

**BEFORE THE  
GOVERNING BOARD OF THE  
MOJAVE UNIFIED SCHOOL DISTRICT**

**In The Matter of the Layoff of**

**CERTIFICATED EMPLOYEES OF  
THE MOJAVE UNIFIED SCHOOL  
DISTRICT,**

**OAH No. 2009060743**

**Respondents**

**PROPOSED DECISION**

H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on July 14, 2009, at City Hall, California City, California.

Peter C. Carton, Attorney at Law, represented Larry Phelps (Phelps), Superintendent of the Mojave Unified School District.

Tamra M. Boyd, Attorney at Law, represented respondents, Donald Beene, Rachel Boyer, Andrea Broaddus, Melissa Brunner, Sarah Davis Tate, Rachel Ketchell, Angelica McKay, Deborah Oakley, Richard Ribaud, Desiree See, Tina Thomas, Linda Waldheim, and Julia Wolf.

This action is colloquially known as a “mid-summer layoff” proceeding. It is brought pursuant to Education Code<sup>1</sup> section 44955.5.

The District has decided to reduce or discontinue certain educational services and has given Respondents notice of its intent not to reemploy them for the 2009-2010 school year. Respondents requested a hearing for a determination of whether cause exists for not reemploying them for the 2009-2010 school year.

///

---

<sup>1</sup> All statutory references are to the Education Code unless otherwise indicated.

Oral and documentary evidence was presented at the hearing. The record was held open to and including July 21, 2009, for the parties to submit written briefs. The briefs were timely received. "Administration's Closing Argument" was marked as Exhibit 8 for identification. "Respondents' Post-Hearing Brief" was marked as Exhibit "R" for identification.

On July 21, 2009, the Administrative Law Judge received four documents from the District's attorney, Mr. Carton, together with a cover letter dated July 20, 2009. In the cover letter, Mr. Carton described the documents as follows:

1. The excerpted portion of the April 24 Round One<sup>[2]</sup> transcript with the testimony of Ms. Davis/Tate. This teacher has already been laid off in Round One. But, we have learned that her augmented testimony last Tuesday does not appear to be totally consistent with her earlier testimony.
2. The complete Reporter's transcript for the final Round One Board meeting on May 12, 2009.
3. A copy of the Governing Board's decision of May 12, 2009, modifying the original proposed Round One decision.
4. A sample copy of the final Round One notice served to certain Respondents after the May 12 Board action.

The four documents referred to above were not marked for identification, admitted into evidence, or even referenced during the July 14, 2009 hearing. They were neither requested nor authorized by the Administrative Law Judge in connection with the briefs. They fall outside the record and are neither marked for identification nor considered in this Proposed Decision.

The matter was submitted on July 21, 2009.

On July 22, 2009, the Administrative Law Judge received a letter of erratum from Respondents' counsel correcting the date of the spring layoff hearing in her closing brief. The record was re-opened, and the letter was marked as Exhibit "S" for identification.

The matter was submitted on July 22, 2009.

///

---

<sup>2</sup> In his letter, Mr. Carton differentiates the spring layoff procedure from the instant action by referring to the spring procedure as "Round One."

## FACTUAL FINDINGS

1. Superintendent Phelps filed the Accusation in his official capacity.
2. Respondents are certificated employees of the District.
3. The procedural history of this mid-summer Reduction in Force action and the preceding spring Reduction in Force action are accurately described in Respondents' Post-Hearing Brief. It is repeated verbatim below.

### A. Spring 2009 Layoff Proceedings

In March of 2009, the District issued layoff notices to 21 teachers, based on the Mojave School Board's decision to eliminate particular kinds of services ("PKS"), pursuant to Education Code Sections 44949 and 44955. . . . Prior to the administrative hearing on these spring layoffs, the District rescinded the layoff notices of three teachers, including current Respondents Andrea Broaddus and Desiree See.

On April 29, 2009<sup>3</sup>, Administrative Law Judge Samuel Reyes conducted an administrative hearing on the District's spring layoffs. The nine Respondents at that hearing were Brenda Ball<sup>4</sup> and current Respondents Rachel Boyer, Melissa Brunner, Sarah Davis Tate, Rachel Ketchell, Angelica McKay, Deborah Oakley, Richard Ribaud and Julia Wolf. Respondents' defense focused in part on the fact that the District has posted on its website multiple job vacancies that the Respondents were qualified to fill.

Judge Reyes issued a proposed decision recommending that the Accusations be dismissed in their entirety against eight of the nine teachers – current Respondents Boyer, Brunner, Tate, Ketchell, McKay, Oakley, Ribaud and Wolf – on the ground that the District had vacant positions these teachers were qualified to fill. As to Ms. Ball, Judge Reyes recommended dismissing the Accusation as to .5 FTE, on the ground that Ms. Ball had demonstrated that her position consisted of .5 FTE of Home Economics and .5 FTE of Foods, and the Board's PKS resolution only eliminated Foods, not Home Economics.

///

---

<sup>3</sup> The date is incorrect. The hearing took place on April 24, 2009.

<sup>4</sup> The District issued Ms. Ball a Section 44955.5 layoff notice in June 2009, but thereafter rescinded it.

On May 12, 2009, Mojave's Board exercised its authority to reject the ALJ's decision as to Respondents Boyer, Brunner, Tate, Ketchell, McKay, Oakley, Ribauda and Wolf. Final layoff notices were issued to a total of 18 teachers (Ms. Ball's layoff notice was for .5 FTE).

On June 11, 2009, Respondents Boyer and Brunner filed a petition for writ of administrative mandate in Kern County Superior Court challenging the spring layoff, which was served on the District during the week of June 22, 2009.

**B. Summer Layoff Proceedings**

On or about June 11, 2009, the District passed a resolution authorizing summer layoffs under Education Code Section 44955.5. The District did not pass a resolution setting a timeline or schedule for these layoffs. . . .

On or about June 12, 2009, the District served summer layoff notices on the following individuals who were not laid off in the spring: Nicole Williford<sup>5</sup> and Respondents Andrea Broaddus, Desiree See, and Linda Waldheim. The District also issued new layoff notices under Section 44955.5 to the 18 teachers that it purported to lay off in May 2009, including current Respondents Beene, Boyer, Brunner, Tate, Ketchell, McKay, Oakley, Ribauda, and Wolf. One and a half weeks later, on or about June 23, 2009, the District issued a layoff notice to one more teacher who was not laid off in the spring, Respondent Tina Thomas. . . .

Respondents' counsel filed a Joint Notice of Defense on behalf of the teachers who received summer layoff notices, which was amended when counsel confirmed which teachers desired representation in connection with the summer layoff. . . . The current Respondents are: Donald Beene, Rachel Boyer, Andrea Broaddus, Melissa Brunner, Sarah Davis Tate, Rachel Ketchell, Angelica McKay, Deborah Oakley, Richard Ribauda, Desiree See, Tina Thomas, Linda Waldheim and Julia Wolf. Ms. Boyer and Ms. Brunner have clearly stated that their participation in the summer layoff proceeding is without prejudice to, and does not waive or concede any arguments in connection with, their pending writ proceeding in Superior Court. . . .

///

---

<sup>5</sup> Ms. Williford, a high school counselor, did not participate in the summer layoff hearing.

4. On June 11, 2009, the governing board of the District (governing board) adopted Resolution Number 061109-1, reducing or discontinuing the following services for the 2009-2010 school year:

<u>Service</u>	<u>FTE<sup>6</sup> Reduction</u>
K-6 Elementary Regular Classroom Teaching Positions (Self-Contained)	21
Music Teaching Position	1
<u>Departmentalized Instruction, High School:</u>	
Science	1
Foods	1
Home Economics	1
<u>Departmentalized Instruction, Junior High:</u>	
Physical Education	1
Math	1
English	1
Social Studies	1
Science	1
Dean of Students	1
Principal Position	1
Counselor	1
<b>Total FTE Reduction</b>	<b>32</b>

///

---

<sup>6</sup> Full-time equivalent position.

5. Superintendent Phelps thereafter provided written notice to the governing board and to Respondents that he recommended the termination of Respondents' services for the 2009-2010 school year due to the reduction of particular kinds of services.

6. On or about June 11, 2009, the District filed and served the Accusation and other required documents on Respondents. As set forth above, respondents' counsel timely filed a Notice of Defense as to all of the respondents, seeking a determination of whether cause exists for not reemploying them for the 2009-2010 school year.

7. All prehearing jurisdictional requirements have been met.

8. The services set forth in factual finding number 4 are particular kinds of services which may be reduced or discontinued within the meaning of sections 44955 and 44955.5.

### **Status of Teachers Noticed for Spring Layoff**

9. Respondents argue that, because the District re-noticed certain teachers for the mid-summer layoff procedure, "the District must now abide by the consequences of its actions." (Exhibit R, page 10, lines 24-25.) Respondents further argue that the District's decision to re-notice those teachers, who had already been laid off in the spring layoff procedure, was a strategic one, designed to re-litigate the spring layoff procedure and to gain an advantage in an administrative mandamus action arising out of that procedure and presently pending in the Superior Court. Respondents assert that, by re-noticing those teachers in the mid-summer procedure, its action "must have the effect of voiding [its] spring layoff notices and initiating *new layoff proceedings* against those individuals under Section 44955.5." (*Id.* at page 11, lines 17-19.) (Emphasis in text.)

10. Respondents offered, and the Administrative Law Judge found, no authority that supports their argument.

11. Of the respondents named in the instant action, the following were named in the spring proceeding: Boyer, Brunner, Tate, Ketchell, McKay, Oakley, Ribaud, and Wolf. Respondents Broaddus and See were originally given layoff notices in the spring proceeding, but those notices were later rescinded. In his Proposed Decision, Judge Reyes dismissed the Accusation against those respondents listed above. However, the District declined to adopt the Proposed Decision as written and issued final layoff notices to them.

///

///

12. The present status of those teachers, therefore, is that they have been laid off for the 2009-2010 school year. Generally, that would render moot all issues involving any of those respondents because, despite the broad discretion granted to the District pursuant to section 44955.5, it cannot lay off a teacher who no longer works for the District. However, in its closing brief, the District explained its conduct as follows:

With little statutory guidance and no judicial precedents for midsummer layoffs, the Administration started from scratch. Here, the Administration aggregated the First Round [spring] and Second Round [mid-summer] service reductions into a single list. . . . Streamlined Education Code and Government Code notices were given to five staff members who had not been laid off in Round One. [Footnote omitted.] Courtesy notices also went to everyone who had been involved in the Round One process. (Exhibit 8, page2, lines 11-16.)

The District further explained:

The Round One noticed employees (Beene, Boyer, Brunner, Davis, Ketchell, McKay, Oakley, Ribaldo and Wolfe; [sic] . . . had full opportunity to address their individual concerns at the Round One hearing on April 24, 2009 and again at the May 12, 2009 Board meeting. As a courtesy, the Administration offered those Round One participants the opportunity at the Round Two hearing to augment their previous Round One testimony for consideration by the Governing Board. Some, indeed, offered additional information about credentials recently acquired. [Footnote omitted.] And some argued for an advanced seniority date. [Footnote omitted.] (*Id.* at page 4, lines 14-20.)

13. This issue turns on the doctrine of waiver. “To have a waiver it is essential that there be an existing right, benefit or advantage, a knowledge, actual or constructive, of its existence, and an actual intention to relinquish it, or conduct so inconsistent with the intent to enforce the right in question as to induce a reasonable belief that it has been relinquished. (51 Cal.Jur.2d pp. 307, 308, § 3.)” *Columbia Engineering Co. v. Joiner* (1965) 231 Cal.App.2d 837, 857, 42 Cal.Rptr. 241.

14. At the time it issued the layoff notices for the mid-summer proceeding, the District had already rejected Judge Reyes’s Order and issued final layoff notices to the above-referenced respondents. By re-noticing those respondents in order to provide them the opportunity to augment their testimony for further governing board consideration, the District acted inconsistently with, and therefore waived, its right to enforce its final layoff notices. The propriety of the layoff notices of those respondents, who are also respondents in this action, will be considered *de novo* in this mid-summer proceeding.

15. However, although Respondents are entitled to new consideration of their appeals, those appeals must be considered in light of extant circumstances rather than the circumstances that existed at the time of the spring layoffs. For example, Judge Reyes based his dismissal of the Accusation as to eight teachers, in large part, on the fact that 22 vacant positions existed at the time of the layoffs, and he ordered the District to retain every respondent with the seniority and qualifications to fill any of those positions. As to another respondent, the Board had included in its resolution the elimination of a “foods” class constituting a .5 FTE position but did not include the other class the same teacher taught. That class also constituted a .5 FTE position. The District has since cured the defects found by Judge Reyes. It no longer has the 22 vacant positions, and no respondent herein is qualified to fill the few remaining vacancies. The District has also included home economics among the particular kinds of services to be reduced or eliminated.

**The Standard for Determination of Layoff Propriety**

16. Respondents next argue that the District must be held to a higher standard for mid-summer layoffs under section 44955.5 than it is for spring layoffs under 44955, and that the mid-summer layoffs are limited to only those layoffs necessary due to the State’s failure to increase the District’s revenue limit per unit of average daily attendance (ADA) by two percent. They further argue that the District is unable to meet that higher standard because (1) it misallocated \$1.3 million in federal stimulus funds that were intended to save jobs; (2) the money saved by the attrition of 17 teachers who left the District’s employ at the end of the 2008-2009 school year more than offset the \$540,000 shortfall in state revenue; (3) although the State requires the District to maintain financial reserves of three percent, and other school districts of similar size maintain reserves of approximately 11 percent, this district maintains financial reserves in excess of 25 percent. Those reserves total more than \$5,000,000, more than nine times the amount needed to offset the loss in state funding; and (4) the District is unnecessarily spending funds on discretionary items such as pre-funding retiree benefits and deferred building maintenance.

///

///

///

///

///

///

///

17. Respondents base their argument on their reading of section 44955.5. They do not dispute that the District’s total revenue limit per unit of ADA for fiscal year 2009-2010 failed to increase by at least 2 percent, Thus, they concede that the District has met the first requirement of section 44955.5. However, they assert:

[Section 44955.5] permits school districts to conduct summer layoffs *only* if: (1) the State Budget Act fails to increase the district’s revenue limit per student by at least 2%, and (2) it is “*therefore necessary* to decrease the number of . . . employees.” The “therefore necessary” language establishes that the scope of a layoff under Section 44955.5 is limited to the funding shortfall attributable to the state’s failure to increase the District’s revenue limit by 2%.

Here, the evidence established that for the 2009-10 school year, Mojave expects a shortfall of approximately \$540,000 due to the State’s failure to increase its revenue limit. Nevertheless, the District cannot prove that layoffs are “therefore necessary,” because federal stimulus funding, the District’s financial reserves, and cost savings to the District from natural attrition are more than sufficient to offset the \$540,000 shortfall caused by the State’s failure to increase the District’s revenue limit. (Exhibit R, page 1, lines 4-15.) (Emphasis in text.)

18. Section 44955.5, subdivision (a) states:

During the time period between five days after the enactment of the Budget Act and August 15 of the fiscal year to which that Budget Act applies, if the governing board of a school district determines that its total revenue limit per unit of average daily attendance for the fiscal year of that Budget Act has not increased by at least 2 percent, ***and if in the opinion of the governing board*** it is therefore necessary to decrease the number of permanent employees in the district, the governing board may terminate the services of any permanent or probationary certificated employees of the district, including employees holding a position that requires an administrative or supervisory credential. ***The termination shall be pursuant to Sections 44951 and 44955*** but, notwithstanding anything to the contrary in Sections 44951 and 44955, in accordance with a schedule of notice and hearing adopted by the governing board. (Emphasis added.)

///

///

///

19. In their reading, Respondents have omitted a key portion of the statute. The “therefore necessary” provision is to be determined solely by “the opinion of the governing board.” Once the initial requirement is satisfied, and the governing board has opined that a reduction in force is necessary, the matter proceeds in accordance with sections 44951 and 44955 and a schedule of notice and hearing adopted by that board<sup>7</sup>.

20. In *California Real Estate Loans, Inc. v. Wallace* (1993) 18 Cal.App.4th 1575, 1582, the Court stated:

The fundamental goal of statutory construction is to ascertain the intent of the Legislature to effectuate the purpose of the law. To determine that intent, we must look first to the statutory language itself, giving words their usual and ordinary meaning. [Citations.] We are not authorized to insert qualifying provisions and exceptions which have not been included by the Legislature, and may not rewrite a statute to conform to an intention which does not appear in the statutory language. [Citations.] Nevertheless, a statute should not be read in isolation; instead, statutes on the same subject must be construed together, to harmonize and give effect to each, if possible. [Citation.] Finally, the contemporaneous administrative construction of statutes by the administrative agency charged with their enforcement and interpretation is entitled to great weight, unless clearly erroneous or unauthorized. [Citation.]

21. By omitting the phrase “if in the opinion of the governing board” from its reading of section 44955.5, Respondents are construing the statute in a manner inconsistent with proper statutory construction. The language of the statute is clear. Giving the words their usual and ordinary meanings, the Administrative Law Judge declines to substitute his, or Respondents’, opinion as to the propriety of the governing board’s decision for that of the board.

22. Section 44955 allows the governing board broad discretion in determining the nature and extent of the layoffs to be made, and its decision will not be overturned absent a showing that it was fraudulent, arbitrary or capricious. (*Campbell Elementary Teachers Assn. v. Abbott* (1978) 76 Cal.App.3d 796.) The decision to reduce particular kinds of service need not be tied with any statistical computation (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627), such as a reduction in the number of students, the amount of reserves held by the District, and/or the money saved by eliminating discretionary spending. The District need not take into account any positively assured attrition occurring between the dates of the preliminary and final layoff notices. (*Ibid.*)

---

<sup>7</sup> As noted above, except for the hearing date and the deadline for adopting or rejecting the Proposed Decision, the governing board did not specify any such dates.

23. Respondents did not establish that the governing board, in making the decisions it did, acted outside of its authority. (See, *Rutherford v. Board of Trustees of Bellflower Unified School District* (1976) 64 Cal.App.3d 167.) Nor do those choices compel an inference that it acted fraudulently, arbitrarily or capriciously. The governing board's decision to reduce or discontinue the services set forth in factual finding number 4 is not fraudulent, arbitrary or capricious, but is rather a proper exercise of the District's discretion<sup>8</sup>.

### **Credential Issues**

24. Respondents argue that additional credentials issued to certain teachers after the District issued its June 12, 2009 mid-summer layoff notices must be considered because, albeit authorized to do so by section 44955.5, the District did not set any deadlines for the mid-summer layoff procedure except for the date by which it must determine the final layoff list. Respondents distinguish the mid-summer layoff procedure from the spring procedure in this regard by arguing that the spring layoff statutes (section 44951 in particular) prohibit the District from issuing layoff notices after March 15, but that no such restriction exists for this mid-summer layoff because the District failed to invoke one. That argument is not persuasive.

25. In *Degener v. Governing Board* (1977) 67 Cal.App.3d 689, 698, the Court stated:

As pointed out by the Board: “[A] school board can only authorize a teacher to teach within his credential. At the time a district must prepare its lay-off notices it must analyze carefully the number of people to be laid-off, the seniority listing of employees, and the credentials and qualifications of the individuals. If a district decides it must lay-off a certain number of employees, it must give those employees proper notice. Once March 15 passes by a district may not notify additional employees that they may be terminated. . . . A district does not have the right to add to the lay-off list. . . .” (See also, *Campbell Elementary Teachers Assn., Inc. v. Abbott* (1978) 76 Cal.App.3d 796, 814-815.)

26. Thus, the question in the instant case is whether a district may issue mid-summer layoff notices continually up until the time of hearing unless, pursuant to section 44.55.5, it decides to schedule a deadline as a self-limitation.

///

---

<sup>8</sup> Because of this ruling, oral and documentary evidence relating to Respondents' criticisms of the District's allocation and expenditure of funds, and the District's reasons therefor, are deemed moot and will not be addressed herein.

27. Section 44955.5 provides that a mid-summer layoff proceeding shall occur in accordance with sections 44951 and 44955 “but, notwithstanding anything to the contrary in Sections 44951 and 44955, in accordance with a schedule of notice and hearing adopted by the governing board.” By choosing June 12, 2009 as the date on which to serve the mid-summer layoff notices, the District acted in accordance with section 44955.5. It, in effect, substituted June 12, 2009, in place of the March 15 deadline set forth in section 44951. It was therefore prohibited from issuing additional layoff notices after that date. To find otherwise would permit the District to continue to issue additional layoff notices progressively closer to the day of the hearing<sup>9</sup>. It could thereby reap the benefit of its own failure to determine a “schedule of notice and hearing.” To permit the District to interpret sections 44941 and 44955.5 in such a way “would alter and conflict with the provisions and purposes of the statutes -- particularly that which sets March 15 [or, in this case, June 12] as the last day for notification to employees by the Board of termination of employment and makes reemployment assured absent notice and would effectively challenge the statutory scheme adopted by the Legislature which cannot be sanctioned. (Citations.)” (*Degener v. Governing Board, supra*, 67 Cal.App.3d at 699.)

**Respondent Julia Wolf**

28. Respondent Julia Wolf was laid off in spring of this year for the 2009-2010 school year. In June 4, 2009, she applied for a Subject Matter Authorization in Social Science and thereafter notified the District of that application. During the week of July 5, 2009, Ms. Wolf learned that the Commission on Teacher Credentialing (CTC) had issued the authorization. Because the authorization was not issued, or the District was unaware of its issuance, before June 12, 2009, the District was not required to take Ms. Wolf’s subject matter authorization into account in determining the order of layoffs.

**Respondent Desiree See**

29. Respondent Desiree See holds a clear multiple subject credential and a supplemental English authorization for grades K through 9. She also obtained a supplemental authorization in drama and theater in May 2009, and timely notified the District of its issuance.

///

///

///

---

<sup>9</sup> The District, in fact, did just that when it issued a layoff notice to Respondent Tina Thomas on June 21, 2009. As is more fully set forth in factual finding 43, below, the notice to Ms. Thomas is found to be improper.

30. During the 2008-2009 school year, a high school drama class was taught by Pamela Kies under a “waiver” authorized by the Board pursuant to section 44263. Under that statute, an authorization is valid for one year but may be renewed annually. The District presently intends to offer the drama class again in the 2009-2010 school year but has not decided who will teach it. No section 44263 waivers have been issued for the upcoming school year. Absent such a waiver, no one with more seniority than Ms. See is qualified to teach high school drama. Ms. See shall be retained.

**Respondent Rachel Ketchell**

31. Respondent Rachel Ketchell applied to the CTC for supplemental authorizations in Social Science and English on June 8, 2009. The CTC has not yet acted on those authorizations. Although the evidence of her qualifications for the authorizations was undisputed, a “school board can only authorize a teacher to teach within his credential.” (*Degener v. Governing Bd.*, *supra*, 67 Cal.App.3d at p. 698.) Not only were the authorizations not issued at the time the District served the layoff notices on June 12, 2009, they have not been issued yet. The District was not required to consider Ms. Ketchell’s potential supplemental authorizations in its decision to serve her with a layoff notice.

**Seniority Date Issues**

**Sarah Davis Tate**

32. Respondent Sarah Davis Tate commenced work for the District on September 15, 2004, as an overflow second grade teacher and continued in that capacity for the remainder of the school year. At the time she began work, she did not receive a contract or any other writing defining her classification with the District. She did not receive a notice of non-reelection for the 2005-2006 school year. By virtue of these facts, she is deemed a probationary employee for the 2004-2005 school year. (§ 44845 and 44916; *Bakersfield Elementary Teachers Assn. v. Bakersfield City School District* (2006) 145 Cal.App.4th 1260, 1273; *Kavanaugh v. West Sonoma Cty. Union High School District* (2003) 29 Cal.4th 911.)

33. Ms. Tate began the 2005-2006 school year as a probationary overflow kindergarten teacher. In September 2005, she took maternity leave and returned the following month. Upon her return, she was assigned to “rove” until November 2005, when she was given a transitional first grade class for the remainder of the school year.

///

///

34. In November 2005, Ms. Tate signed a contract with the District. The contract designated her as a long-term substitute. At the administrative hearing, the District did not offer any evidence that Ms. Tate filled the position of an absent teacher. Therefore, it failed to establish that she worked as a long-term substitute. The fact that she was not hired as a long-term substitute at the time she signed the long-term substitute contract renders that contract null and void. “[A]ny contractual provision purporting to waive the protections accorded certificated school employees by the Education Code, including the provisions governing their classification and termination, is ‘null and void.’ [Citations.]” (*Bakersfield Elementary Teachers Assn. v. Bakersfield City School District, supra*, 145 Cal.App.4th at 1275.)

35. It was not established that Ms. Tate has had a break in service since September 15, 2004.

36. The District maintains that Ms. Tate’s seniority date is November 1, 2005, the date she received the long-term substitute contract. That date is incorrect. Ms. Tate’s seniority date shall be adjusted to September 15, 2004, the date of her first day of paid service.

#### **Respondent Melissa Brunner**

37. Respondent Melissa Brunner was hired by the District as a district intern, with a first date of paid service of April 25, 2005. She was provided a written contract<sup>10</sup>. As a district intern, she was afforded probationary status. (*Id.* at 1291<sup>11</sup>; § 44885.5.) The District did not provide Ms. Brunner with a notice of non-reelection at any time during the 2004-2005 school year.

38. At the beginning of the 2005-2006 school year, Ms. Brunner was not invited back to the District until late September, and she did not begin her teaching assignment until October 10, 2005.

39. The District maintains that, because of the break in service at the beginning of the 2005-2006 school year, Ms. Brunner’s seniority date is October 10, 2005. That date is incorrect. As a probationary employee, Ms. Brunner was entitled to the protections the Education Code provides in the event of termination of services. The District did not afford her those protections. Ms. Brunner’s seniority date shall be adjusted to April 25, 2005, her first date of paid service.

///

---

<sup>10</sup> The contract can no longer be located.

<sup>11</sup> *Bakersfield* was decided in 2006, well after the 2004-2005 school year. However, the *Bakersfield* court did not change the status of district interns. It simply re-stated that which was already codified in section 44885.5.

**Improper Notice**

**Respondent Tina Thomas**

40. Appended to Resolution 061109-1 (the mid-summer PKS resolution), is an “Aggregated List of Certificated Services Being Reduced or Eliminated.” As the name implies, and as stated in the District’s closing brief (Exhibit 8, page 2, lines 12-13), the list is a combination of the particular kinds of services being reduced or eliminated in both the spring and mid-summer layoffs. The list includes one FTE position in junior high school English.

41. Sylvester Edwards, a university intern with a seniority date of August 14, 2008, taught English during the 2008-2009 school year. His non-reelection at the end of the school year accounted for the one FTE English position.

42. Respondent Tina Thomas is an English teacher with a seniority date of August 14, 2007. She is not subject to layoff in this mid-summer procedure because the one FTE position has already been eliminated.

43. In addition, the District issued its mid-summer layoff notice to Ms. Thomas on June 23, 2009, approximately 11 days after issuing its initial layoff notices to the other respondents. As indicated in findings 24-27, above, notice to Ms. Thomas was improper.

44. Ms. Thomas shall be retained.

**LEGAL CONCLUSIONS**

1. All notice and jurisdictional requirements set forth in Education Code sections 44949, 44955 and 44955.5 were met.

2. The services identified in Board Resolution #061109-1 are particular kinds of services that could be reduced or discontinued under Education Code section 44955. The Board’s decision to reduce or discontinue the identified services was neither fraudulent, arbitrary nor capricious, and was a proper exercise of its discretion. Cause for the reduction or discontinuation of services relates solely to the welfare of the District’s schools and pupils within the meaning of Education Code section 44949 as it relates to section 44955.5.

///

///

///

3. A District may reduce services within the meaning of section 44955, subdivision (b), “either by determining that a certain type of service to students shall not, thereafter, be performed at all by anyone, or it may ‘reduce services’ by determining that proffered services shall be reduced in extent because fewer employees are made available to deal with the pupils involved.” (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)

4. Cause exists to reduce the number of certificated employees of the District due to the reduction and discontinuation of particular kinds of services. The District identified the certificated employees providing the particular kinds of services that the governing board directed be reduced or discontinued.

5. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render.

6. Respondent Desiree See was improperly noticed for layoff. The District intends to offer a high school drama class in the upcoming school year. No one with more seniority than Ms. See is qualified to teach high school drama. Ms. See shall be retained.

7. Respondent Tina Thomas was improperly noticed for layoff. The District elected to discontinue one FTE position in junior high school English. To that end, it non-reelected an individual with less seniority than Ms. Thomas. In addition, the District failed to timely serve Ms. Thomas with her layoff notice. Ms. Thomas shall be retained.

8. The seniority date for Respondent Sarah Davis Tate was miscalculated. Her seniority date shall be adjusted to September 15, 2004.

9. The seniority date for Respondent Melissa Brunner was miscalculated. Her seniority date shall be adjusted to April 25, 2005.

## **ORDER**

1. The District shall comply with Legal Conclusions 6, 7, 8, and 9.

2. Except as noted above, notices shall be given to Respondents that their services will not be required for the 2009-2010 school year because of the reduction or discontinuation of particular kinds of services. Notice shall be given to respondents in inverse order of seniority.

///

///

3. All other contentions and claims not specifically mentioned were considered and are denied.

DATED: July 28, 2009

---

H. STUART WAXMAN  
Administrative Law Judge  
Office of Administrative Hearings