

BEFORE THE
GOVERNING BOARD
OF THE
CORONA-NORCO UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Reduction in Force
Involving Certain Employees of the
Corona-Norco Unified School District under
Board Resolution No. 85,

Respondents.

OAH No. 2009120737

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Norco, California, on April 13, 2010.

Margaret A. Chidester, Attorney at Law, and Alexandria M. Davidson, Attorney at Law, represented the Corona-Norco Unified School District.

Carlos Perez, Attorney at Law, represented all certificated employees named as respondents who appeared at the hearing.

The matter was submitted on April 13, 2010.

FACTUAL FINDINGS

The Corona-Norco Unified School District

1. The Corona-Norco Unified School District (CNUSD or the district) is located in Riverside County. The district encompasses approximately 156 square miles and serves the educational needs of approximately 54,000 students living in the cities of Corona and Norco. After years of growth, the district's enrollment has stabilized, but fortunately enrollment is not declining.

CNUSD operates 31 elementary schools, seven middle schools, five comprehensive high schools, two alternative education programs, and one special education school. The district currently employs over 4,500 individuals, approximately 2,680 of whom are

certificated employees. CNUSD's projected annual budget for the 2010-2011 school year is approximately \$364 million, about 84 per cent of which pays employee salaries and benefits.

2. The district is governed by an elected five-member Board of Education (the governing board). Kent L. Bechler, Ph.D. (Dr. Bechler), the Superintendent of Schools, is the district's Chief Executive Officer. Michael Lin, Ed.D. (Dr. Lin) is the district's Assistant Superintendent of Schools, Human Resources. Jay Johnson (Director Johnson) serves as the district's Administrative Director, Human Resources.

The Fiscal Crisis – Economic Layoffs

3. Proposition 13, a constitutional amendment enacted in 1978, limited the imposition of local property taxes and reduced a major source of assured revenue for public education funding. After Proposition 13 was passed, public school districts 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 July, but sometimes taking much longer. A school board's obligation to balance its budget often requires that some teachers, administrators or 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 certificated 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 a credential, special training or experience necessary to teach a course of study or to provide services which more senior employees do not possess, a process known as skipping.

The District's Response

4. By late 2009, CNUSD's governing board and administration (as well as the governing boards and staff of most other public school districts) were well aware of the State of California's continuing budget problems and of the probable crippling impact on public education funding. As a result of the impending financial crisis, CNUSD projected a budget deficit of about \$31 million for the 2010-2011 school year. The district was once again required to look into ways to balance its budget including the reduction of certificated and classified staffing and the elimination of various programs.

Dr. Lin, Director Johnson and CNUSD staff prepared a recommendation which Superintendent Bechler presented to the governing board that outlined a proposed reduction and elimination of particular kinds of services being provided by certificated employees.

On February 18, 2010, following Dr. Bechler’s recommendation and its consideration thereof, CNUSD’s governing board adopted Resolution No. 85, which related to the reduction or discontinuation of particular kinds of services.

5. On March 3, 2009, the governing board passed the following resolution:

“RESOLUTION NO. 85

**RESOLUTION OF THE GOVERNING BOARD OF THE
CORONA-NORCO UNIFIED SCHOOL DISTRICT
REGARDING A REDUCTION OR DISCONTINUANCE
OF PARTICULAR KINDS OF SERVICE**

WHEREAS, the District’s governing board, upon recommendation of the Superintendent, has determined that it is in the best interests of the District, and the welfare of the students thereof, to reduce or discontinue certain particular kinds of services hereinafter enumerated.

**NOW THEREFORE, IT IS HEREBY RESOLVED, DETERMINED AND
ORDERED AS FOLLOWS:**

1. Pursuant to Education Code §§ 44949 and 44955, the following particular kinds of service shall be reduced or discontinued at the close of the 2009-2010 school year. These services, listed by full-time equivalent (FTE) positions, and performed by certificated employees are as follows:

(1.1)	K-12 Assistant Principals	(10 FTE)
(1.2)	District Coordinators	(3 FTE)
(1.3)	Elementary School Self-Contained Classroom Teachers	(220 FTE)
(1.4)	Secondary Language Arts Teachers	(14 FTE)
(1.5)	Secondary Math Teachers	(12 FTE)
(1.6)	Secondary Social Science Teachers	(11 FTE)
(1.7)	Secondary Fine Arts Teachers	(2 FTE)
(1.8)	Secondary Spanish Teachers	(3 FTE)
(1.9)	Secondary Business Teachers	(2 FTE)
(1.10)	Secondary Health Teacher	(1 FTE)
(1.11)	Secondary Physical Education Teachers	(4 FTE)
(1.12)	Independent Studies Teachers	(3 FTE)
(1.13)	K-12 Special Education/Mild Moderate Teachers	(13 FTE)
(1.14)	K-12 Music Teachers	(5 FTE)
(1.15)	K-12 School Counselors	(27 FTE)
(1.16)	Student Advisors	(8 FTE)
(1.17)	School Librarians	(5 FTE)
(1.18)	Intervention Support Teachers	(150 FTE)

493 TOTAL FTEs

2. The Superintendent or his/her designee is hereby directed to serve notices of termination in accordance with and in the manner prescribed by Education Code §§ 44955 and 44949. In addition, the Superintendent/designee is authorized, where deemed necessary, to issue additional notices so that certain other employees whose rights may be affected will have an opportunity to be heard.

3. In selecting those certificated employees who shall receive notice of termination pursuant to this resolution and the provisions of Education Code § 44955, those certificated employees whose names and positions are set forth in Exhibit "A," a copy of which is attached hereto and by this reference incorporated herein, shall receive notice; however, an exception from the order of layoff will be sought because of the special training and experience of certain certificated employees who are assigned to teach a course of study or to fulfill a particular administrative task which others with more seniority do not possess.
4. The Governing Board has determined that as between certificated employees who first rendered service in a probationary position on the same date, the order of termination of said employees shall be determined by reference to the tiebreaker criteria and points to be assigned as described in Exhibit "B," a copy of which is attached hereto and by this reference incorporated herein.

ADOPTED, SIGNED AND APPROVED THIS 19th DAY OF February, 2010.

Exhibit A provided:

**CERTIFICATED PERMANENT, PROBATIONARY AND TEMPORARY
PERSONNEL WHOM THE DISTRICT SHALL SEEK TO EXEMPT FROM
THE ORDER OF LAYOFF BY VIRTUE OF THEIR CREDENTIALS,
COMPETENCE, ASSIGNMENT, EXPERIENCE OR CERTIFICATION**

The Governing Board will seek to exempt from the order certificated layoff, pursuant to Education Code section 44955 because of special training, experience, or credential that others with more seniority do not possess:

1. Certificated personnel who possess a BCLAD credentials, and who may be assigned to teach in the Dual Immersion or Primary Language program (Option 3) for the 2010-11 school year.
2. Certificated personnel who possess a BCLAD credential, who are assigned to a Title I school, are a TSA or assigned to Primary Language Instruction (Option 3) for the 2009-10 school year, and will be assigned for the 2010-11 school year.
3. Certificated personnel who possess a credential authorizing service in language, speech and hearing, who are presently assigned within the scope of that credential, and who will be assigned within the scope of that credential for the 2010-11 school year.
4. Certificated personnel who possess administrative credentials, who are currently assigned to administrative positions, and who will be assigned to administrative positions for the 2010-11 school year.

Exhibit B provided:

The District values the services of all employees who may, by coincidence, share the same date of first paid service in a probationary position. Education Code section 44955 (b) states in part:

‘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.’

1. The Governing Board has determined that as between certificated employees who first rendered service in a probationary position to the District on the same date, the order of termination of said employees shall be determined by reference to the tiebreaker criteria and points to be assigned as follows:

- a. 1 point for holding a Cross cultural, Language and Academic Development (CLAD) certificate.
- b. 2 points for holding a Bilingual Cross-cultural, Language and Academic Development (BCLAD) certificate emphasis or Bilingual Certificate of Competence (BCC) or Bilingual cross-cultural special credential.
- c. 5 points for currently teaching in a Dual Immersion program or Primary Language program (Option 3).
- d. 5 points for “hard to hire” credentials held (Math, Science, English, Spanish, Special Education) for preliminary and clear.
- e. 2 points for 1 or more years of service teaching in a “hard to hire” area (Math, Science, English, Spanish, Special Education) at the intermediate level within the last 3 years and will be assigned in that “hard to hire” area for the 2010-11 school year.
- f. 5 points for teaching in a program improvement school for the 2008-2009 and 2009-10 school years.
- g. 5 points for National Board Certification.

2. Individuals who are specifically exempted by resolution and individuals who do not receive a notice of layoff due to the scope of their credential will nevertheless receive point totals so that their service may be properly credited in the event of a dispute.

3. Employees who receive a notice and who share the same date of first paid service shall be ranked by point totals. Low point totals will indicate low seniority for that hire date. For example, an individual with a point total of “1” will be laid off before an individual with a point total of “3” where both individuals share the same date, and provided layoff was not otherwise determined by virtue of credential or exemption.

4. If the criteria listed above do not break a tie, the District shall hold a lottery at least five work days prior to the layoff hearing. Each group of tied employees shall have the right to attend the lottery and pick a lottery number. In the absence of the employee, the Superintendent or designee will select a lottery number on behalf of the employee.

