority information, Horne submitted a notice dated January 23, 2009, which stated, in part, "During the 'pink slip' process last year of March 2008, I received a letter that had my seniority dated marked as 8/18/2006. Please fix this so that my seniority date is marked as 8/18/2006." Attached are two papers that indicated my seniority date that you gave me last year." (Exhibit 18.) Horne

attached a seniority list from the 2008 reduction in force proceeding indicating she had a seniority date of August 18, 2006, and a tie-breaker form showing that seniority date.

According to Genny Girtten, an experienced personnel technician, the district's payroll records did not establish that Horne was paid to attend any training or to provide any services on August 18, 2006 (Exhibit 52). Horne did not attend a mandatory new teacher orientation on August 18, 2006, because of her previous temporary employment. Horne's first paid date of probationary service was, in fact, August 22, 2006, as set forth in Exhibit 13.

Horne's status and seniority date was correctly set forth in Exhibit 13.

27. Michael Hymes: Exhibit 13 stated Horne's seniority date was August 22, 2006, and that he held a single subject teaching credential in Social Science.

Hymes began coaching at Westview High School in August 2005. Exhibit 19 established that Hymes signed an acknowledgment on July 18, 2005, that stated "I have been informed that my contract will be a temporary contract, effective 8/19/05 and will remain a temporary contract unless or until otherwise noticed in writing." On August 18, 2005, Hymes signed an Agreement for Temporary Certificated Employee which stated that he was being hired by PUSD as a temporary teacher under Education Code section 44920 for a period to commence on August 19, 2005, and extend through June 30, 2006. On August 11, 2006, Hymes signed an Agreement for Temporary Certificated Employee which stated that he was being hired by PUSD as a temporary teacher under Education Code section 44920 for a period to commence on July 1, 2006 and extending through June 30, 2007. A certificated personnel report dated November 13, 2006, stated that Hymes' status was changed from temporary to probationary effective the 2006-07 school year.

Hymes' status and seniority date should be corrected to show a first paid date of probationary service of August 19, 2005, based on his first paid date of probationary service.

28. Craig Morrison: Exhibit 13 stated Morrison's seniority date was August 22, 2006, and that he held a multiple subject teaching credential.

Morrison started his employment with PUSD in 2002 when he worked at Black Mountain Middle School, serving about 50 percent as a Coach and 50 percent as a Math teacher. Thereafter, Morrison became an instructional aide. He began working in the special education field in 2003 as a coach in the PAL Program. He was a temporary employee from 2003 to 2006⁶, and in November 2007, Morrison became a probationary employee, with his probationary service retroactive to August 2006. Morrison acknowledged that he began working as a temporary teacher after he signed temporary contracts of employment.

⁶ Morrison was told during his employment these years that he had not attained probationary status because he taught outside of his credentialed area and because he did not hold CLAD authorization. Morrison received one erroneous evaluation that indicated he was a probationary employee, but it was not until November 2007 that he was told by PUSD's administration (as opposed to a misstatement on an evaluation form by a site administrator) that he held probationary status.

A September 15, 2003, letter from Assistant Superintendent Chiment to Morrison stated that his employment with PUSD was on a short-term temporary contact, but hoped to “extend your temporary contract through at least first semester at the secondary level, and through June at the elementary level.” (Exhibit 20.) There was no formal agreement through the 2003-04 school year; however, Morrison was well aware of his temporary status in the 2003-04 school year.

On August 19, 2003, Morrison signed an acknowledgment that stated “I have been informed that my contact will be a temporary contact, effective 8-20-03.” On September 30, 2003, Morrison signed an Agreement for Temporary Certificated Employee which stated that he was being hired by PUSD as a temporary teacher under Education Code section 44920 for a period to commence on September 20, 2003. On an unspecified date, Morrison signed an Agreement for Temporary Certificated Employee which stated that he was being hired by PUSD as a temporary teacher under Education Code section 44920 for a period to commence on July 1, 2004 and extend through June 30, 2005. On August 9, 2005, Morrison signed an Agreement for Temporary Certificated Employee which stated that he was being hired by PUSD as a temporary teacher under Education Code section 44920 for a period to commence on July 1, 2005 and extend through June 30, 2006. On August 7, 2006 [the contract was misdated by Morrison with the date August 7, 2007], Morrison signed an Agreement for Temporary Certificated Employee which stated that he was being hired by PUSD as a temporary teacher under Education Code section 44920 for a period to commence on July 1, 2006 and extend through June 30, 2007. On August 13, 2007, Morrison signed an Agreement for Temporary Certificated Employee which stated that he was being hired by PUSD as a temporary teacher under Education Code section 44920 for a period to commence on July 1, 2007 and extend through June 30, 2008. (Exhibit 21.)

Morrison’s status and seniority date was correctly set forth in Exhibit 13.

29. Azza Ayouty: Ayouty’s sister was a highly respected teacher within the district. Sometime before the 2005-06 school year, Ayouty accompanied her sister to the district offices. While she was there, she met Assistant Superintendent Chiment, who learned that Ayouty had a single subject teaching credential in Math, had experience teaching elsewhere, and was then looking for employment. Assistant Superintendent Chiment knew that there was an opening for a Math teacher and, after speaking with Ayouty, he suggested that Ayouty immediately contact the site supervisor at that school for an interview. He told Ayouty that he would contact the site supervisor and let that person know that Ayouty was on her way for an interview. Assistant Superintendent Chiment did not offer employment to Ayouty at that time. The interview at the school went well and the site supervisor gave Ayouty a key to the classroom and directed her to get the classroom ready for the upcoming school year. Ayouty was present on campus on August 19, 2005, but she did not attend the new teacher training being held that date. The site supervisor was not authorized by PUSD to enter into a formal employment agreement with Ayouty, but that supervisor certainly let the district office know that Ayouty could be employed there for the 2005-06 school year and that her services were desired. Ayouty organized her classroom on August 19, 2005, but she was not paid by the district to do so.

On August 19, 2005, Ayouty signed an Agreement for Temporary Certificated Employee which stated that she was being hired by PUSD as a temporary teacher under Education Code section 44920 for a period to commence on August 22, 2005 extending through June 30, 2006. This agreement was not signed on August 23, 2005, as Ayouty claimed. On August 7, 2006, Ayouty signed an Agreement for Temporary Certificated Employee which stated that she was being hired by PUSD as a temporary teacher under Education Code section 44920 for a period to commence on July 1, 2006 extending through June 30, 2007. (Exhibit 22.)

District payroll records for Ayouty established that her first day of paid service as on August 23, 2005. She was not paid for any services she may have rendered before then.

Ayouty's status and seniority date was correctly set forth in Exhibit 13.

30. Diane Cokkins: Exhibit 13 stated Cokkins' seniority date was August 23, 2001, and that he held a single subject teaching credential in Physical Education.

Cokkins was employed under a temporary contract in the 2000-01 school year. She was rehired for the following year, which became her first year of probationary service.

Cokkins believed her first paid date of service was August 14, 2001, when she attended Quantum Learning training, a course extending from August 14 through August 16. Cokkins did not attend the New Teacher Training that year as a result of her prior experience with the district.

The evidence established that the Quantum Learning training was voluntary, and that Cokkins was paid at the rate of pay provide to a substitute, and was not paid a rate of pay equivalent to that paid under her employment contract. (Exhibit 23.)

Cokkins' status and seniority date was correctly set forth in Exhibit 13.

31. Kenneth Daum: Exhibit 13 stated Daum's seniority date was August 22, 2006, and that he held a single subject teaching credential in Physical Education. At all times relevant to this matter, Daum taught physical education and provided services to the Associated Student Body (ASB).

Daum received a preliminary layoff notice that stated .87 percent of his services (Physical Education .67/ASB .33) would not be required for the following school year. (Exhibit 24.) The .87 FTE listed in the notification did not add up to one full FTE, and Daum claimed this constituted improper notice.

The district conceded that there was a clerical error in the preliminary layoff notice, that 1.00 FTE should have been listed, but that even if .87 FTE were to be applied, there would be no prejudice because Daum testified he would not remain to work .13 FTE.

The listing of .87 FTE was clearly a clerical error, and it does not justify rescinding the preliminary layoff notice.

Daum's status and seniority date was correctly set forth in Exhibit 13.

32. Cynthia Gavin: Exhibit 13 stated Gavin's seniority date was August 22, 2006, and that she held a single subject teaching credential in Home Economics.

Gavin began working for the district on a part-time basis in 2000 in its ROP program. She was paid an hourly rate. In 2001, Gavin began teaching as a replacement teacher for a teacher who left a full-time, tenured position. She taught two ROP classes and three general education classes that year. She was assigned a new teacher mentor and was evaluated under the Poway Professional Assistance Program (PPAP). On one evaluation form a box marked "probationary" was checked; that did not occur on other evaluations. At the conclusion of two years, Gavin was told she was not tenured because she was teaching ROP classes. She signed a contract as a temporary teacher for a third year and for each year thereafter. In all, Gavin signed seven temporary employment contracts. Others who had been teaching ROP classes and who began working in the district after Gavin were given tenure before Gavin became a permanent employee. Ultimately, Gavin was given a seniority date of August 22, 2006, and became a permanent employee. Gavin believed she was not treated the same as others, that it cost her a job, and she was frustrated and upset because "I feel I deserve what is right and fair for the nine years I have given [the district.]" The documentary evidence related to Gavin's employment is set forth in Exhibit 25.

The last temporary contract did not in fact specify a statutory basis for the contract being temporary, but Education Code section 44916 does not require that the basis for being given a temporary contract be specified.

The credible testimony established that participation in the PPAP is not restricted to probationary employees, and that temporary employees also participate in PPAP. Further, Gavin's seniority date did not entitle her to retain her position, and that would have been the case even if she had been given any seniority date after 1979 since those who were not selected for layoffs in Home Economics had seniority dates extending back to 1979.

Gavin's status and seniority date was correctly set forth in Exhibit 13.

33. Tiffanie Kasner: Exhibit 13 stated Kasner's seniority date was August 23, 2005, and that she held a multiple subject teaching credential.

Kasner claimed a seniority date of August 14, 2004, the day she was given keys to the classroom and entered the classroom to begin the 2004-05 school year. Kasner observed that the acknowledgments she had signed in 2003 and 2004 (Exhibit 26) did not contain a salary or an ending date for the employment.

On December 17, 2003, Kasner signed an acknowledgment that her employment was temporary. On August 20, 2004, she signed another acknowledgment that her employment

was temporary. On August 2, 2005, Kasner signed an Agreement for Temporary Certificated Employment for the 2005-06 school year. On August 8, 2006, Kasner signed an Agreement for Temporary Certificated Employment for the 2006-07 school year. (Exhibit 26.)

Kasner always knew her status with the district was as a temporary employee. Any lapse in signing the agreements occurred after Kasner first serving as a temporary employee.

Under all the circumstances, Kasner's status and seniority date was correctly set forth in Exhibit 13.

34. Milena Schroeder: Exhibit 13 stated Schroeder's seniority date was August 13, 2008, and that she held a multiple subject teaching credential.

Schroeder claimed a seniority date of September 1, 2003.

Schroeder began working for the district in 2000 as a temporary employee. She served as a probationary employee under a contract dated July 1, 2003, was first paid in a probationary position on September 1, 2003, and continued her employment through 2005. Schroeder was on maternity leave for two years (2005-06 and 2006-06). She then resigned, but she was rehired within 39 months of her resignation.

The district claimed *San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d, 627, 631, established when a permanent certificated employee resigns and is re-employed within 39 months, the re-employment restores all individual rights, benefits and burdens of a permanent employee; however, for seniority purposes, the employee does not regain his or her original hiring date. Schroeder claimed that the district improperly applied that decision and that she was entitled to her first paid date of probationary service – January 1, 2003.

San Jose Teachers Association v. Allen (1983) 144 Cal.App.3d, 627 is directly on point (Legal Conclusion 13, *infra*).

Schroeder's status and seniority date was correctly set forth in Exhibit 13.

35. Courtney Kaul: Exhibit 13 stated Kaul's seniority date was August 23, 2005, and that she held a multiple subject teaching credential with supplemental authorizations in Business and Computer Concepts and Applications.

Kaul claimed a seniority date of August 21, 2005.

Kaul began employment with the district in August 2004 as a temporary teacher. She attended the new teacher orientation that year and began the PPAP program. At the end of the 2004-05 school year, the district notified Kaul that she would return to the same school for the 2005-06 school year on a temporary contract. Kaul's contract did not require her to attend new teacher orientation on August 21, 2005, as entirely new teachers to the district were required to do by their contracts. Kaul received permanent status in the 2007-

08 school year. The documentary evidence related to Kaull's employment is contained in Exhibit 27.

Kaull's status and seniority date was correctly set forth in Exhibit 13.

36. Jennifer Hanson: Exhibit 13 stated Hanson's seniority date was August 23, 2005, and that she held a multiple subject credential authorizing her to teach basic education.

Hanson testified she was hired in October 2004 as a temporary teacher to replace a full-time teacher who did not return to the district. She did not sign a contract for the 2004-05 school year, although she signed an acknowledgment that she was being employed on a temporary status. Hanson did not attend the mandatory new teacher training in the 2005-06 school year, but she attended that training on August 16, 2006, at her principal's request. Hanson signed two more temporary contracts.

On August 9, 2004, Hanson signed a document stating, "I have been informed that my contract will be a temporary contract effective Aug. 20, 2004. On August 11, 2005, Hanson signed an Agreement for Temporary Certificated Employment which specifically stated that she was being hired as a temporary placement. On August 4, 2006, Hanson signed an Agreement for Temporary Certificated Employment which specifically stated that she was being hired as a temporary placement. (Exhibit 28.) The district granted Hanson seniority dating back to August 23, 2005, the first paid date of probationary service.

Hanson's status and seniority date was correctly set forth in Exhibit 13.

37. Amber Richards: Exhibit 13 stated Richards' seniority date was August 24, 2004, and that she held a multiple subject teaching credential.

Richards (nee Dobson) signed an acknowledgment on August 21, 2003, stating, "I have been informed that my contract will be a temporary contract effective 8-21-03." On September 4, 2003, Richards signed an Agreement for Temporary Certificated Employment for the period August 21, 2003, through September 30, 2003. On October 20, 2003, Richards signed an Agreement for Temporary Certificated Employment for the period September 30, 2003, through June 30, 2004. On August 6, 2004, Richards signed an Agreement for Temporary Certificated Employment for the period commencing July 1, 2004, through June 30, 2005. On August 10, 2005, Richards signed an Agreement for Temporary Certificated Employment for the period commencing July 1, 2005, through June 30, 2006. (Exhibit 29.) The district provided Richards with a seniority date of August 24, 2004, which related to her first date of probationary service.

Richards turned down a two year offer of employment with the San Diego City Unified School District, but not because of anything PUSD did or failed to do.

Any delays in signing the agreements for temporary certificated employment occurred after Richards signed an acknowledgment that her employment with PUSD would be temporary, and there was always a signed contract in place before she began paid

employment with the district even though the agreement mentioned a period of time before that paid employment began.

Richards' status and seniority date was correctly set forth in Exhibit 13.

38. Lori Renas-Hetzel: Exhibit 13 stated Renas-Hetzel had a seniority date of August 16, 2007, and that she had a single subject teaching credential in Physical Education with a supplemental authorization in Biology.

Renas-Hetzel claimed a different employment status based upon her belief that the paperwork she signed was insufficient to support her status as a temporary employee.

On October 2, 2006, Renas-Hetzel signed an acknowledgment that she would be employed under a temporary contract from a date TBD (to be determined) and that she would remain so employed until otherwise noticed in writing. On October 4, 2006, Renas-Hetzel signed an acknowledgment that stated that "if a contract assignment results from this long-term substitute assignment, that the contract will be a temporary contract . . ." On November 27, 2006, Renas-Hetzel signed an Agreement for Temporary Certificated Employment that stated she was being employed on a temporary basis from October 3, 2006, through June 30, 2007. On August 9, 2007, Renas-Hetzel signed an Agreement for Temporary Certificated Employed that stated she was being employed on a temporary basis from July 1, 2007, through June 30, 2008, on a 50 percent assignment. On July 18, 2008, Renas-Hetzel signed an Agreement for Temporary Certificated Employed that stated she was being employed on a temporary basis from August 12, 2008, through June 30, 2009, on a 50 percent assignment. (Exhibit 30.)

The fact that all of the district's records may not have been provided to respondents' counsel, or that respondents' counsel may have misfiled or misplaced such documentation, does not establish that the documentary evidence offered in this matter was unreliable; and, even if the district failed to provide such evidence in discovery, it did not prejudice Renas-Hetzel in this proceeding.

Under Education Code section 44920⁷, Renas-Hetzel was entitled to receive one year of credit for serving as a temporary replacement teacher, with that year of credit to be applied after becoming a probationary employee.

The district correctly calculated Renas-Hetzel's seniority date as it related back to August 16, 2007.

⁷ Education Code section 44920 provides in part:

"Any 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 by the governing board as a probationary employee and the previous year' employment as a temporary employee shall be deemed one year' employment as a probationary employee for purposes of acquiring permanent status."

Renas-Hentzel's status and seniority date was correctly set forth in Exhibit 13.

39. Brian Kooiman: Exhibit 13 stated Kooiman held a seniority date of August 23, 2000, and that he held a single subject teaching credential in Physical Education.

Kooiman claimed he had the right to teach Health Science and claimed a seniority date of August 20, 2000.

Kooiman's first paid date of employment was in October 1999, not on August 20, 2000, when he began full time employment at Rancho Bernardo High School. Kooiman claimed he was not told that his contract for the 1999-2000 school year was for a temporary position until he worked for about two months, and that he passed up two job offers outside PUSD and that he was subject to "bait and switch." In August 2000, Kooiman began working at Rancho Bernardo High School as a full time employee, teaching Physical Education and Health Science. Kooiman did not have a single subject teaching credential or a supplemental authorization to teach Health Science. Kooiman taught a split schedule of Physical Education and Health Science for six years at Rancho Bernardo High School, with his level of instruction in Health science increasing yearly. Following the 2005-06 school year, Kooiman was transferred involuntarily to another school site and a teacher who was three year's Kooiman's junior was retained to teach Health Science. Kooiman's employment history with PUSD is set forth in Exhibit 31.

Assistant Superintendent Chiment established that Kooiman taught Health Science under board resolutions for many years, but that such a resolution had not been approved by the governing board to authorize Koomian to instruct in Health Science in the last three years. Kooiman's current credential does not authorize him to instruct in Health Science.

Kooiman's status and seniority date was correctly set forth in Exhibit 13.

40. Jeffrey Blankman: Exhibit 13 stated Gavin's seniority date was August 23, 2006, and that he held a single subject teaching credential in English with a supplemental authorization in Speech. The documentary evidence related to Blankman's employment with PUSD is set forth in Exhibits 32 and 49.

Blankman contested his seniority date because he recalled that he was offered a job on August 17, 2006, that he was given authorization to skip a mandatory district-wide training the next day, and that he would report to work at Rancho Bernardo High School on August 21, 2006. Blankman was not told about signing a contract and he did not know that if he did not attend the August 17, 2006, training it might impact his seniority.

On August 21, 2006, Blankman went to Ranch Bernardo High School, met wit the vice principal, and attended a "technology training" with other new employees.

On August 22, 2006, Blankman reported to Rancho Bernardo High School and spent most of the day in the classroom or meeting with other English teachers. Later that afternoon, Blankman received a call from the district office asking that he come in to sign a

contract to enable Blankman to get a paycheck. Blankman went to the district office, had a final interview, and then signed a contract. Blankman was never told the date on the contract might affect his tenure or service with the district.

Blankman was never confused about the temporary nature of his employment status. His pay was docked because he worked less than the full contract year. His contract stated he was “hired for a period commencing August 23, 2006.” The district did not misrepresent any information to Blankman, or make any statement to him on which he reasonably relied to his detriment.

Blankman’s status and seniority date was correctly set forth in Exhibit 13.

41. Heidi Uyloan: Exhibit 13 stated Uyloan had a seniority date of October 17, 2008, and that she held a single subject teaching credential in English.

Uyloan contended she was entitled to a seniority date of August 16, 2006.

Uyloan interviewed in June 2006 and was told her contract would go into effect when the teacher she was replacing filed for a leave of absence. Uyloan attended new teacher trainings.

On August 16, 2006, Uyloan signed an acknowledgment stating, “I have been informed that if a contract assignment results from this long-term substitute assignment, that the contract will be a temporary contact, unless otherwise noticed in writing.” On September 15, 2006, Uyloan signed an acknowledgment stating, “I have been informed that if a contract assignment results from this long-term substitute assignment, that the contract will be a temporary contract, unless otherwise noticed in writing, including temporary contract employment in subsequent school years.” On November 30, 2006, Uyloan signed an Agreement for Temporary Certificated Employment employing her from October 17, 2006, through June 30, 2007, on a temporary basis. On August 9, 2007, Uyloan signed an Agreement for Temporary Employment employing her from July 1, 2007, through June 30, 2008. On September 12, 2008, Assistant Superintendent Chiment sent a letter to Uyloan stating that with her first day of service in the 2008-09 school year, she attained permanent status. (Exhibit 33.)

Uyloan acknowledged that she was a substitute teacher in August 2006. Uyloan did not receive credit for service before October 16, 2006, because no statute authorizes the time spent teaching as a substitute teacher as counting towards probationary or permanent status. The time Uyloan spent teaching after that under a temporary contract was correctly used to calculate her seniority.

Uyloan’s status and seniority date was correctly set forth in Exhibit 13.

42. Sonita Lucht: Exhibit 13 stated Lucht had a seniority date of August 16, 2007, and that she held a single subject teaching credential in Math.

Lucht contended that she did not have a contract for the remainder of the 2004-05 school year, and that as a result she may have had the right to claim probationary status, status that was afforded her in a letter from PUSD. Lucht, as many others, found the process stressful and was frustrated that others with less seniority had attained tenure when she had not been able to do so.

On August 22, 2005, Lucht signed an acknowledgment stating, "I have been informed that my employment contract will be a temporary contract effective 8/23/05 and will remain a temporary contract unless or until otherwise noticed in writing." On August 24, 2005, Lucht signed an Agreement for Temporary Certificated Employment employing her from August 23, 2005, through October 21, 2005. On June 15, 2006, Assistant Superintendent Chiment sent Lucht a letter seeking to "clarify your assignment for next year with the Poway Unified School District." In that letter, he stated that Lucht would be offered a temporary contract and would be assigned to Bernardo Heights Middle School, and that the "status may be changed to probationary and you will be notified in writing." On August 11, 2006, Lucht signed an Agreement for Temporary Certificated Employment extending her temporary employment from July 6, 2006, through June 30, 2007. On June 5, 2007, Assistant Superintendent Chiment sent Lucht a letter advising her that she would be offered a temporary contract for the next school year. On July 27, 2007, Lucht signed an Agreement for Temporary Certificated Employment for the period July 1, 2007, through June 30, 2008. On May 28, 2008, Assistant Superintendent Chiment sent Lucht a letter advising her that the district would be able to reemploy temporary contract teachers when budget issues became more clear. On June 11, 2008, he sent another letter advising Lucht that PUSD would offer her a temporary position for the 2008-09 school year. On July 24, 2008, Lucht signed an Agreement for Temporary Certificated Employment for the period from August 12, 2008, through June 30, 2009. (Exhibit 34.)

Lucht's status and seniority date was correctly set forth in Exhibit 13.

43. Edith Corbell: Exhibit 13 stated Corbell had a seniority date of August 22, 2008, and held a single subject teaching credential in English and Home Economics.

Corbell claimed a seniority date of January 30, 2006, the first date of paid service in the 2005-06 school year.

Corbell began working under a temporary contract for the 2004-05 school year with a 60 percent FTE assignment. She began working full time in the 2005-06 school year, serving as a 9th grade English teacher because (at the time) she held an Introductory English credential which did not permit her to teach grades 10, 11 and 12. Corbell's site administrators urged her to obtain a single subject teaching credential in English to permit her to teach 10th through 12th grades. She did so. Corbell began teaching full-time on January 30, 2006.

After one year of full-time employment, Corbell asked her site supervisor about being placed on a tenure track. Corbell did not have CLAD authorization at the time and she was unaware that the district's policy was to not grant tenure to teachers who did not possess

CLAD, BCLAD or other EL authorization. Had Corbell known of this policy, she could have obtained CLAD authorization concurrently with her single subject English credential.

Corbell also claimed that she attended the required new teacher meeting for the 2004-05 school year and, thus, was not required to attend new teacher training thereafter.

The preponderance of the evidence established that Corbell's first paid date of probationary service was August 22, 2006. This first paid date of probationary service is consistent with the documentary evidence. (Exhibit 35.) Corbell was not entitled to an earlier seniority date because she was always a temporary employee before that date. There is no factual basis to support an earlier date based on legal theories involving promissory estoppel or detrimental reliance.

Corbell's status and seniority date was correctly set forth in Exhibit 13.

44. Anne Mikkelson: Exhibit 13 stated Mikkelson's seniority date was August 22, 2006, and that she held a multiple subject teaching credential.

Mikkelson claimed a seniority date of August 16, 2006, because she attended a PPAP course on that date.

According to Genny Girten, an experienced personnel technician, Mikkelson was employed as a substitute teacher from September 10 through October 2005, on a day to day basis. This was documented by district payroll records.

On October 7, 2005, Mikkelson signed an acknowledgment of her temporary status, which began on October 10, 2005. She had no written contract for the 2005-06 school year, and one was not required. The district proposed to hire Mikkelson on a temporary basis for the 2006-07 school year. (Exhibit 36.) Girten testified she mailed an Agreement for Temporary Certificated Employment before the conclusion of the 2006-07 school year, which Mikkelson later returned and signed; because it did not involve initial employment, the Education Code did not require that the agreement be signed before Mikkelson began providing services in a temporary capacity that school year.

The PPAP training Mikkelson attended on August 16, 2006, was voluntary and was not required by her contract of employment. Mikkelson was not paid at her contract rate for attending the PPAP training. (Exhibit 50.)

Mikkelson's status and seniority date was correctly set forth in Exhibit 13.

45. Liliana Lazzari: Exhibit 13 stated Lazzari had a seniority date of August 22, 2006, with a single subject teaching credential in Music.

Lazzari claimed a seniority date of August 21, 2006, when she attended a new teacher meeting.

Assistant Superintendent Chiment testified that the training Lazzari attended was not mandatory and was not required by her contract. The attendance sheet for that meeting indicated it was a PPAP meeting, and that she was paid a substitute rate of pay and not a rate of pay due under her employment agreement. (Exhibits 37 and 51.) Even if Lazzari were given an August 21, 2006, seniority date, she still would have received a preliminary layoff notice.

Lazzari's status and seniority date was correctly set forth in Exhibit 13.

46. Janelle Morshead: Exhibit 13 stated Morshead had a seniority date of August 11, 2006, and that she had a multiple subject teaching credential.

Morshead contested her seniority date, observing that she had been employed continuously with PUSD since August 2005.

In August 2005, Morshead took over another teacher's position at Stone Ranch Elementary School with the understanding that the other teacher would return in April 2006. On December 14, 2005, Morshead signed an acknowledgement which stated she understood her employment contract was a temporary contract, effective January 3, 2006, and would remain a temporary contract. On March 4, 2005, Morshead signed an acknowledgment stating, "I have been informed that if a contract assignment results for this long-term substitute assignment, that the contract will still be a temporary contract, unless otherwise noticed in writing." The date Morshead was to begin the long-term assignment was March 21, 2005. The other teacher did not return for the 2005-06 school year and took a leave of absence. Morshead completed the 2005-06 school year. On June 9, 2005, Morshead signed an Agreement for Temporary Certificated Employment for the period June 6, 2005, through June 30, 2006. On January 24, 2006, Morshead signed an Agreement for Temporary Certificated Employment for the period January 3, 2006, through April 23, 2006. On August 16, 2006, Morshead signed an acknowledgment in which she stated that she understood that her employment contract would be a temporary contract effective August 22, 2006. On September 20, 2006, Morshead signed an Agreement for Temporary Certificated Employment for the period August 18, 2006 through June 30, 2007. In the 2006-07 school year, Morshead had her own classroom and her own students. On July 25, 2007, Morshead signed an Agreement for Temporary Certificated Employment for the period July 1, 2007, through June 30, 2009. (Exhibit 38.)

Throughout her employment, PUSD notified Morshead in a timely fashion that her employment with the district would be on a temporary basis. Morshead had previously served as a temporary teacher in those instances in which a contract was signed after she was employed on a temporary basis. Morshead was aware of her temporary status.

Morshead's status and seniority date was correctly set forth in Exhibit 13.

47. Danielle Perkio: Exhibit 13 stated Perkio had a seniority date of August 22, 2006, and held a multiple subject teaching credential.

Perkio was concerned about her seniority date, observing that she had been employed continuously with PUSD since the 2005-06 school year and that she was never told she could or should have attended the new teacher orientation which resulted in some employees who were new to the district having a few days more seniority than Perkio.

On August 22, 2005, Perkio signed an acknowledgement stating, "I have been informed that my employment contract will be a temporary contract, effective August 23, 2005, and will remain a temporary contract unless or until otherwise noticed in writing." On August 15, 2006, Perkio signed an acknowledgment stating, "I have been informed that my employment contract will be a temporary contract, effective August 22, 2006, and will remain a temporary contract unless or until otherwise noticed in writing." On October 30, 2006, Perkio signed an Agreement for Temporary Certificated Employment for a period of employment from August 22, 2006, through June 30, 2007. On August 14, 2007, Perkio signed an agreement for Temporary Certificated Employment from July 1, 2007, through June 30, 2008. (Exhibit 39.)

Throughout her employment, PUSD notified Perkio in a timely fashion that her employment with the district would be on a temporary basis. Perkio had previously served as a temporary teacher when she signed a contract for temporary employment after she began that temporary employment. Perkio was aware of her temporary status.

Perkio's status and seniority date was correctly set forth in Exhibit 13.

48. Lauren Oreilly: Exhibit 13 stated Oreilly's seniority date was August 22, 2006, and that she held a multiple subject teaching credential with supplemental authorizations in English and Introduction to Social Studies.

Oreilly believed there was no contract for the 2005-06 school year, and that service she provided in 2005 in a classified position could be credited for seniority purposes.

In 2005, Oreilly (Bachety) began teaching in the district as an elementary school teacher. On August 18, 2005, the day before she commenced service with PUSD, she signed an Agreement for Temporary Certificated Employment that stated she was being hired as a temporary teacher for the period August 19, 2005, through June 30, 2006. On August 16, 2006, she signed an acknowledgment stating, "I have been informed that my employment contract will be a temporary contract, effective August 22, 2006, and will remain a temporary contract unless or until otherwise reduced in writing, including temporary contract employment in subsequent school years." On August 20, 2006, Oreilly signed an Agreement for Temporary Certificated Employment for the period September 8, 2006, through the end of the coming school year, on June 20, 2007. (Exhibit 40.)

Oreilly conceded that there was never a time in the 2005-06 school year that she thought she was a probationary teacher and that she believed she had temporary status.

Under the Education Code, Oreilly was not entitled to have her classified service credited towards her permanent status as a credentialed employee. She produced no evidence suggesting that she was told by anyone from PUSD that might be the case.

Oreilly's status and seniority date were correctly set forth in Exhibit 13.

49. Danielle Schelhorse: Exhibit 13 stated Schelhorse had a seniority date of August 22, 2006, and held a single subject teaching credential in English.

Schelhorse asserted an earlier seniority date as a result of having been told she was not required to attend a new teacher orientation and as a result of having attended an earlier training for which she received substitute teacher pay but not pay at her contracted rate.

Documentary evidence (Exhibit 41) established that Schelhorse's attendance at the summer move at Mt. Carmel High School before the school year began was "voluntary" (i.e., not part of her formal agreement with PUSD) and that she received substitute pay for her participation.

Schelhorse's status and seniority date were correctly set forth in Exhibit 13.

50. Alexandra Sullivan: Exhibit 13 stated Sullivan had a seniority date of August 22, 2006, and that she held a multiple subject teaching credential.

Sullivan was a tenured teacher who was hired by PUSD in 1996. She was on maternity leave for the 2002-03 school year. She resigned from her employment in February 2003 to save another more junior teacher's employment. After she resigned, Sullivan and her husband moved to Boston, where her husband engaged in medical training. When Sullivan and her husband returned to California in 2006, she made arrangements to resume working at PUSD. Sullivan thought she was protected under the 39 month reemployment rule and that her seniority would date back to her original service as a probationary employee; where Sullivan obtained this belief was unclear. Someone else, it was not clear who, told Sullivan her seniority date was August 22, 2006.

The documentary evidence established that PUSD accepted Sullivan's resignation on March 4, 2003. Nothing in that letter of acceptance indicated that Sullivan would retain her seniority date if she returned to employment with the district within 39 months. On August 16, 2006, Sullivan signed an acknowledgment stating, "I have been informed that my employment contract will be a temporary contract, effective August 16, 2006, and will remain a temporary contract unless or until otherwise reduced in writing, including temporary contract employment in subsequent school years." On August 21, 2006, Sullivan signed an Agreement for Temporary Certificated Employment for the period August 22, 2006, through September 8, 2006. On September 8, 2006, Sullivan signed an acknowledgment stating that she was informed that her employment would be under a temporary contract, effective September 11, 2006. On October 27, 2006, Sullivan signed an Agreement for Temporary Certificated Employment for the period from September 11, 2006, through June 30, 2007. (Exhibit 42.)

After Sullivan expressed a desire to return to employment with PUSD, PUSD notified Sullivan in a timely fashion that her employment with the district would be on a temporary basis. Sullivan had previously served as a temporary teacher when she signed a contract for temporary employment after she began that temporary employment. Sullivan was aware, or reasonably should have been aware, of her temporary status. The 39 month rule⁸ does not apply because Sullivan did not return to service within 39 months of her last day of paid service and because of the appellate decision in *San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 641 [when a permanent certificated employee resigns and is reemployed within 39 months a reemployment restores all individual rights, benefits and burdens of a permanent employee; however, for seniority purposes, employee does not regain his or her original hiring date; Legal Conclusion 13].

Sullivan's status and seniority date were correctly set forth in Exhibit 13.

51. Emily Westmoreland: Exhibit 13 stated Westmoreland had a seniority date of August 24, 2004, and held a multiple subject teaching credential with a supplemental authorization in English.

Westmoreland believed she might be entitled to a seniority date of August 22, 2003, the date on which she signed an employment agreement with the district.

On April 4, 2003, Westmoreland signed an Agreement for Temporary Certificated Employment for the period extending from April 14, 2003, through June 30, 2003. On August 21, 2003, Westmoreland signed an acknowledgment that stated, "I have been informed that my contract will be a temporary contract, effective 8/21/03." On August 22, 2003, Westmoreland signed an Agreement for Temporary Certificated Employment for the period extending from September 30, 2003, through June 30, 2004. On October 2, 2003, Assistant Superintendent Chiment sent Westmoreland a letter advising her that he would recommend the extension of her temporary contract through June 16, 2004. On October 24, 2003, Westmoreland signed an Agreement for Temporary Certificated Employment for the period from September 30, 2003, through June 30, 2004. On August 19, 2004, Westmoreland signed an acknowledgement stating, "I have been informed that my employment contract will be a temporary contract, effective 8/20/04 and will remain a temporary contract unless or until otherwise noticed in writing." On September 30, 2004, Westmoreland signed an Agreement for Temporary Certificated Employment for the period from August 24, 2004, through June 30, 2005. On August 8, 2005, Westmoreland signed an

⁸ Education Code section 44931 provides in part:

"Whenever any certificated employee of any school district who, at the time of his or her resignation, was classified as permanent, is reemployed within 39 months after his or her *last day of paid service*, the governing board of the district shall, disregarding the break in service, classify him or her as, and restore to him or her all of the rights, benefits and burdens of, a permanent employee, except as otherwise provided in this code. . . ." (Emphasis added.)

Agreement for Temporary Certificated Employment for the period from July 1, 2005, through June 30, 2006. (Exhibit 43.)

Westmoreland acknowledged her temporary status before she began employment with PUSD. There was no bait and switch. Thereafter, Westmoreland was always employed under a temporary employment agreement through June 30, 2006. Westmoreland candidly admitted that she knew that she was always a temporary employee, and no one from the district told her she was a probationary employee.

Westmoreland's status and seniority date were correctly set forth in Exhibit 13.

52. Ella Whitehead: Exhibit 13 stated Whitehead had a seniority date of August 22, 2006, and that she had a single subject teaching credential in Art, with designated subjects of Printing & Graphic Arts.

Whitehead contended that she was entitled to a much earlier seniority date because she replaced a tenured employee in August 1999 and because there was no temporary contract for the 2001-02 school year, which moved her into probationary status by default.

Whitehead started working at PUSD in August 1999 as a replacement teacher for a graphic arts teacher who went on leave. Whitehead refused employment at an hourly rate, and stated that she wanted to be paid a salary because she had layoff experience in New York and she thought being a salaried employee would put her on the tenure track. By letter dated June 7, 1999, (then) PUSD Assistant Superintendent David K. Hughes advised Whitehead that the assignment was being funded by categorical funds, and that due to the uncertainty in funding, she would be continued on a temporary contract for 1999-2000. On June 13, 2000, Assistant Superintendent Chiment sent Whitehead a letter stating that Whitehead's position with PUSD was under a temporary contract, which did not guarantee continuing employment, that her assignment was funded with categorical funds, and that he regretted being "unable to offer a contract that would move you toward tenure." The Agreement for Temporary Certificated Employment Whitehead signed on July 31, 2000, stated Whitehead was a temporary employee from August 23, 2000, through June 30, 2001. On June 8, 2001, Assistant Superintendent Chiment sent a letter to Whitehead advising her that she would be offered a contacted position for the next year with her assignment to remain at Rancho Bernardo High School. (Exhibit 44.) Whitehead testified that when she received this letter, she thought she was on the tenure track. No contract was produced for the 2001-2002 school year. However, Agreements for Temporary Certificated Employment were produced for the 2002-03, 2003-04, 2004-05, 2005-06 school years. By letter dated June 15, 2006, Assistant Superintendent Chiment advised Whitehead that she had been serving on a temporary contract, and that her assignment was being funded by categorical funding, and for that reason she would be on a temporary contract for the next year. Whitehead was further advised, "As this position is categorically funded, your assignment will not accrue service toward permanent status." An Agreement for Temporary Certificated Employment was provided for the 2006-07 school year. On October 16, 2006, Assistant Superintendent Chiment wrote to Whitehead, advising her that he understood that she felt it was "unfair, unethical, and should be illegal" that the district was continuing her on a temporary status

because her classes were categorically funded. He confirmed that her compensation, her retirement plan with the State Teachers Retirement System and other factors were not affected by her temporary status. Whitehead signed “under protest” an Agreement for Temporary Certificated Employment for the 2007-08 school year. By letter dated September 18, 2007, Assistant Superintendent Chiment advised Whitehead that the governing board changed her contract from temporary to probationary at its meeting on September 10, 2007, and that her prior eligible service with the district made her a secondary probationary employee. (Exhibit 44.)

Whitehead is not entitled to probationary status because she replaced a teacher who did not return. (See, *Santa Barbara Federation of Teachers, Local 1081 v. Santa Barbara High School District* (1977) 76 Cal.App.3d 223.) On this factual record, Whitehead was unable to establish that she was entitled to probationary status because the district did not produce a temporary employment agreement for the 2001-02 school year. She had always been employed as a temporary teacher before then, she was always employed as a temporary teacher after that school year, she never claimed before this proceeding that she thought she was a probationary teacher that year, and there was nothing to corroborate the claim that she was enticed into employment for the 2001-02 school year on the promise of probationary status; indeed, it was well documented the district had always taken the position that Whitehead was a temporary employee as a result of her class being categorically funded.

53. Christine Millsap: Exhibit 13 stated Millsap had a seniority date of August 23, 2001, with a single subject teaching credential in Biology and a supplemental authorization in Introduction to Science.

Millsap, who did not testify in this matter, contended that the district improperly listed her as having an Introduction to Spanish authorization. Millsap claimed that if she had been classified properly, she would have been retained.

Based on the possibility that the district made an error, it is recommended that Millsap’s file be reviewed, that it be determined if she holds a special authorization in Introduction to Science, and that it be determined if that authorization provides her with sufficient qualifications to bump a more junior employee.

54. Jacquelyn Whitaker: Exhibit 13 stated Whitaker had a seniority date of August 23, 2005, and that she held a single subject teaching credential in Math and a multiple subject teaching credential, with supplemental authorizations in Computer Concepts & Applications and Physics.

Whitaker did not testify, but she submitted a position statement that observed that the “entire process is disheartening and arbitrary.” Whitaker’s statement noted the special relationship that exists between a student and a teacher, the need for a caring instructor, and the notion that compensation and retention should be based on performance, ability, and commitment. This view is widely held. Implementation of a merit-based system is a matter of legislative concern as Whitaker observed, and further discussion is not required for purposes of this layoff proceeding.

Signing the Acknowledgments

55. Each respondent initially signed an acknowledgment of some kind in which the respondent acknowledged that his or her forthcoming employment with PUSD would be as a temporary employee. These initial acknowledgments did not include the salary that was to be paid to the temporary employee or the duration of the employment. Respondents assert that the failure to include salary information and the duration of employment required that they be given probationary status under Education Code section 44916 and under the California Supreme Court's majority decision in *Kavanaugh v. West Sonoma County High School District* (2003) 29 Cal. 4th 911. PUSD, on the other hands, asserts that the written acknowledgments it provided to new employees sufficiently complied with the notice requirements of Education Code section 44916 to prevent these brand new employees from obtaining probationary status by default.

No credible evidence established that any respondent herein thought he or she was being hired as a probationary employee upon initial employment. No credible evidence established that the failure to provide salary information or information related to the duration of the temporary contract influenced the decision of any respondent herein to become a PUSD employee.

The factual conflict described in *Kavanaugh* and the possibility of a bait-and-switch scenario that was raised in *Kavanaugh* simply was not present in this matter. It is concluded that even if there were some technical defect in the notice, it was insufficient to result in these PUSD employees obtaining probationary status. All of them knew that they were temporary employees before they first began providing services.

56. There were some lapses in temporary employment contracts after respondents signed the initial contract. Some respondents claimed that these lapses resulted in their obtaining probationary status. However, *Kavanaugh* factually applies only to initial employment, and its holding was designed to prevent new hires from being misled and then trapped into unwanted employment. *Kavanaugh* did not involve a lapse between contracts.

No respondent in this matter reasonably believed after the first period of employment that he or she was being offered a probationary position; indeed, each of the contracts signed stated that subsequent employment would be on a temporary basis unless otherwise stated.

Ultimate Factual Conclusions

57. The governing board resolved to reduce or discontinue particular kinds of services provided by teachers and other certificated employees for budgetary reasons. This decision was not related to the competency or dedication of PUSD certificated employees whose services were proposed to be discontinued. It was in the best interests of the district and its students.

PUSD's administrative staff initiated and followed a systematic procedure for identifying employees directly affected by the governing board's resolution to reduce and eliminate of particular kinds of services. Careful evaluation of each employee's seniority date, credential, and qualifications preceded the determination of what bumping rights, if any, an employee had. Skipping rights were accorded in the best interests of the district and its students. Adjustments were made to the seniority list where indicated.

Except as otherwise noted, no junior credentialed employee was retained by the district to provide services which a more senior employee was certificated, competent and qualified to render.

Teacher Testimony

58. The heartfelt, painful testimony of respondents about their love of teaching and their desire to retain their employment with the district established the frustration, sorrow and inevitable loss that accompany the termination of bright, young, highly skilled, dedicated and enthusiastic teachers.

LEGAL CONCLUSIONS

Statutory Authority

1. Education Code section 44944 provides in part:

“No later than March 15 and before an employee is given notice by the governing board that his or her services will not be required for the ensuing year . . . the governing board and the employee shall be given written notice by the superintendent of the district or his or her designee . . . that it has been recommended that the notice be given to the employee, and stating the reasons therefor . . .

(b) The employee may request a hearing to determine if there is cause for not reemploying him or her for the ensuing year . . . If an employee fails to request a hearing on or before the date specified, his or her failure to do so shall constitute his or her waiver of his or her right to a hearing . . .

(c) In the event a hearing is requested by the employee, the proceeding shall be conducted and a decision made in accordance with . . . the Government Code and the governing board shall have all the power granted to an agency therein, except that all of the following shall apply:

(1) The respondent shall file his or her notice of defense, if any, within five days after service upon him or her of the accusation and he or she shall be notified of this five-day period for filing in the accusation.

...

(3) The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof. The proposed decision shall be prepared for the governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition. None of the findings, recommendations, or determinations contained in the proposed decision prepared by the administrative law judge shall be binding on the governing board. Nonsubstantive procedural errors committed by the school district or governing board of the school district shall not constitute cause for dismissing the charges unless the errors are prejudicial errors. Copies of the proposed decision shall be submitted to the governing board and to the employee on or before May 7 of the year in which the proceeding is commenced. . . .”

2. Education Code section 44955 provides in part:

“(a) No permanent employee shall be deprived of his or her position for causes other than those specified in Sections 44907 and 44923, and Sections 44932 to 44947, inclusive, and no probationary employee shall be deprived of his or her position for cause other than as specified in Sections 44948 to 44949, inclusive.

(b) Whenever . . . a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year . . . and when in the opinion of the governing board of the district it shall have become necessary . . . to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.

. . .

As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof . . .

. . .

(c) Notice of such termination of services shall be given before the 15th of May . . . and services of such employees shall be terminated in the inverse of the order in which they were employed, as determined by the board in accordance with the

provisions of Sections 44844 and 44845. In the event that a permanent or probationary employee is not given the notices and a right to a hearing as provided for in Section 44949, he or she shall be deemed reemployed for the ensuing school year.

The governing board shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render. However, prior to assigning or reassigning any certificated employee to teach a subject which he or she has not previously taught, and for which he or she does not have a teaching credential or which is not within the employee's major area of postsecondary study or the equivalent thereof, the governing board shall require the employee to pass a subject matter competency test in the appropriate subject.

(d) Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons:

- (1) The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess.
- (2) For purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws.”

Jurisdiction

3. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied as to all respondent employees.

The Reduction of Particular Kinds of Services

4. A school board's decision to reduce or discontinue a particular kind of service is not tied in with any statistical computation. Where a governing board determines to discontinue or reduce a particular kind of service, it is within the discretion of the board to determine the amount by which it will reduce a particular kind of service as long as a district does not reduce a service below the level required by law. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 635-636.)

Seniority, Bumping, and Skipping

The Statutory Scheme

5. Education Code section 44955, the economic layoff statute, provides in subdivision (b), in part, as follows:

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

Essentially this language provides senior certificated and qualified employees with “bumping” rights and a school district with “skipping” authority to retain junior employees who are certificated and competent to render services which more senior employees are not. Subdivision (d)(1) of section 44955 provides an exception to subdivision (b) where a district demonstrates specific need for personnel to teach a specific course of study and that a junior certificated employee has special training and experience necessary to teach that course that the senior certificated employee does not possess. (*Bledsoe v. Biggs Unified School Dist.* (2008) 170 Cal.App.4th 127, 134-135.)

Bumping

6. The district has an obligation under section 44955, subdivision (b), to determine whether any permanent employee whose employment is to be terminated in an economic layoff possesses the seniority and qualifications which would entitle him/her to be assigned to another position. (*Bledsoe v. Biggs Unified School Dist., supra*, at 136-137.)

Skipping

7. Subdivision (d)(1) of section 44955 expressly allows a district to demonstrate its specific “needs” and there is nothing in the statute that requires such needs to be evidenced by formal, written policies, course or job descriptions, or program requirements. (*Bledsoe v. Biggs Unified School Dist., supra*, at 138.)

Temporary Teachers

Categorically Funded Positions

8. The district correctly assigned temporary status to certificated employees who were employed in categorically funded positions. A categorically funded project need not involve the creation of special classes divorced from the normal curriculum, but may augment the curriculum in whatever manner is specified in the particular program. The defining characteristics are that the program be financed outside the base revenue limit with the funds designated for a use specified by the particular program. (*Zalac v. Governing Board of the Ferndale Unified School District* (2002) 98 Cal.App.4th 838, 848.)

Temporary Replacements

9. The district granted leaves of absence to certain certificated employees for the current school year. Reasons for those leaves of absence likely included medical reasons (Ed. Code, §§ 44920; 44986); placement of regular teachers on “special assignment” in non-teaching capacities (*Levy v. San Francisco Unified School District* (1978) 79 Cal.App.3d 953); and assignment of regular teachers to job-share arrangements, to the extent those assignments created full or partial FTE vacancies in the teachers’ regular positions.

PUSD employed temporary certificated employees for the current school year to fill the positions held by permanent and probationary employees who were on leave, and the district provided each temporary employee with written notice of his or her temporary status under Education Code section 44916 and the decision in *Kavanaugh*. Each temporary employee expressly agreed to his or her temporary status by initially signing an acknowledgment thereafter signing valid temporary contracts of employment for the current school years.

There Is No Direct One-to-One Replacement Requirement for Temporary Employees

10. Because the number of regular employees assigned to categorically funded programs plus the number of employees on other leaves of absence did not exceed the number of employees who were designated by the district as temporary employees, all of those temporary employees were properly classified. In *Santa Barbara Federation of Teachers, Local 1081 v. Santa Barbara High School District* (1977) 76 Cal.App.3d 223, the court observed:

“[W]e do not believe that section 13337.3 [now section 44920] requires that a temporary teacher replace a particular employee on leave, as is contended by petitioners. Section 13337.3 should be viewed as the Legislature’s attempt to provide some stability for both pupils and teachers in the face of teacher shortages created by probationary and permanent employees on leaves of absence. By allowing school districts to replace such employees on a year long basis, the Legislature has created . . . a device which ensures continuity of instruction while avoiding the problems of overstaffing. Without this device, as noted above, school districts would resort to filling temporary vacancies on a day-to-day basis with various substitute teachers, such practice would be harmful to both the students and their substitute teachers.” (76 Cal.App.3d at pp. 732-733.)

Temporary Employees Do Not Have the Same Protections

11. Temporary employees are not entitled to the protections of Education Code sections 44949 and 44955. (See Ed. Code, § 44955(a); *California Teachers Ass’n v. Vallejo City Unified School District* (2007) 149 Cal.App.4th 135, 152 [“These statutory rights are expressly provided only to permanent and probationary employees”]; *Bakersfield Elementary Teachers Ass’n v. Bakersfield City School District* (2006) 145 Cal.App.4th 1260, 1273

[“temporary employees, unlike permanent and probationary employees, may be dismissed at the pleasure of the board and need be given only a more limited form of notice before the end of the school year, and no hearing”].) Moreover, temporary employees do not accrue seniority, and so must be released before probationary employees. (*Bakersfield, supra*, at p. 1273; *California Teachers Ass'n v. Vallejo City Unified School District* (2007), *supra*, at p. 145.)

The District Properly Reexamined Seniority and Status

12. In reviewing the seniority list, the district discovered that in the past or currently it had improperly conferred probationary status on one or more certificated employees and had provided an incorrect date of employment in a paid probationary position. The district corrected the status of these certificated employees by changing their seniority dates and, in some instances, their status.

Under Education Code section 44845, seniority is determined by the date a certificated employee “first rendered paid service in a probationary position.” Education Code section 44929.21 states:

“Every employee of a school district of any type or class having an average daily attendance of 250 or more who, after having been employed by the district for two complete consecutive school years in a position or positions requiring certification qualifications, is reelected for the next succeeding school year to a position requiring certification qualifications shall, at the commencement of the succeeding school year be classified as and become a permanent employee of the district.”

Under Education Code section 44918, a certificated employee must serve at least seventy-five percent of the days of the school year to be deemed to have worked a complete school year.

In *Fleice v. Chualar Union Elementary School District* (1988) 206 Cal.App.3d 886, the school district misclassified Fleice as a tenured employee after she worked for just one complete school year. The court stated: “[W]e believe that early tenure would conflict with the tenure statute and is, thus, beyond a school board’s power.” (*Id.* at p. 890.) The court rejected Fleice’s argument that the legislature permitted a school board the right to grant early tenure, stating:

“Our school system is established not to provide jobs for teachers but rather to educate the young. Establishing a test period for teachers to prove themselves is essential to a good education system.” (*Ibid.* at p. 892, citing *Turner v. Board of Trustees* (1976)16 Cal.3d 818. 825.)

The Effect of Resignation and Reemployment on Seniority

13. Permanent certificated employees who resign and are reemployed within 39 months retain their permanent status. Education Code section 44931 states:

“Whenever any certificated employee of any school district who, at the time of his or her resignation, was classified as permanent, is reemployed within 39 months after his or her last day of paid service, the governing board of the district shall, disregarding the break in service, classify him or her as, and restore to him or her all of the rights, benefits and burdens of, a permanent employee, except as otherwise provided in this code. However, time spent in active military service, as defined in Section 44800, subsequent to the last day of paid service shall not count as part of the aforesaid 39-month period.” (Emphasis added.)

Individuals who resign and are reemployed sometimes contend a seniority date relating back to their first date of employment. That contention ignores the effect of the “as otherwise provided in this code” exception.

Specifically, Education Code section 44848 states:

“When any certificated employee shall have resigned or been dismissed for cause and shall thereafter have been reemployed by the board, his date of employment shall be deemed to be the date on which he first accepted reemployment (if reemployed before July 1, 1947) or rendered paid service (if reemployed after June 30, 1947) after his reemployment.

When an employee’s services are terminated for lack of enrollment or discontinuance of service or are otherwise interrupted in a manner declared by law not to constitute a break in service, his original order of employment shall stand.” (Emphasis added.)

For seniority purposes, an employee who resigns and then is reemployed does not regain his or her original hiring date. (*San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627, 641.)

Kavanaugh v. West Sonoma County High School District

14. The primary dispute in this matter involves the application of *Kavanaugh v. West Sonoma County High School District* (2003) 29 Cal.4th 911 and the interpretation to be given to Education Code section 44916. In this matter, unlike *Kavanaugh*, there was no factual dispute and no employee claim of bait and switch.

All new PUSD employees were informed of their temporary status before they began work. Written acknowledgments were signed by the respondents before they initially commenced their temporary employment with PUSD. The acknowledgments varied in detail, but no acknowledgment included the amount of salary the employee was to be paid or the ending date of the employment agreement.

No employee in this proceeding claimed that he or she thought initial employment was of anything but a temporary nature, and no employee stated he or she was misled concerning the level of pay or the duration of the contract. PUSD did not engage in any

subterfuge and made no attempt to frustrate the purpose of Education Code section 44916. No prejudice arose out of the district's failure to provide any of these brand new employees with salary information or with duration of contract information. For employees being rehired under a temporary contract, there were some lapses, but no employee was misled into believing that his or her next employment would be on anything but a temporary basis. The length of the agreement was PUSD's fiscal year. The compensation for services was set by a collective bargaining agreement between PUSD and the teachers' association. There were no misunderstandings.

15. *Kavanaugh* involved an English teacher (Kavanaugh) who began working for the West Sonoma County High School District (the district) in the 1999-2000 school year. Kavanaugh had previous teaching experience in other districts. Kavanaugh claimed she was not told when she applied if the position she sought was temporary or probationary, and that before she started work, her principal told her that she would work two years as a probationary teacher before she became eligible for tenure. The principal denied this representation. Kavanaugh began working on August 26, 1999. On September 9, 1999, the district's governing board approved Kavanaugh's contract as a temporary teacher. Kavanaugh signed that contract on November 9, 1999, which stated she was a temporary employee. Kavanaugh asked her principal about her status and, according to Kavanaugh, she was told she would be given probationary status if she proved to be a good employee. The principal denied making this statement. Near the end of the 1999-2000 school year, the district experienced a fiscal crisis and decided not to reemploy several certificated employees, including Kavanaugh.

When Kavanaugh received a notice of non-reelection, she filed a writ in the superior court, claiming she was a probationary employee because the district failed to provide her with timely written notice that she was a temporary employee and because, as a probationary employee, she was not given notice by March 15, 2000, of the district's intent not to employ her the following school year.

In a 4-3 decision, the California Supreme Court reached a number of conclusions:

First, the Education Code establishes four possible classifications for certificated employees: Permanent, probationary, substitute and temporary. The date on which a certificated employee is first classified within one of these four employment categories is often critical, for such status has ramifications for both the teacher and the district throughout the employment relationship. For example, if a certificated probationary employee works for two complete consecutive school years and is then reelected for the next succeeding year, the employee is elevated to permanent status by operation of law. (Ed. Code, § 44929.21, subd. (b).) In some circumstances, a probationary employee who is not informed of his or her nonreelection by March 15th of the current school year is deemed reelected for the following school year. (Ed. Code, §§ 44929.21, subd. (b) and 44955, subd. (c).) If a certificated employee works as a temporary employee for a complete school year and is then "reemployed for the following school year in a position requiring certification qualifications, [he or she must] be classified by the governing board 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.” (Ed. Code, § 44917; see also § 44920.) (*Kavanaugh, supra*, at pp. 916-917.)

Second, a certificated teacher’s classification governs the level of statutory job protection and controls the level of procedural protections that apply if the teacher is not reelected. In general, permanent employees may not be dismissed unless one or more statutorily enumerated grounds are shown. (Ed. Code, § 44932.) Probationary employees may not be dismissed during the school year except for cause or unsatisfactory performance (Ed. Code, § 44948.3), but, on timely notice, may be non-reelected without any showing of cause, without any statement of reasons, and without any right of appeal or administrative redress. Substitute and temporary employees, on the other hand, fill short range needs and generally may be summarily released. Thus, temporary teachers may be dismissed at the pleasure of the governing board before serving at least 75 percent of the number of days during one school year (Ed. Code, § 44954, subd. (a)), and after that time so long as the temporary employee is notified before the end of the school year (Ed. Code, § 44954, subd. (b)). The Legislature scheme is specific as to the rights and responsibilities of certificated teachers and their employers, the governing boards. (*Kavanaugh, supra*, at p. 917.)

Third, Education Code section 44916 mandates that a school district comply with three requirements if it desires to hire a “new certificated employee” as a temporary employee: (a) it must notify the employee of his or her salary and status as a temporary employee; (b) it must do so in a written notice; and (c) it must give such notice “at the time of initial employment.” (*Kavanaugh, supra*, at p. 918.) The majority concluded the Legislature’s intent and purpose in enacting section 44916 was to benefit teachers; stated differently, the Legislature intended that certificated teachers *be informed of their classification* sufficiently early in the hiring process to enable them to make informed decisions regarding their future employment (emphasis added). For teachers employed by the district in the preceding school year, that time was in July, well before the start of the next school year. A school district’s need for new employees, however, may not be apparent until sometime closer to the beginning of the school year, or even after the school year has begun. Thus, *informing those new employees of their classification at the time of their initial employment* was interpreted to mean before they first rendered paid service to their employer. (*Kavanaugh, supra*, at p. 921, emphasis added.) The majority reasoned that once a school year begins, for teachers to find a job as other than as a substitute teacher is much more difficult, and that *a requirement that an employing district inform applicants for certificated positions of their proposed employment status (permanent, probationary, temporary, substitute) before they actually begin working* avoids the kind of bait-and-switch scenario in which a teacher begins the school year believing his or her status is probationary (with the accompanying level of job protection) only to discover after the year has started—when it is too late to find another position—that the position is only temporary. (*Kavanaugh, supra*, at pp. 921-922, emphasis added.)

Fourth, the majority observed that a district has the option to give a new employee—on or before his or her first day of paid service—written notice that the position is a temporary one pending confirmation by the school board and verification of the teacher’s educational and employment references, at which point the teacher can be reclassified as

probationary. In addition, a district can give the teacher written notice that he or she is temporary and then reelect the teacher for the following year, at which point his or her year as a temporary employee would be deemed a year as a probationary employee under Education Code section 44917. (*Kavanaugh, supra*, at pp. 925.)

Based on this reasoning, a majority of the California Supreme Court concluded:

“We conclude plaintiff Kavanaugh was not given written notice of her status as a temporary employee “[a]t the time of [her] initial employment,” because she did not receive such notice on or before her first day of paid service. Accordingly, pursuant to section 44916, she must be considered a probationary employee as a matter of law. Because the District did not provide her with statutorily required notice before March 15th, the District had a clear, present and ministerial duty to reelect her for the following school year, and she has a clear, present and beneficial right to performance of that duty, entitling her to a writ of mandate. . . .” (*Kavanaugh, supra*, at p. 926.)

The majority opinion carefully stated a requirement that *notice of classification* be given before employment commenced; however, the majority did not require that notice of the contract’s duration or the salary be given.

There were three dissents to the majority opinion. Justice Brown in her dissent concluded that Education Code section 44916 requires a school district to provide a written statement to a new certificated temporary employee indicating that person’s employment status and salary when its governing board takes formal action to hire the employee, rather than on the date that the new employee first renders paid service to the district. Justices Baxter and Chin concurred. In addition, Justice Chin provided further explanation for his dissent:

“Kavanaugh's job classification matters in this case only because the District believed that Kavanaugh was a temporary employee. It accordingly gave notification of nonreelection on April 20, 2000, instead of on March 15, 2000, dates which occurred many months after Kavanaugh received her written notice. In giving notification of nonreelection on April 20th, the District reasonably relied on its September 13, 1999, letter that Kavanaugh's position was a temporary one. Thus, the timing of the written notice appears to be immaterial in this case. In finding that the written notice of job classification was untimely, and deeming Kavanaugh a probationary employee under section 44916, the majority places form over substance.”

Lapse in a Series of Temporary Contracts

16. Lapses between temporary contracts do not result in a temporary employee obtaining probationary status by default. *Kavanaugh* applies factually and legally only to initial employment with a school district, and the majority in *Kavanaugh* was correctly concerned with preventing new hires from being misled and then trapped. *Kavanaugh* did not involve a lapse between contracts.

The issue of lapse was addressed in *Haase v. San Diego Community College District* (1980) 113 Cal.App.3d 913, at 924, analyzed the wording of the last sentence of language identical to the last sentence of section 44916, and concluded, “[T]he last sentence of the section upon which plaintiff rests his case refers to initial classification only.”

Cause Exists to Give Notice to Certain Employees

17. As a result of the governing board’s lawful reduction of particular kinds of service, cause exists under the Education Code for the district to give notice to those certificated employees who received preliminary layoff notices with notice that their employment will be terminated at the close of the current school year and that their services will not be needed by the district for the 2009-10 school year.

Determination

18. The charges set forth in the accusation were sustained by the preponderance of the evidence and were related to the welfare of the Poway Unified School District and the pupils thereof. PUSD’s administrative staff made necessary assignments and reassignments in such a manner that the most senior employees were retained to render services which their seniority and qualifications entitled them to render, except as otherwise noted herein. No employee with less seniority than any respondent will be retained to render a service which any respondent is certificated, competent and qualified to render.

This determination is based on all factual findings and on all legal conclusions.

RECOMMENDATION

It is recommended that teachers of dual language immersion classes constitute be exempted from this layoff proceeding and not be displaced by more senior employees unless such more senior employee has served in a dual language immersion class within the district.

It is recommended that Michael Hymes’ status and seniority date be corrected to show a first paid date of probationary service on August 19, 2005.

It is recommended that Christine Millsap’s personnel file be reviewed, that it be determined if she holds a special authorization in Introduction to Science, and that, if she holds such authorization, it be determined whether the authorization provides her with sufficient qualifications to bump a more junior employee; if so, the preliminary layoff notice issued to Christine Millsap should be rescinded.

It is recommended that the governing board give a final layoff notice to the most junior certificated district employees who are providing the particular kinds of services that were identified in Board Resolution 34-2009 that are to be eliminated or reduced under Board Resolution 34-2009 provided those employees received a preliminary layoff notice and that final notices be issued in the inverse order of seniority.

DATED: _____

JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings