

BEFORE THE  
GOVERNING BOARD OF THE  
REDDING SCHOOL DISTRICT  
STATE OF CALIFORNIA

In the Matter of the Reduction in Force of:

CERTAIN CERTIFICATED PERSONNEL  
EMPLOYED BY THE  
REDDING SCHOOL DISTRICT,

Respondents.

OAH No. 2010030050

**PROPOSED DECISION**

Catherine B. Frink, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Redding, California, on April 19, 2010.

Thomas E. Gauthier, Attorney at Law, of Lozano Smith, represented the Redding School District.

Michael N. McCallum, Attorney at Law, represented 24 respondents identified in Exhibit A (represented respondents), a copy of which is attached hereto and incorporated herein by reference.

Dawn Smith and Donna Walker were present and represented themselves.

Evidence was received, the hearing was closed, and the record was held open for the submission of post-hearing briefs, which were received on April 23, 2010. Respondents' Closing Brief was marked as Exhibit O and made part of the record. Redding School District's Post-Hearing Brief was marked as Exhibit 17 and made part of the record. The record was closed and the matter was submitted for decision on April 23, 2010.

**FACTUAL FINDINGS**

**Jurisdiction**

1. Diane Kempley, Ed.D., Superintendent of the Redding School District (District), State of California, filed the Accusations in her official capacity as a public officer.

2. On February 16, 2010, the Governing Board of the Redding School District (Board) adopted Resolution No. 39-09-10, which reduced and/or discontinued particular kinds of certificated services no later than the beginning of the 2010-2011 school year.

3. On March 12, 2010, the Board adopted Resolution No. 46-09-10, which reduced and/or discontinued additional particular kinds of certificated services no later than the beginning of the 2010-2011 school year.

4. The Board further determined that it shall be necessary by reason of the reduction and/or discontinuance of services to decrease the number of permanent and/or probationary certificated employees at the close of the 2009-2010 school year by a corresponding number of full-time equivalent (FTE) positions, and directed the Superintendent or her designee to proceed accordingly by notifying the appropriate employees to implement the Board's determination.

5. On or before March 15, 2010, the District served 29 certificated employees, including respondents, with written notice, pursuant to Education Code sections 44949 and 44955, that their services would not be required for the next school year (Notice). Each Notice set forth the reasons for the recommendation. The Notice attached and incorporated by reference Resolution No. 39-09-10, or Resolution No. 46-09-10, which listed the services to be reduced or discontinued. The combined total of the two resolutions resulted in a proposed reduction in the certificated staff by 27.6 FTE positions.

6. Requests for Hearing were timely filed by 26 certificated employees to determine if there is cause for not reemploying them for the next school year. Any certificated employee who failed to file a request for hearing has waived his or her right to a hearing, and may be laid off by the District.

7. The Superintendent made and filed Accusations against each of the certificated employees who requested a hearing. The Accusations with required accompanying documents and blank Notices of Defense (Accusation packet) were timely served on those certificated employees.

8. Notices of Defense were timely filed by the represented respondents, and by respondents Dawn Smith and Donna Walker.

9. Each respondent is presently a certificated employee of the District.

10. Jurisdiction for the subject proceeding exists pursuant to Education Code sections 44949 and 44955.

### **Services to be Reduced or Eliminated**

11. The District provides educational services to approximately 3,200 students from kindergarten through the eighth grade (K-8) at seven school sites. The District employs

approximately 175 certificated employees and 235 classified employees. The District has operated at a budget deficit during the 2009-2010 school year, and must make \$3.2 million in budget cuts for the 2010-2011 school year. To accomplish the budget reduction, the District must reduce services for the next school year.

12. Resolution No. 39-09-10 called for the reduction or discontinuance of the following particular kinds of services for the 2010-2011 school year:

<b>Service</b>	<b>FTE</b>
Elementary school teaching services	17.0
Community Day School teaching services	1.0
Music	4.0
Techno Expo	1.0
Physical Education (P.E.)	1.0
Assistant Principal	1.0
Assistant to the Principal	1.0
Total	26.0

13. Resolution No. 46-09-10 reduced four part-time elementary teaching services positions (.4 FTE each), for a total of 1.6 FTE, in addition to the 26.0 FTE reduction pursuant to Resolution No. 39-09-10.

14. The above-described services are “particular kinds of services” that can be reduced or discontinued within the meaning of Education Code section 44955.

15. In arriving at the number of certificated employees required to be terminated, Resolution No. 39-09-10 and Resolution No. 46-09-10 both state that the Board “has considered all positively assured attrition which has occurred to date and which is expected to occur, that is, all deaths, resignations, retirements, and other permanent vacancies and leaves of absence” as of March 12, 2010. The Board concluded that, notwithstanding any vacancies resulting in positively assured attrition, it would still be necessary to terminate certificated employees equal to 27.6 FTE.

## **Bumping and Skipping**

16. Economic layoffs are generally to be carried out on the basis of seniority. A teacher with more seniority typically has greater rights to retain employment than a junior teacher. A senior teacher whose position is discontinued has the right to a position held by a junior teacher if the senior teacher is properly credentialed. That displacement of a junior teacher is known as “bumping.” In general, the District has an affirmative obligation to reassign senior teachers who are losing their positions into positions held by junior teachers if the senior teacher has both the credentials and competence to occupy such positions. The seniority rule is not absolute, and a junior teacher with a needed credential or skills may be retained even if a more senior teacher is terminated. Such “skipping” is recognized by statute (Education Code section 44955, subdivision (d)(1)) and appellate law (*Santa Clara Federation of Teachers, Local 2393 v. Governing Board of the Santa Clara Unified School District* (1981) 116 Cal.App.3d 831). In order to depart from a seniority-based economic layoff, Education Code section 44955, subdivision (d)(1), requires the District to “demonstrate a specific need for personnel to teach a specific course or course of study... and that the certificated employee [to be skipped] has special training and experience necessary to teach that course or course of study...which others with more seniority do not possess.”

17. The District maintains a seniority list which contains pertinent information such as employees’ date of first paid service, current assignment, and credentials on file. The District used the seniority list to develop a proposed layoff list. The District considered whether senior employees currently assigned in the various services being reduced or eliminated could bump more junior employees. In determining who would be laid off for each kind of service reduced or eliminated, the District first applied known vacancies and then applied in progressive sequence the seniority list in inverse order, from least to most senior. Employees with the same date of hire were laid off according to the needs of the District and its students.<sup>1</sup>

18. The District skipped all special education teachers, nurses, and psychologists (with the exception of one special education teacher who was nonreelected), due to the fact that these individuals possess special credentials, training and experience that more senior certificated employees who were identified for layoff do not possess, and the District will have a need for these services in the 2010-2011 school year.

## **Seniority Date – Mike Spence**

19. According to the District’s seniority list, Mike Spence has a seniority date of August 23, 2004. Mr. Spence began work for the District on October 3, 2003 as a long-term

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<sup>1</sup> Article 14, section 14.1 of the Collective Bargaining Agreement (CBA) between the District and the Redding Teachers Association (RTA) specifies the method of determining the order of seniority as between two bargaining unit members with the same seniority date.

substitute at the Community Day School. He worked in this position from October 2003 to April 2004. He then worked as a temporary teacher from April 14, 2004 through the end of the school year. If his service as a long-term substitute and temporary teacher is combined, he worked 141 days out of 184 total duty days in the 2003-2004 school year, which is more than 75 percent of the school year. Respondents contended that Mr. Spence should be given credit for his service in the 2003-2004 school year by reason of Education Code section 44918, and that his seniority date should be October 3, 2003.

20. Education Code section 44918 states, in pertinent 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.

[¶] . . . [¶]

(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.

[¶] . . . [¶]

21. The District argued that Mr. Spence cannot combine his temporary and substitute service to achieve 75 percent of the school days for purposes of Education Code section 44918. The District contrasted the language of Education Code section 44918 with that of Education Code section 44914, which states:

If an employee of a school district has served as a probationary employee of the district in a position requiring certification qualifications, for one complete school year, and in the year immediately preceding the service as probationary employee has served as a substitute employee, or as a substitute and probationary employee, serving in both capacities during the same school year in the schools of the district, at least 75 percent of the number of days the regular schools of the district were maintained, the governing board of the district may count the year of employment as a substitute or as a substitute and probationary employee as one year of the probationary period

which he is required by law to serve as a condition to being classified as a permanent employee of the district.

22. The District's argument is not persuasive. Education Code 44914 addresses a different issue, namely, whether a teacher can combine substitute service with probationary service in order to achieve a calculation of 75 percent of the school year for purposes of achieving probationary status. The language of Education Code section 44918, while not specifically allowing for a combination of temporary and substitute service, does not preclude a calculation which combines both types of service, so long as the employee "has performed the duties normally required of a certificated employee of the school district," as Mr. Spence has done in this case.

23. By operation of Education Code section 44918, Mr. Spence became a probationary employee of the District on October 3, 2003, and his seniority date shall be adjusted accordingly.

### **Respondents' Challenges to Bumping**

*Richard Hall*

24. Molly Ranken (seniority date 8/21/96) currently serves in the position of Assistant Principal. This position was eliminated by Resolution No. 39-09-10. Ms. Ranken holds the following credentials: multiple subjects (MS); CLAD Administrative Services; Standard Secondary; and Learning Handicapped (LH). She also has a reading specialist authorization. Richard Hall (seniority date 9/21/05) holds MS and CLAD credentials, and had a limited assignment authorization to teach P.E. for the 2009-2010 school year. His teaching assignment for 2009-2010 was sixth grade core (language arts and history) and P.E. The District served a layoff notice on Mr. Hall, because Ms. Ranken has greater seniority and can bump Mr. Hall from his position.

25. Respondents contend that Ms. Ranken cannot completely displace Mr. Hall, because she cannot teach P.E. However, Mr. Hall had a limited assignment authorization to teach P.E., which the District does not intend to renew. Therefore, Ms. Ranken would be able to bump Mr. Hall from any position which he would be credentialed to teach in the 2010-2011 school year. Respondents' argument to the contrary is not persuasive.

26. Respondents also contend that, because Ms. Ranken holds a special education credential, she should be skipped by the District and be assigned to teach special education. The evidence established that Ms. Ranken's LH credential would authorize her to teach in either of two special education positions that will be vacant for the 2010-2011 school year (one due to the nonreelection of an employee, and the other due to the resignation of Lillian Smith (Jones)). The District argued that it is not required to assign Ms. Ranken to a special education position, but may reassign her to a teaching position utilizing her MS credential. This contention was not persuasive. If the District proposes to skip teachers who hold special education credentials because of the District's needs for such services, then it must do

so consistently. Therefore, the most senior respondent with an MS credential, Mike Spence (seniority date 10/3/03, as set forth in Findings 19 through 23) shall be retained.<sup>2</sup>

*John Selke*

27. Jody Greaney (seniority date 8/20/07) holds an MS credential as well as single subject credentials in Life Science and Introductory Physical Science. Ms. Greaney's teaching assignment for the 2009-2010 school year was a combination K-1 class. John Selke (seniority date 8/18/08) holds a preliminary single subject credential in Science: Biology, and Introductory Business. He also had a limited assignment authorization to teach mathematics for the 2009-2010 school year. His teaching assignment for 2009-2010 was eighth grade science and math. The District did not serve Ms. Greaney with a layoff notice, because she has greater seniority than Mr. Selke, and was able to bump him from his position teaching science. Respondents contend that Ms. Greaney cannot completely displace Mr. Selke, because she cannot teach math. This argument is not persuasive. Mr. Selke had a limited assignment authorization to teach math, which the District does not intend to renew. Therefore, Ms. Greaney would be able to bump Mr. Selke from any position which he would be credentialed to teach in the 2010-2011 school year.

*Donna Walker*

28. Garnet Callahan (seniority date 8/23/04) holds MS and CLAD credentials. Her teaching assignment for the 2009-2010 school year was as a home school K-8 teacher. This service has not been reduced or eliminated for the 2010-2011 school year. The District has determined that the position of home school teacher does not require any specific credential, and can be filled by any certificated employee with a valid teaching credential. Ms. Callahan received a layoff notice because there were more senior teachers slated for layoff who could fill her position as a home school teacher.

29. Donna Walker (seniority date 8/22/91) holds a single subject credential in P.E. and a specialist credential in reading/language arts. She is the most senior respondent. At hearing, she stated her willingness to accept assignment to the home school K-8 teaching position for the 2010-2011 school year. In its closing brief, the District acknowledged that the layoff notice given to Ms. Walker should be rescinded, in that Ms. Walker is eligible to bump into Ms. Callahan's position.

**Temporary Job-Share Employees**

30. The District has a practice of allowing permanent or probationary certificated employees to work part-time for the District (typically .6 FTE), through an arrangement in

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<sup>2</sup> The District served a layoff notice on Mr. Spence because he was being bumped by William Barnett (seniority date 9/11/00) who currently serves in the position of Assistant to the Principal. This position was eliminated by Resolution No. 39-09-10. Mr. Barnett holds a multiple subjects (MS) credential, and is able to bump Mr. Hall, for the reasons set forth in Findings 24 and 25.

which the District employs a temporary teacher for .4 FTE to share a 1.0 FTE classroom assignment with the permanent or probationary employee.<sup>3</sup> The teacher(s) requesting to work part-time must submit a request to the District for a leave of absence, and the arrangement is approved on a year-to-year basis, with the District hiring a sufficient number of temporary teachers to correspond to the number of permanent teachers for which part-time job-sharing agreements have been approved. As specified in section 12.1.3 of the CBA, the two individuals who propose to job-share (i.e., the permanent or probationary employee and the temporary employee) must submit a joint application on a form that has been approved by the District and the RTA (Exhibit D to the CBA). The joint application form includes the beginning and ending dates of proposed job-share, and has signature lines for both applicants, the school principal, and the Superintendent, as well as a line to indicate the date of Board action either approving or disapproving the application.

31. Although the joint application form does not use the word “temporary” to describe the job-share employment arrangement, the joint application has a proposed beginning and ending date, and the permanent or probationary employee participating in the job-share arrangement must apply for a leave of absence for .4 FTE (which is stated in the joint application form). Therefore, the individuals filling the .4 FTE position of the job-share arrangement are fully informed, by the joint application, that the position is for one year only, i.e., is a temporary position with the District, and that they are filling in for a teacher on leave of absence.

32. According to Dr. Kempley, the District notified the four individuals occupying the .4 FTE job-share temporary positions that they were being released as of the end of the 2009-2010 school year. Although the District considered these individuals to be temporary employees who are not entitled to notices of layoff, the Board adopted Resolution No. 46-09-10 as a precaution, in the event that any of the individuals asserted that they should be considered probationary employees. At the recommendation of the superintendent, the District sent precautionary layoff notices to three of the four individuals occupying the .4 FTE job-share positions: Jeni Moore, Elisabeth Bade, and Dawn Smith.<sup>4</sup>

33. At the present time, the District is not considering approval of any job-share arrangements for the 2010-2011 school year.

34. Dawn Smith was first employed as a .4 FTE job-share teacher for the 2002-2003 school year, and has been so employed by the District for every school year thereafter, through the 2009-2010 school year. After a review of Ms. Smith’s personnel file, the District was able to locate temporary part-time employment contracts for Ms. Smith for the 2002-2003, 2004-2005, 2006-2007, 2007-2008, 2008-2009, and 2009-2010 school years. The District did not have temporary employment contracts for Ms. Smith for the 2003-2004 or

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<sup>3</sup> Job sharing is addressed in Article 12 of the CBA.

<sup>4</sup> Dr. Kempley testified that the fourth individual, Theresa Vrismo, was hired as a substitute teacher to replace a .4 FTE permanent employee (Rebekah Gartin) who is on leave of absence for the 2009-2010 school year.

2005-2006 school years. Other District records pertaining to Ms. Smith demonstrated that she signed a joint application form, as described in Findings 30 and 31 above, for each of the school years in which she served in a .4 FTE job-share position.

35. Ms. Smith contended that she did not receive a temporary contract for her position as a job-share teacher for the 2003-2004 school year, as required by Education Code sections 44915 and 44916, and that she should have been considered probationary as of that date, in accordance with the rationale of *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911 (*Kavanaugh*).

36. Education Code section 44915 states: “Governing boards of school districts shall classify as probationary employees, those persons employed in positions requiring certification qualifications for the school year, who have not been classified as permanent employees or as substitute employees.”

37. Education Code section 44916 states:

The classification shall be made at the time of employment and thereafter in the month of July of each school year. At the time of initial employment during each academic year, each new certificated employee of the school district shall receive a written statement indicating his employment status and the salary that he is to be paid. If a school district hires a certificated person as a temporary employee, the written statement shall clearly indicate the temporary nature of the employment and the length of time for which the person is being employed. If a written statement does not indicate the temporary nature of the employment, the certificated employee shall be deemed to be a probationary employee of the school district, unless employed with permanent status.

38. In *Kavanaugh*, the plaintiff, a certificated employee, believed she had been hired as a probationary employee. She did not receive written notice of her status as a temporary employee until she had been working in her classroom for more than two weeks. In contrast, Ms. Smith (and all other certificated personnel participating as .4 FTE job-share employees) were well aware of their status as temporary employees, as reflected by the joint application, prior to the start of their employment. Although the word “temporary” does not appear in the joint application, the temporary nature and duration of the employment is clearly indicated. Other documents provided by the District, including the Certificated Employment Notification and Payroll Status Change Forms, contain information about employment status and pay rate. These documents, taken together, constituted a “written statement” in compliance with Education Code section 44916.

39. The District properly characterized Ms. Smith’s employment as temporary, and her argument to the contrary was not persuasive.

## **Seniority Date – Kimberly Miller**

40. Kimberly Miller (seniority date 9/18/06) has MS and CLAD credentials, and was assigned to teach a first grade class during the 2009-2010 school year. Prior to the 2006-2007 school year, Ms. Miller worked part-time for the District, as a .4 FTE job-share teacher for the 2000-2001 school year, and as a .5 FTE job-share teacher for the 2001-2002 through the 2005-2006 school years.

41. Respondents introduced payroll status change documents with effective dates of August 2001 and August 2002, indicating that she worked .5 FTE in the classification “Job Share with Roberta Harris.”

42. Ms. Miller testified that she signed a contract for the 2000-2001 school year, and that she filled out the joint application form, as described in Findings 30 and 31 above, for each of the school years in which she served in a .5 FTE job-share position. She contended she did not receive a temporary contract for her position as a job-share teacher for the 2001-2002 school year, and therefore she should have been considered probationary as of that date, in accordance with the rationale of *Kavanaugh*. This contention is without merit, for the reasons set forth in Findings 36 through 38.

## **Services Performed Pursuant to Personnel Services Agreements**

43. The District has employed a number of individuals in short-term positions through the use of Personnel Services Agreements (PSAs), under the authority of Education Code section 45103, subdivision (d)(2).<sup>5</sup> Pursuant to Education Code section 45103, subdivision (b)(1), “short term employees employed and paid for less than 75 percent of a school year, shall not be a part of the classified service.” Many of these short-term positions are paid for by categorical funds. Some PSAs cover activities outside the regular school day, while others cover activities during the regular school day. Each PSA specifies that the employee “is employed ‘at will’ and may be released from employment at any time.” Each PSA lists the first date of service, as well as an estimated date of completion, and accounts for employment less than 75 percent of the school year. The Board has adopted resolutions establishing the various short term positions and authorizing the superintendent to fill those positions.

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<sup>5</sup> Education Code section 45103, subdivision (d)(2), states:

“Short-term employee” means any person who is employed to perform a service for the district, upon the completion of which, the service required or similar services will not be extended or needed on a continuing basis. Before employing a short-term employee, the governing board, at a regularly scheduled board meeting, shall specify the service required to be performed by the employee pursuant to the definition of “classification” in subdivision (a) of Section 45101, and shall certify the ending date of the service. The ending date may be shortened or extended by the governing board, but shall not extend beyond 75 percent of a school year.

44. Respondents contended that some services currently being performed under PSAs are education positions, i.e., positions requiring certification qualifications.<sup>6</sup> Education Code section 44065, subdivision (a), provides in pertinent part:

. . . [A]ny person employed on or after July 1, 1963, by a school district, . . . in a position in which 50 percent or more of his or her duties performed during the school year, whether performed in a particular school or district or countywide, consist of rendering service in directing, coordinating, supervising or administering any portion or all of the types of functions listed below in this section shall hold a valid teaching or service credential as appropriate, whichever is designated in regulations adopted by the Commission on Teacher Credentialing, authorizing the particular service.

The types of functions are:

- (1) The work of instructors and the instructional program for pupils.
- (2) Educational or vocational counseling, guidance and placement services.
- (3) School extracurricular activities related to, and an outgrowth of, the instructional and guidance program of the school.

[¶] . . . [¶]

- (5) The selection, collection, preparation, classification or demonstration of instructional materials of any course of study for use in the development of the instructional program in the schools of the state.

[¶] . . . [¶]

- (9) The school library services.

[¶] . . . [¶]

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<sup>6</sup> Education Code section 44001 states:

“Education position” or “position requiring certification qualifications” includes every type of service for which certification qualifications are established by or pursuant to Sections 44000 to 44012, inclusive, Section 44065, and Chapter 2 (commencing with Section 44200) of this part.

45. Respondents specifically identified three employees who they contend are serving in education positions: Barbara Bambauer (Tutor/Coordinator and Read 180 Coordinator); Byrn Valencia (Intervention Groups Tutor, Intervention Coordinator, and after school literacy projects); and Mary Mazzini (classroom/primary grade music teacher).

46. Respondents further contended that the individuals occupying these positions should properly be classified as probationary employees, citing *Bakersfield Elementary Teacher's Association v. Bakersfield City School District* (2006) 145 Cal.App.4th 1260, 1287 (*Bakersfield*). Consequently, respondents argued that a corresponding number of respondents should be retained to fill the positions held by Ms. Bambauer, Ms. Valencia, and Ms. Mazzini.

47. The District argued that the individuals providing services pursuant to PSAs during the school day did not need to be certificated, since they worked under the direction of classroom teachers or other certificated personnel, in a manner similar to instructional aides. The District noted that, under Education Code section 45344, an instructional aide need not perform his or her duties in the physical presence of the teacher, "but the teacher shall retain his responsibility for the instruction and supervision of the pupils in his charge." The District further contended that respondents could not displace any individual working under a PSA, because those contracts terminate at the end of the 2009-2010 school year, and no certificated employees are being retained to perform work in these positions for the 2010-2011 school year. Finally, the District argued in its closing brief that, "if certificated employees are concerned that their duties are being transferred to classified employees, then their remedy is to file an unfair labor practice charge with the Public Employment Relations Board."

48. The parties disputed the extent to which Ms. Bambauer, Ms. Valencia, and Ms. Mazzini worked independently in providing services to students. Ms. Bambauer, Ms. Valencia, and Ms. Mazzini did not testify at the hearing.

49. Respondents' arguments were not persuasive. Even assuming, as respondents contend, that the positions occupied by Ms. Bambauer, Ms. Valencia, and Ms. Mazzini required certification qualifications, and that they were positions in categorically funded programs, it does not follow that the individuals occupying those positions should be classified as probationary. Education Code section 44909 states, in pertinent part:

The governing board of any school district may employ persons possessing an appropriate credential as certificated employees in programs and projects to perform services conducted under contract with public or private agencies, or categorically funded projects which are not required by federal or state statutes. The terms and conditions under which such persons are employed shall be mutually agreed upon by the employee and the governing board and such agreement shall be reduced to writing. Service pursuant to this section shall not be included in

computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee unless (1) such person has served pursuant to this section for at least 75 percent of the number of days the regular schools of the district by which he is employed are maintained and (2) such person is subsequently employed as a probationary employee in a position requiring certification qualifications. Such persons may be employed for periods which are less than a full school year and may be terminated at the expiration of the contract or specially funded project without regard to other requirements of this code respecting the termination of probationary or permanent employees other than Section 44918.

[¶] . . . [¶]

50. In *Bakersfield*, the court discussed employees in categorically funded programs, stating that, “although such persons are not specifically identified in the Code as temporary employees, they are treated in much the same way in that they may be dismissed without the formalities required for probationary and permanent employees in the event the program expires or is terminated, and their service does not count toward acquiring permanent status (unless they are reemployed the following year in a probationary position).” (*Id.* at p. 1286.)<sup>7</sup>

The decision in *Zalac v. Governing Board of Ferndale Unified School District* (2002) 98 Cal.App.4th 838, 851, appears to support the conclusion in *Bakersfield*, that the rationale underlying Education Code section 44909 is to “[permit] school districts to hire additional teachers for special programs so long as the designated funds remain available, while retaining the flexibility to readily lay these teachers off if and when the funding is discontinued.”

51. On the other hand, there are cases in which the courts classify employees hired pursuant to Education Code section 44909 as temporary. For example, in *Vasquez v. Happy Valley Union School District* (2008) 159 Cal.App.4th 969 (*Happy Valley*), the court noted that, “[t]he classification of ‘temporary’ covers a variety of scenarios. A temporary teacher is, among other definitions, a teacher hired by the district for a semester or a complete school year to replace a regular teacher who has been granted leave for that time or is experiencing long-term illness. (§ 44920.) A teacher may also be classified as temporary where the teacher is working on so-called categorically funded projects. (§ 44909.)” (*Id.* at p. 975.)

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<sup>7</sup> The court in *Bakersfield* went on to state: “Thus, certificated teachers assigned to a categorically funded program may be laid off without the procedural formalities due a permanent and probationary employee *only* if the program has expired. (*Hart Federation of Teachers, supra*, 73 Cal.App.3d at pp. 215-216; *Zalac, supra*, 98 Cal.App.4th at p. 852.)” (*Id.* at p. 1287.)

Likewise, in *Schnee v. Alameda Unified School District* (2004) 125 Cal.App.4th 555, 563-564 (*Schnee*), the court traced the history of Education Code section 44909, stating:

“The intent of former section 13329 [now 44909] was ‘to prevent a person from acquiring probationary status solely through teaching in a categorically funded program. This permits the hiring of qualified persons for categorically funded programs of undetermined duration without incurring responsibility to grant tenured status based on such teaching services alone.’” (*Zalac, supra*, 98 Cal.App.4th at p. 845.) ... Any doubts that one may entertain concerning the interpretation of section 44909 that best conforms with the evident intent of the Legislature – no illuminating legislative history having been brought to our attention – are resolved by reference to those provisions of the Education Code that deal with temporary employees as defined in section 44919.... We can perceive no reason for treating persons whose employment is temporary by virtue of section 44909 differently in this respect than temporary employees under section 44919.

52. The individuals serving under the PSAs currently in effect for the 2009-2010 school year were clearly notified that the positions were for a limited duration at the time they entered into the contracts, in that the commencement and termination dates were specified, and the work was described as “at will” and subject to termination at any time. Thus, at best, such employees would be deemed temporary, and could properly be released by the District at the end of the 2009-2010 school year. The rationale of *Schnee* is persuasive. Temporary classification is specifically statutorily permitted to allow districts flexibility in staffing short-term vacancies and meeting district needs without having to provide status toward tenure and benefits. Consequently, there would be no certificated employees who respondents could displace for the 2010-2011 school year,

#### *Individual Respondents*

53. Jennifer Severin (seniority date 8/14/08) - Ms. Severin holds MS and CLAD credentials, with authorizations to teach social science and English. She is currently assigned to a seventh grade class for the 2009-2010 school year. She provided reading intervention services and after school tutoring under a PSA from August 2006 to January 2007. This position was categorically funded. In January 2007, she took over a second grade classroom for the remainder of the 2006-2007 school year, pursuant to a temporary contract. She was subsequently employed by the District to teach seventh and eighth grade core and physical education. Ms. Severin argued that her employment under the PSA should be considered probationary, and that her seniority date should be changed to reflect her first date of paid service in a probationary capacity. This argument is rejected, for the reasons set forth in Findings 46 through 52. At best, her employment under the PSA was temporary, not

probationary, and was for less than 75 percent of the school year, thereby allowing the District to terminate her employment at the conclusion of the contract period.

54. Jeffrey Wilder (seniority date 10/8/07) – Mr. Wilder holds a CLAD credential and a single subject credential in music. His teaching assignment for the 2009-2010 school year is “K-8 music.” For the 2004-2005, 2005-2006, and 2006-2007 school years, he taught part-time for the District pursuant to PSAs. He taught a guitar ensemble class during school hours, and one or two music classes after school. The evidence did not establish that he worked more than 75 percent of the school year for any of the years that he worked part-time. The funding for his PSAs was not established by the evidence. Mr. Wilder contended that he was employed as a probationary employee starting in the 2004-2005 school year, and his seniority date should be changed to reflect his first date of paid service in a probationary capacity. Argument rejected, for the reasons set forth in Findings 46 through 52. At best, his employment under the PSAs was temporary, not probationary, and was for less than 75 percent of the school year, thereby allowing the District to terminate his employment at the conclusion of each contract period.

### **Charter School**

55. The District is the chartering entity of Stellar Charter School (Stellar). Stellar’s charter petition addresses employment qualifications in Element E, at page 10. Paragraph 4 states:

Beginning in the 2006-2007 school year, Stellar Charter School hired all staff members as “at will” employees. Because of the tentative nature of charter schools, employees hired at Stellar Charter School from this date and through the term of this charter will accept their status of “at will”, which will not exceed the current school year of employment. There will be no tenure rights granted to these employees at Stellar Charter School or Redding School District, nor will these employees be a part of the collective bargaining unit in the Redding School District.

56. Stellar’s charter petition addresses employee rights in Element M, at page 14:

1. Current employees of the Redding School District have no rights to employment at Stellar Charter School. All employees hired after 2006 at Stellar Charter School are considered at-will employees. In order for a current employee of Redding School District to become a Stellar Charter School employee, the individual would need to resign employment with Redding School District and waive all former employment and reemployment rights.

2. Employees who were hired before the 2006-2007 school year shall retain rights to return to a comparable position in the Redding School District (California Education Code 47605). Such staff shall continue to earn service credit in the Redding School District, and any other rights afforded to regular certificated/classified employees of the Redding School District.
3. No Redding School District employee shall be required to work at Stellar Charter School (California Education Code 47605).

57. Stellar's charter petition addresses labor relations in Element O, at page 15:

Stellar Charter School shall be the exclusive public school employer of the employees of the charter school for the purpose of the Education Employment Relations Act.

58. Respondents contend that, because the District has certain oversight responsibilities over Stellar as the chartering authority of the charter school, and because Stellar's charter provides that employees hired before the 2006-2007 school year retain rights to return to a comparable position in the District and continue to earn service credit, respondents with multiple subject credentials should be able to displace less senior teachers at Stellar with multiple subject credentials. This argument is without merit, and directly contradicts the terms of Stellar's charter. Laid-off certificated employees of the District may seek employment at Stellar for the 2010-2011 school year, but would be required to waive all former employment and reemployment rights with the District. Employment at Stellar is "at will," and no respondent could be guaranteed a position for the 2010-2011 school year.

### **Welfare of the District and Its Students**

59. The Board's decision to reduce or discontinue the particular kinds of services identified in Resolution No. 39-09-10 and Resolution No. 46-09-10 was not arbitrary or capricious, but constituted a proper exercise of discretion.

60. The reduction or discontinuation of particular kinds of services related to the welfare of the District and its pupils. The reduction or discontinuation of particular kinds of services was necessary to decrease the number of certificated employees of the District as determined by the Board.

61. Except as previously noted, no certificated employee junior to any respondent was retained to perform any services which any respondent was certificated and competent to render.

## LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied.
2. The services identified in Resolution No. 39-09-10 and Resolution No. 46-09-10 are particular kinds of services that could be reduced or discontinued under section Education Code section 44955. Cause exists to reduce the number of certificated employees of the District due to the reduction or discontinuance of particular kinds of services. Cause for the reduction or discontinuance of services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949.
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. Respondent Mike Spence's seniority date shall be changed to October 3, 2003, by reason of Findings 19-23.
5. As set forth in Finding 26, the District shall rescind the layoff notice to respondent Mike Spence.
6. As set forth in Findings 28 and 29, the District shall rescind the layoff notice to respondent Donna Walker.
7. No employee with less seniority than any named respondent is being retained to render a service which any named respondent is certificated and competent to render. Except as set forth in Legal Conclusions 5 and 6, the Board may give respondents final notice before May 15, 2010, that their services will not be required for the ensuing school year, 2010-2011.

## ORDER

1. The District shall comply with Legal Conclusions 4 through 6.
2. Except as set forth in Legal Conclusions 5 and 6, the Accusations served on respondents are sustained. Notices of layoff shall be rescinded as to respondents Mike Spence and Donna Walker. Notices shall be given to Dawn Smith and to the remaining respondents identified in attached Exhibit A that their services will not be required for the 2010-2011 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: \_\_\_\_\_

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CATHERINE B. FRINK  
Administrative Law Judge  
Office of Administrative Hearings

EXHIBIT A  
REDDING SCHOOL DISTRICT  
RESPONDENTS REPRESENTED BY  
MICHAEL McCALLUM, ATTORNEY AT LAW

Adams, Heather  
Alexander, Stephanie  
Bade, Elizabeth  
Callahan, Garnet  
Conway, Katherine  
DeMott, Janetta  
Fowler, Chad  
Hall, Rich  
Henderson, Michelle  
Henry, Sherri  
Jones, Samantha Grace  
Kubish, Mark  
Lockard, Michele  
Miller, Kim  
Moore, Jeni  
Osborne, Shannon  
Petty, Jennifer  
Roccal, Brenda  
Selke, John  
Severin, Jennifer  
Skelton, Kim  
Spence, Mike  
Wilder, Jeffrey  
Winterscheidt, Julie