5. As between tied employees, low lottery numbers will indicate low seniority for that hire date. For example, an individual with a lottery number of ‘1’ would be laid off before an individual with a lottery number of ‘10.’

6. These criteria have been determined to best serve the needs of the District and students thereof, and will be applied in the April 12, 2010, April 13, 2010, April 14, 2010 & April 15, 2010 layoff hearing in which the issue may arise.”

6. Director Johnson established that the district made teaching and related assignments based on an employee’s seniority and an employee’s possession of appropriate authorizations and credentials for such an assignment.

Under Exhibit A to the board's resolution, certain employees were "exempt" from the layoff process so that that these employees would retain their employment over more senior employees. The exempt employees included: Certificated personnel who possessed a BCLAD credential and who were assigned to teach in the Dual Immersion or Primary Language program for the 2010-2011 school year¹ (the possession of such a credential was critical to the program's operation); certificated personnel who possessed a BCLAD credential assigned to teach in a Title I school, to serve as a teacher on special assignment or to teach in a Primary Language Instruction assignment for the 2010-2011 school year (the possession of such a credential was critical and sometimes required); certificated personnel who possessed a credential authorizing service in language, speech and hearing assigned to Special Education (the possession of an appropriate credential was required); and certificated personnel who possessed an administrative credential who were currently assigned to administrative positions and who would be assigned to administrative positions for the 2010-2011 school year (there was a need for administrative continuity at school sites and within the district).

The employees exempted from the layoff process under Exhibit A held appropriate authorizations and credentials and possessed distinct practical experience that made their services particularly valuable to the district such that the retention of these employees over more senior employees was in the best interest of the district and the students thereof. The proposed skipping of these individuals was recommended in good faith. No capricious or arbitrary criteria were used to skip these junior employees. Nothing suggested that the skipping of these junior employees was not in the best interest of the district or its students.

7. Under all the circumstances, the governing board's adoption of Resolution No. 85, and Exhibits A and B was in the best interest of the district and the students thereof. The governing board's decision to reduce particular kinds of services was the direct result of California's fiscal crisis, the probable reduction in CNUSD's funding for the 2010-2011 school year, CNUSD's obligation to submit a balanced budget to the County Board of Education, and the drastic repercussions for the failure to do so, including the taking over of the district's operations by other governmental entities.

The Reduction in Force and the Issuing of Preliminary Layoff Notices

8. The particular kinds of services identified in the governing board's resolution were services the governing board was authorized to reduce and discontinue. The board's resolution to reduce and eliminate certain services was neither arbitrary nor capricious, and the reduction and elimination of the particular kinds of services identified in Resolution No. 85 was a matter squarely within the governing board's sound discretion. No particular kind of service was reduced to a level below that mandated by federal or state law.

In accordance with Resolution No. 85, CNUSD administrative staff issued preliminary layoff notices to the most junior employees holding those positions that were

¹ The district operates a dual immersion programs at two elementary schools, which integrate language minority students (English learners) and language majority students (English speakers) to develop bilingualism and biliteracy in English and Spanish.

subject to reduction and elimination and exempted from the layoff process those employees who were granted an exemption under Exhibit A. CNUSD served more notices than there were reductions in full-time equivalent positions to give employees whose rights might be affected (such as substitute teachers and temporary employees) an opportunity to be heard as well as to ensure that a sufficient number of preliminary notices were issued to cover any changes in the seniority list or other matters affecting the layoff process. Before issuing the preliminary layoff notices, the administrative staff considered all known positive attrition including resignations, retirements and probationary non-reelects.

Jurisdictional Matters

9. On and before March 15, 2010, 366 CNUSD certificated employees were served with written notice that the superintendent had recommended that their services be terminated at the conclusion of the current school year, and that their services would not be needed for the upcoming 2010-2011 school year. Each employee was notified of the right to a hearing. Each employee who filed a request for a hearing was thereafter served with an accusation and other required jurisdictional documents. Notices of defense were filed.

10. On April 13, 2010, the record in the administrative hearing was opened. Attorneys Margaret A. Chidester and Alexandria M. Davidson appeared on behalf of the district. Attorney Carlos Perez appeared on behalf of all respondents who were present at the layoff hearing. No respondent at the hearing was unrepresented. Counsel gave brief opening statements. Jurisdictional documents were presented, sworn testimony was provided, and documentary evidence was introduced. The parties stipulated that the accusations filed against respondents Lisa Nickerson and Jason Allen should be withdrawn and dismissed. The parties also stipulated that the district's "Persons Subject to Layoff" list be amended to include at page 3 employee 2431, Sean Robinson, between employees number 2430 and 2432. The parties further stipulated that the seniority list should be amended to delete that portion the entry for Brianna Brown, seniority number 2416, that indicated she was "L.O." [laid off] and that the entry for Sean Robinson, seniority number 2431, be corrected to add a notation "2310 bumps – L.O." Following the taking of evidence and counsels' brief closing arguments, the record was closed and the matter was submitted.

The Seniority List, First Date of Paid Service, and the Implementation of Resolution No. 85

11. For many years CNUSD maintained a seniority list, a continuously evolving schedule that sets forth each employee's seniority number, name, seniority date, status (retiring, permanent, probationary 2, probationary 1, intern), the school site where services were most recently provided, the employee's current assignment, the employee's credentials, any supplemental authorizations, the employee's English language authorization, district comments and, for teachers with the same date of employment, a tie-breaking column and a lottery result column when necessary. CNUSD's seniority list is based on information obtained from an employee's personnel file, data provided by the employee, information from the California Commission on Teacher Credentialing, and any relevant material provided by others. The seniority list is modified as new employees are hired and when current employees retire, resign or otherwise separate from district employment. The

seniority list is corrected or updated when new information becomes available to administrative staff.

12. The district attempts to ensure that each employee's seniority date is based on the employee's first date of paid service in a probationary position within the district.² Establishing a first date of paid probationary service is sometimes complicated by such matters as previous service in long-term substitute or temporary employment positions or attendance at training sessions occurring before the formal school year begins.

13. Substitute and Temporary Employees: An individual who worked as a substitute or temporary employee for CNUSD for at least 75 percent of the school days during the previous school year in the same classroom for a single permanent teacher and who performed the duties normally required for that absent employee was deemed by the district to have served a complete school year as a probationary employee. For such an employee, the prior year of service was "tacked" on for seniority purposes.³ However, CNUSD's policy does not permit a substitute teacher or a temporary employee to use the cumulative time served when substituting for several teachers absent for relatively brief periods during the preceding school year.

One employee, Valorie Enciso, was affected by this policy.

14. Attendance at Mandatory Training as a First Date of Paid Probationary Service: CNUSD and the Corona-Norco Teachers' Association (the association) entered into a collective bargaining agreement that was in effect on and before the date of this proceeding. Article 10 of that agreement was entitled "Hours of Employment" and provided in part:

"The work year for Regular Probationary or Permanent Adult Education Teachers and Temporary Teachers shall be as mutually agreed by the District and the unit member. The work year of all other unit members shall be one hundred eighty-five (185) days unless otherwise agreed by the District and the unit member. The work year for non-support personnel unit members who have not been employed by the District in the past other than a substitute position and who are placed on Class A, Steps 1-3 and Class B, Step 1 shall be one hundred ninety (190) days . . . All other new non-support unit members shall work 186 days. The per diem rate for these unit members shall be based on 185 days of service. . . ."

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."

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."

By virtue of the agreement between the district and the teachers' association, CNUSD employed all new teachers who were new to the district and who had no previous teaching experience under the 190 day per year contract. But, CNUSD employed new teachers to the district without any teaching experience who held additional credentials or advanced degrees in a pay class above Salary Steps [Classes] A and B1 and under a 185/186 day contract. And, CNUSD employed teachers with prior teaching experience outside the district who were new to the district under a 185/186 day per year contract and in a pay class above Salary Steps A and B1. Thus, brand new teachers with no experience who were hired by the district were required to work five more days than teachers who were new to the district and were paid outside Salary Steps A or B1.

15. In a memo dated May 30, 2006, addressed to "All New Corona-Norco Unified School District Teachers on Salary Steps A1, A2, A3 and B 1," the district advised:

- "New teachers to the district and to teaching are required to work 190 days during their first year of service. Five of these 190 days must be devoted to various curricular and professional development activities as approved by our site principal (in-service, classroom preparation, conferences, etc.).
- As one of these five days, all new teachers hired before June 29, 2006 must attend the new Teacher In-service Day . . .
- All new teachers need to register to attend one of the Kagan Cooperative Learning two-day training sessions. These dates have been scheduled for June 27 and 28, 2006 for year-round teachers and August 15 and 16, 2006, for traditional track teachers, as well as any other teacher that is not hired before August. This training will provide teachers with the necessary tools to ensure a successful school year . . .
- All new teachers may also attend Effective Management and Planning for Teachers on either June 29 or August 28, 2006. . . ." (Original emphasis.)

16. In this proceeding, the district took the position that if a 190 day contract employee attended an approved course before the start of the school year, then that employee's seniority date related back to the first day the employee attended the required training for which the employee was paid under the employee's contract with the district; however, if the 190 day employee did not attend required training before the school year began, then that employee's seniority date was the date on which the new employee first began providing services under the 190 day contract. The seniority date for teachers who were new to the district but who were not paid under Salary Steps A or B1 was the date on which that new employee first began providing services under the contract of employment, even if that new employee had "voluntarily" attended the training that was required for brand new teachers paid under Salary Steps A or B1.

17. It is clear that an inequity exists for teachers with prior teaching experience who were new to the district and who were employed under a 185/186 day contract and were paid above Salary Steps A or B1. Since there was no contractual obligation for those employees to attend the “voluntary” training, their seniority date was the date on which they first began providing services under the contract, even if they “voluntarily” attended a training occurring before the commencement of the 185/186 day contract. Under the district’s method of establishing seniority, a newly hired, inexperienced teacher always received an earlier seniority date than that afforded to a more experienced teacher who received a higher rate of pay, even though both employees attended the same training on the same day.

Four teachers – Karen Bunnell, Kristen D’Amato, Jason Bradbury and Katherine Kononchuk – each of whom was paid above Salary Steps A or B1 and each of whom worked under a 185/186 day contract—testified that they believed that they were entitled to an earlier seniority date than was set forth in the district’s seniority list by reason of having been told that their attendance at the training was required and because they attended that training. In addition, Jason Bradbury testified that in an earlier reduction in force proceeding, the district had assigned him an earlier seniority date based upon his attendance at such a training.

The district argued that the seniority dates assigned to these four employees was correct.

18. Before issuing preliminary layoff notices in this matter, the district made the seniority list available to certificated employees and recommended that any certificated employee who had any questions about seniority or wanted to provide additional information concerning his or her seniority date or his or her authorizations and credentials contact the administrative staff to make corrections. Several matters were brought to the administrative staff’s attention that necessitated a change in the seniority list, which was updated to reflect those changes until the day before this layoff proceeding.

19. Under Director Johnson’s supervision, the updated master seniority list was utilized to produce a bumping list and retention schedule that was employed in these layoff proceedings (Exhibit 2). Those employees who were exempt under Exhibit A to Resolution No. 85 were not given preliminary layoff notices and were not included in the layoff proceeding. No temporary employees or substitute employees were involved in this layoff proceeding. For employees who were deemed to have rendered service in a probationary position on the same date, the administrative staff used the information in its possession to assign tie breaking points in a manner consistent with the governing board’s tie breaking criteria (Exhibit B to Resolution No. 85). For those employees with the same seniority date and who had the same number of tie breaking points, a lottery was conducted in the presence of representatives of the teachers’ association to determine the order of layoff between those individuals. There was no suggestion the district’s application of the tie breaking criteria or related use of the lotteries was improper.

Seniority Date Issues

20. Karen Bunnell: The seniority list indicated that Karen Bunnell (Bunnell) held seniority number 2189 with a seniority date of July 5, 2006. Bunnell was hired by the

district in mid-June 2006. Bunnell had teaching experience outside the district and she also held a master's degree. Bunnell was initially under a 190 day contract, but she was given a 185/186 day contract at a pay scale above Salary Steps A and B1 before she began her employment. Before her first date of paid service under her employment contract with the district, Bunnell read and reviewed the memo to new teachers,⁴ which she concluded applied to her. She believed it contained a misrepresentation. Since she was in fact new to the district, Bunnell attended the Kagan Cooperative Learning training sessions on June 27 and 28, 2006. However, she was not given a seniority date of June 27, 2006. While Bunnell was paid for attending the training, the district did not consider June 27, 2006, as her first paid date of probationary service because her service began under the 185/186 day contract.

21. Kristen D'Amato: The seniority list indicated that Kristen D'Amato (D'Amato) held seniority number 2186 with a seniority date of July 5, 2006. D'Amato was hired at Salary Schedule D and on a 185/186 day contract, but she was a new teacher to the district. D'Amato's site supervisor specifically told D'Amato that she was required to attend the Kagan Cooperative Learning training sessions held on June 27 and 28, 2006. D'Amato did so based on that direction and for the purpose of clearing her credential. D'Amato was paid for the training, but the district did not consider June 27, 2008, as her first date of paid probationary service for seniority purposes.

22. Jason Bradbury: The seniority list indicated that Jason Bradbury (Bradbury) held seniority number 2582 with a seniority date of August 26, 2008. Bradbury enjoyed considerable teaching experience before he was hired by the district. Bradbury was hired at a pay level above Salary Schedule A or B1 and on a 185/186 day contract. Before he began his employment, Bradbury attended five days of training "to get it out of the way." That training began on August 18, 2008. In last year's layoff proceeding, Bradbury was given a seniority date of August 18, 2008. In this year's proceeding, however, the district assigned him a seniority date of August 26, 2008, the date he was required to report to work under his 185/186 day contract. Bradbury did not understand how the district could provide him with two different seniority dates.

23. Katherine Kononchuk: Katherine Kononchuk (Kononchuk) holds seniority number 2505, with a seniority date of August 28, 2007. Kononchuk was new to the district and had never worked as a probationary teacher. The district hired Kononchuk at Salary Scale B1 on a 190 day contract, but after Kononchuk established that she had other teaching experience that qualified her for a higher pay scale, the district retroactively moved Kononchuk to salary schedule C1 and paid her at that rate for the full year. However, she was never given a 185/186 day contract. Before Kononchuk began her employment and while she was being paid at Salary Scale B1 on the 190 day contract, Kononchuk was told that she was required to attend the Kagan Cooperative Training sessions. Kononchuk did so, with her first day of (then) paid probationary employment beginning on August 15, 2007. The district maintained Kononchuk's seniority date as August 15, 2007, until this layoff proceeding, when it changed the seniority date to August 28, 2007.

⁴ See Factual Finding 15.

24. Resolution of the Seniority Date Issues: Bunnell, D'Amato and Bradbury were hired on 185/186 day contracts, and their first paid dates of probationary service did not begin until the commencement date specified in their employment contracts with the district. No authorized district representative made any representation to Bunnell, D'Amato, or Bradbury that reasonably caused any one of them to conclude that the district would assign them a seniority date that related to the first day they attended a pre-contract training, even though each of them believed their attendance at such a training session was required. There was no factual basis established to support promissory estoppel. Even if there was a basis for claiming that there was a misrepresentation in the district's May 30, 2006, memo, and it was not established that there was such a misrepresentation, any misunderstanding arising out of that memo was unrelated to the assignment of a seniority date to Bunnell.

25. The seniority dates of Bunnell and D'Amato remain July 5, 2006, their first date of paid probationary service with the district. They could not have an earlier date of paid service because they held 186 day contracts under the teachers' association agreement and because their payment for the pre-contract training was not included under that agreement.

26. The district mistakenly established an incorrect seniority date for Bradbury, whose first paid date of probationary service occurred on August 26, 2008, the date his service began under his agreement with the district. Bradbury, like Bunnell and D'Amato, held a 186 day contract, not a 190 day contract, and Bradbury could not be paid for attending pre-contract training under the teacher association's bargaining agreement. The district had a duty to correct Bradbury's seniority date when it discovered the date it assigned was in error.

27. A far different factual situation exists in Kononchuk's case. Unlike Bunnell, D'Amato and Bradbury, Kononchuk was hired at Salary Scale B1 on a 190 day contract and began employment under that contract. The district's memo advising of the obligation of new teachers hired at Salary Schedules A and B applied directly to her, and she was required to attend the Kagan Cooperative Learning training sessions. Unlike Bunnell, D'Amato, and Bradbury, she could have been fired had she not done so. The fact that the district changed her contract at some point down the line and paid her retroactively did not affect her seniority. Thus, Kononchuk's seniority date is August 15, 2007, and the seniority list should be amended to reflect that date.

Long Term Temporary Assignments

28. Valorie Enciso (Enciso) holds seniority number 2106 and her seniority date on the district's seniority list is February 6, 2006. Enciso contested that date, claiming a seniority date of June 30, 2005, the date she received in-service training before beginning long term substitute assignments for Heather Zepeda and other elementary school teachers.

Enciso is an elementary school teacher. On July 1, 2005, Enciso began a long-term substitute service assignment in Heather Zepeda's classroom at Eisenhower Elementary School. That assignment ended on September 2, 2005. Enciso next worked as a substitute teacher from November 8 through November 22, 2005, in Jill Linne's classroom at

Eisenhower. Enciso then worked as a substitute teacher in Katie Lawrence's classroom at Eisenhower from November 28 through December 23, 2005. Enciso returned to work as a substitute teacher in Jill Linne's classroom from January 9 through February 3, 2006. On February 6, 2006, the district placed Enciso in a vacant classroom at Eisenhower for the remainder of the 2005-2006 school year.

Enciso claimed that she was entitled to a seniority date of June 30, 2005, because from that date through February 6, 2006, she worked at least 75 percent of the scheduled school days at Eisenhower Elementary School, although her period of service involved four separate assignments for three different teachers.

The district asserted that day-to-day substitute service and multiple long-term substitute assignments for several teachers over the course of a single school year do not constitute probationary service for purposes of determining seniority.

Based on the rationale of *Centinela Valley Secondary Teachers Assn v. Centinela Valley Union High School District* (1974) 37 Cal.App.3d 35, it is concluded that CNUSD's determination of Enciso's seniority date as reflected on its seniority list was correct, even though the service Enciso provided at Eisenhower Elementary as a substitute was extremely valuable to the district.

Ultimate Conclusions Regarding CNUSD's Layoff

29. CNUSD's governing board resolved to reduce and 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 the employees whose services were proposed to be reduced and discontinued. The board's determination that it was necessary to reduce and discontinue particular kinds of services and that employees with identifiable education, credentials, training and experience should be exempt from the reduction in force was lawful, reasonable, and ultimately in the best interest of the district and its students.

The district's administrative staff initiated and followed a systematic procedure for identifying employees who were directly affected by the governing board's reduction in force resolution. Adjustments were made to the seniority list where indicated until the day before the layoff proceeding. A careful evaluation was made to determine each employee's seniority date, credentials and authorizations, and qualifications in making determinations about what bumping rights, if any, an employee had. A preponderance of the evidence did not support a recommendation that any employee's seniority date as set forth in the district's seniority list be amended except for the seniority date assigned to Katherine Kononchuk, which should be amended to reflect a seniority date of August 15, 2007.

Except for those employees who were exempted from the reduction in force, no junior credentialed employee was retained by the district to provide services which a more senior employee was certificated, competent and qualified to render.

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 other jurisdictional requirements contained in those sections were satisfied as to all respondent employees identified herein.

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 board’s discretion to determine the amount by which it will reduce a particular kind of service as long as the 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.)

Competence

5. The intent of the Education Code is to leave to a school board the discretion of determining whether in addition to possessing seniority an employee is also “certificated and competent” to be employed in a vacant position. The term “competent” in this regard relates to an individual’s specific skills or qualifications including academic background, training, credentials, and experience, but does not include evidence related to on-the-job performance. (*Forker v. Board of Trustees* (1984) 160 Cal.App.3d 13, 18-19.) In addition to seniority, the only limitation in placing a teacher in a vacant position is that the teacher selected be “certificated and competent” to render the service required by the vacant position. Among employees who meet this threshold limitation, there is no room in the statutory scheme for comparative evaluation. (*Martin v. Kentfield School Dist.* (1983) 35 Cal.3d 294, 299.) An employee holding a special credential or needed skill, if such credentials or competence are not shared by a more senior employee, may be retained though it results in termination of a senior employee. (*Moreland Teachers Assn. v. Kurze* (1980) 109 Cal.App.3d 648, 655.)

Seniority, Bumping, and Skipping

The Statutory Scheme

6. 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 “bumping” rights for senior certificated and competent employees, and “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.) School districts have broad discretion in defining positions within the district and establishing requirements for employment. This discretion encompasses determining the training and experience necessary for particular positions. Similarly, school districts have the discretion to determine particular kinds of services that will be eliminated, even though a service continues to be performed or provided in a different manner by the district. (*Hildebrandt v. St. Helena Unified School Dist.* (2009) 172 Cal.App.4th 334, 343.)

Bumping

7. 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

8. 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.)

Seniority

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

Based on its agreement with the teachers’ association, the district reasonably concluded that a new certificated employee who was hired under Salary Steps A or B1 on a

190 day contract was required to attend the Kagan Cooperative Learning training and that such an employee was entitled to a seniority date based upon a first paid date of probationary service if that new employee attended the required training before the formal teaching assignment began. For employees employed under a 185/186 day contract, the district reasonably concluded that their attendance at the Kagan Cooperative Learning training was not mandatory under the district's employment agreement and that their attendance at such training before the formal teaching assignment began did not constitute such an employee's first paid date of probationary service.

10. Education Code section 44846 provides in part: "The governing board shall have power and it shall be its duty to correct any errors discovered from time to time in its records showing the order of employment."

When a mistake is made, such as occurred with Bradbury's seniority date in the last reduction in force proceeding, CNUSD must correct the mistake.

11. Bunnell and D'Amato may have believed that the district required them to attend the Kagan Cooperative Learning training, but their testimony did not support the application of the promissory estoppel doctrine.

The elements of a promissory estoppel claim are (1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) the reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 901.) Case law has also confirmed that promissory estoppel claims are peculiarly equitable in nature and courts are given broad discretion to allow or deny such claims. (*Id.* at 907.)

Here, there was no promise made in the district's memo that related to the assignment of a seniority date, hence there was no reliance. The memo was specifically addressed to new district employees within Salary Steps A and B1. Thus, the district could not reasonably foresee that an employee outside these salary steps might mistakenly interpret the memo as requiring attendance. Under these circumstances, promissory estoppel does not apply.

Substitute and Temporary Service

12. Under Education Code section 44917, governing boards must "classify as substitute employees those persons employed in positions requiring certification qualifications, to fill positions of regularly employed persons absent from service." Under Education Code section 44953, substitute employees may be dismissed at any time at the pleasure of the board. As noted in *California Teachers Ass'n v. Vallejo City Unified School Dist.* (2007) 149 Cal.App.4th 135, 144-145 and *Balen v. Peralta Junior College District* (1974) 11 Cal.3d 821, 826, substitute and temporary teachers fill the short range needs of a school district and may be summarily released.

In specific situations, an employee's position in something other than a probationary position may be credited retroactively as probationary employment. Thus, a certificated

employee working in a temporary position as a long-term replacement teacher under Education Code section 44920 or in a categorically funded position under Education Code section 44909 may accrue credit toward permanent status under certain circumstances described in Education Code sections 44909, 44917, 44918 or 44920.

The Education Code recognizes two distinct types of substitute teachers: Long-term substitute teachers and day-to-day substitute teachers. Education Code section 44918 makes this distinction:

“(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.

(b) Any such employee shall be reemployed for the following school year to fill any vacant positions in the school district unless the employee has been released pursuant to subdivision (b) of Section 44954.

(c) If an employee was released pursuant to subdivision (b) of Section 44954 and has nevertheless been retained as a temporary or substitute employee by the district for two consecutive years and that employee has served for at least 75 percent of the number of days the regular schools of the district were maintained in each school year and has performed the duties normally required of a certificated employee of the school district, that employee shall receive first priority if the district fills a vacant position, at the grade level at which the employee served during either of the two years, for the subsequent school year. In the case of a departmentalized program, the employee shall have taught in the subject matter in which the vacant position occurs.

(d) Those employees classified as substitutes, and who are employed to serve in an on-call status to replace absent regular employees on a day-to-day basis shall not be entitled to the benefits of this section.

(e) Permanent and probationary employees subjected to a reduction in force pursuant to Section 44955 shall, during the period of preferred right to reappointment, have prior rights to any vacant position in which they are qualified to serve superior to those rights hereunder afforded to temporary and substitute personnel who have become probationary employees pursuant to this section.

(f) This section shall not apply to any school district in which the average daily attendance is in excess of 400,000.”

In a very similar factual situation (a substitute teacher providing a full year’s service for two different teachers who worked at the same school), and involving the application of a nearly identical predecessor statute (Ed. Code, § 13336.5), the court held:

“In this context we are of the opinion that the statute in question and in particular the phrase ‘who teaches . . . any class or classes which would have been taught by one person absent from service . . .’ was intended to apply to the situation where a substitute teacher replaces one and the same permanent teacher for an entire school year regardless of particular class assignments. Stated another way, the statute only applies when a substitute fills a vacancy in teacher complement of one year duration, created by the absence of one permanent teacher and does not apply to a one year vacancy which results from the aggregate of several teachers being absent for shorter periods.

This interpretation preserves administrative discretion while affording fair treatment of substitutes and thus achieves what we presume to be the overall objective of the statute.” (*Centinela Valley Secondary Teachers Assn. v. Centinela Valley Union High Sch. Dist.* (1974) 37 Cal.App.3d 35, 44.)

This holding applies to Enciso’s situation. Indeed, the failure to apply *Centinela Valley* might result in a claim that CNUSD exceeded its authority.

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.)

Cause Exists to Give Notice to Certain Employees

13. As a result of the governing board’s lawful reduction of particular kinds of service being provided by certificated employees, cause exists under the Education Code for the district to give notice to those respondents who are identified hereafter 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 2010-2011 school year.

Determination

14. The charges set forth in the accusation were sustained by a preponderance of the evidence and related to the welfare of the Corona-Norco Unified School District and the students thereof. CNUSD’s administrative staff made assignments and reassignments under Resolution No. 85 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.

RECOMMENDATIONS

It is recommended that the preliminary layoff notices issued to Lisa Nickerson and Jason Allen be rescinded and that the accusations filed against them be dismissed.

It is recommended that the district's "Persons Subject to Layoff" list be amended to include at page 3 the inclusion of employee 2431, Sean Robinson, between employees number 2430 and 2431.

It is recommended that the seniority list was amended by stipulation to provide that the entry for Brianna Brown, seniority number 2416, indicating "L.O." [laid off] be stricken and that the entry for Sean Robinson, seniority number 2431, be corrected to add "2310 bumps – L.O."

It is recommended that the seniority date assigned to Katherine Kononchuk on the district's seniority list be amended to August 15, 2007.

It is recommended that the governing board give notice to the respondents whose names are set forth in the attachment hereto that their employment will be terminated at the close of the current school year and that their services will not be needed for the 2010-2011 school year.

DATED: _____

JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings