

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

In the Matter of:

OAH No. 2009020838

THE REDUCTION IN FORCE OF CERTAIN
CERTIFICATED EMPLOYEES OF THE
FONTANA UNIFIED SCHOOL DISTRICT
FOR THE 2009-2010 SCHOOL YEAR,

Respondents.

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Fontana, California, on April 2, 2009.

Melanie A. Petersen, Attorney at Law, represented the Fontana Unified School District.

Marianne Reinhold, Attorney at Law, represented 301 certificated employees, including most of the individuals who received a preliminary layoff notice for the 2009-2010 school year.

Respondent Angelina Conception represented herself and was present throughout the administrative proceeding.

The matter was submitted on April 8, 2008, following the submission of written arguments.

FACTUAL FINDINGS

The Fontana Unified School District

1. The City of Fontana is situated in the heart of the Inland Empire. It was an agricultural center in the 1920's, a leader in steel production in the 1950's, and is currently a center for technology, industry and commerce.

The Fontana Unified School District (FUSD or the district) exists to serve the educational needs of kindergarten through twelfth grade students who live within the district's boundaries. FUSD is the twelfth largest school district in California, with an enrollment of over 43,000 K-12th grade students. FUSD maintains 29 elementary schools, one sixth grade school, seven middle schools, four comprehensive high schools, two continuation high schools, a School of Language Development, and one adult school. FUSD currently employs approximately 3,800 persons, 2,200 of whom are certificated employees. Most certificated employees are elementary school, middle school, and high school teachers.

2. About 40 percent of FUSD students require English learner services. Classes at FUSD are most often composed of both English learners (ELs) and other students who are deemed proficient in English. During the course of the school year, an EL may transfer into a class previously having no ELs. Thus, there is a necessity for the district to hire and retain teachers who are authorized to teach English learners. Since 2005, FUSD continuously notified its certificated employees of the need to hold either a Crosscultural Language and Academic Development certificate (CLAD) or a Bilingual Crosscultural Language and Academic Development (BCLAD) certificate.¹ Notice was provided through flyers, postings and direct contact with non-CLAD and non-BCLAD certificated employees. FSUD offered to pay the cost for non-certificated employees to attend approved training programs.

The retention of teachers holding English learner authorizations is necessary for FUSD to meet compliance reviews conducted by the San Bernardino County Board of

¹ The California Commission on Teacher Credentialing (CCTC) is responsible for issuing credentials and appropriate assignment for teaching and non-teaching positions in California public schools. The California Department of Education administers and oversees state and federal programs and regulations to support schools, including programs for English learners (ELs).

State and federal regulations, local policies, student population, and the content of a course being taught all determine what authorizations a teacher must possess. A teacher assigned to ELs needs an authorization for instruction to ELs in addition to an authorization to teach in the content area of instruction. The requirement for an authorization is based on the rights and needs of the students to an appropriate education.

ELs require English language development (ELD) and specially designed academic instruction in English (SDAIE) which must be provided by teachers authorized to provide such instruction until these students are reclassified as English proficient. Through monitoring reviews, the California Department of Education specifically investigates teachers assigned to core academic subjects (such as courses required for graduation and promotion) and determines if EL students are succeeding in English coursework in a manner comparable to their English-speaking peers. The CCTC monitors credential assignments, including subject matter content, grade-level, and EL authorization. Program design, placement of students, and teacher hiring and retention practices are local decisions, with financial incentives and sanctions being set at the discretion of the employer.

EL teachers must hold an appropriate credential document authorization. Their classrooms may be referred to as ESL, sheltered, or bilingual. CLAD and BCLAD certificates, or emergency permits, authorize instruction to ELs. Certificates are issued to a teacher by CCTC following the completion of an approved California Teacher English Learner program and passing an examination. In some instances, these certificates are embedded in the teacher's credential.

Education and the California Department of Education and it is in the best interest of the students who attend FUSD schools.

3. FUSD is governed by an elected, five-member Board of Trustees (the governing board). The governing board's Chief Executive Officer is Cali L. Olsen-Binks, the Superintendent of Schools. Yolanda Mendoza (Mendoza), an Associate Superintendent of Schools, is in charge of Human Resources. Alejandro Alvarez (Alvarez) is FUSD's director of certificated personnel services.

The Fiscal Crisis – Economic Layoffs

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

A school district cannot determine the level of state funding it will receive until the state budget is chaptered, an event usually occurring in late June although, as this past year demonstrated, that event may take much longer. Before then, a school district's governing board must take steps to make certain that ends meet if a worst-case financial scenario develops. A school district's usual budgetary problems were compounded by California's current fiscal crisis.

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

The economic layoff statutes found in the Education Code generally require the retention of senior employees over more junior employees and the retention of permanent employees over probationary employees and others with less seniority. A 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 other unique experience necessary to teach a course of study or to provide other services which more senior employees do not possess.

FUSD's Response to the Budget Crisis

5. FUSD's annual budget totals approximately \$331 million. About 85 percent of FUSD's budget pays for services rendered by its employees. In early 2009, FUSD's governing board and administration became acutely aware of California's massive budget crisis. As a result of the crisis, FUSD projected a budget deficit of about \$23 million for the 2009-2010 school year. FUSD was required to look into ways to trim its budget. Mendoza and Alvarez played key roles in reviewing the particular kinds of services the district was providing, the competency required to provide those services, and how the reduction or elimination of particular kinds of services might impact the district and its students.

FUSD’s administrative staff prepared a recommendation that was given to the governing board which proposed the reduction and elimination of particular kinds of services to help meet the district’s projected budgetary shortfall, but which would permit FUSD to meet all mandated staffing and curriculum requirements. In accordance with this recommendation, Resolution 09-18 was drafted.

6. On February 23, 2009, the governing board unanimously adopted Resolution 09-18, which provided:

WHEREAS, the Governing Board of the Fontana Unified School District has determined, pursuant to Education Code Sections 44955 and 44949, that it shall be necessary to reduce or discontinue the particular kinds of services of the District as itemized in Exhibit “A” at the close of the current school year; and

WHEREAS, it shall be necessary to terminate at the end of the 2008-2009 school year, the employment of certain certificated employees of the District as a result of this reduction or discontinuance in particular kinds of services;

THEREFORE, BE IT RESOLVED that the Superintendent is directed to send appropriate notices to all employees whose services shall be terminated by virtue of this action. Nothing herein shall be deemed to confer any status or rights upon temporary or categorically funded project certificated employees in addition to those specifically granted to them by statute.

Adopted by the Governing Board of the Fontana Unified School District this 23rd day of February, 2009.

7. Exhibit A to the resolution set forth the elimination or reduction of the following particular kinds of services:

<u>Services</u>	<u>Number of Full-Time Equivalent Positions</u>
1. Elementary Multiple Subject	235.0 FTE
2. Elementary Reading First Coach	13.0 FTE
3. Elementary Physical Education	3.0 FTE
4. Elementary Science Enrichment	10.0 FTE
5. Elementary English Language Learner Intervention Teacher	1.0 FTE
6. Elementary Instructional Support Teacher	9.0 FTE
7. Elementary Outreach Consultant	1.0 FTE
8. Elementary Assistant Principal	4.0 FTE
9. Reading First Coordinator	1.0 FTE
10. Middle School Multiple Subject	12.0 FTE
11. Middle School Social Studies	5.0 FTE
12. Middle School Physical Education	5.0 FTE
13. Middle School English Language Development	2.0 FTE

14. Middle School Science	4.0 FTE
15. Middle School Math	4.0 FTE
16. Middle School Reading Success	1.0 FTE
17. Middle School Counselor	.5 FTE
18. Middle School Assistant Principal	7.0 FTE
19. High School Math	3.0 FTE
20. High School English Language Development	5.0 FTE
21. High School English	7.0 FTE
22. High School Business Computers	2.0 FTE
23. High School Music	2.0 FTE
24. High School Biology	1.0 FTE
25. High School Drafting	1.0 FTE
26. High School Social Studies	6.0 FTE
27. High School Art	2.0 FTE
28. High School AVID	1.0 FTE
29. High School NovaNet	1.0 FTE
30. High School Health	2.0 FTE
31. High School French	1.0 FTE
32. High School Physical Education	3.0 FTE
33. High School Machine Shop	1.0 FTE
34. High School Agricultural Biology	1.0 FTE
35. High School ROTC	4.0 FTE
36. High School Special Education Mild to Moderate	2.0 FTE
37. High School Culinary Arts	1.0 FTE
38. High School Teacher on Assignment	1.0 FTE
39. Continuation High School Computers	1.0 FTE
40. Continuation High School English	1.0 FTE
41. Continuation High School Read 180	2.0 FTE
42. Continuation High School Assistant Principal	2.0 FTE
43. Nurses	8.0 FTE
44. SB 2042 Consulting Teacher	2.0 FTE

Total Full Time Equivalent reductions 380.5 FTE

8. The governing board unanimously adopted tie-breaking criteria to be used to determine the order of layoff for employees who first rendered paid service to the district on the same day.² It provided:

DETERMINATION OF TIE-BREAKING CRITERIA FOR 2009-2010

Pursuant to provisions of Education Code section 44955, the Board of Education is required to determine the District needs should it become necessary to determine the

² For employees hired on the same date, Education Code section 44955, subdivision (b) provides:

“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.”

order of termination for employees who first rendered paid service to the District on the same day.

For the 2009-2010 school year only, to meet the requirements of section 44955, the Board of Education determined the needs of the District and the students by establishing the following tie-breaking criteria:

The following rating system shall be applied in determining the order of termination of certificated employees:

- A. Total Number of Credentials and Supplemental Authorizations
- B. Credential Status (Clear, Preliminary, Intern, Permit)
- C. Total Number of Years of Teaching Experience in the Fontana Unified School District
- D. Total Number of Verified Years of Teaching Experience post Bachelors Degree

TIE-BREAKING PROCEDURE

In the event that common day hires have equal qualifications based on application of the above criteria, the District will then break ties by utilizing a lottery.

9. Under Alvarez's direction, district staff prepared a preliminary seniority list. The preliminary list contained line numbers, next to which was a number indicating if the named employee was being laid off, the employee's name, whether the employee was a permanent full time employee, a probationary employee or an intern, the school site where the employee provided services, the employee's hire date, the employee's first date of paid probationary service, a description of the employee's services, a description of the employee's teaching credential, the subject currently being taught or the service being provided, and whether the employee had a supplemental teaching credential. The information set forth in the preliminary seniority list was obtained from the San Bernardino County Department of Education and from the district's personnel files.

On January 22, 2009, Alvarez provided each site administrator with a copy of the preliminary seniority list. He requested that each site administrator review the preliminary seniority list with the certificated employees providing services at that site, and make any corrections, changes or modifications to it that were necessary. FUSD established a dedicated email address and provided a telephone number to enable certificated employees to contact district staff to discuss any questions pertaining to their seniority. All questions were answered by district staff, revisions were made when justified, and a final seniority list was prepared (Exh. 2).

10. In making a decision regarding those certificated employees who should receive preliminary layoff notices, the district decided in some instances to "skip" junior

employees and retain their services over more senior employees. In this regard, the district relied on authority in the Education Code for skipping.³ Alvarez testified about the reasons for the district's decision to skip certain junior employees over more senior employees.

A. Holders of CLAD and BCLAD Certificates and Emergency Permits:

Certificated employees holding CLAD and BCLAD certificates and current emergency CLAD permits were retained over more senior employees who did not hold such certificates or permits. The decision to skip these junior employees over more senior employees was based on the district's needs to retain teachers who were authorized to provide instruction to ELs to meet state mandates and compliance reviews (Factual Finding 2). While the district's decision to skip these junior employees was not in writing, no statute or regulation required that. The district's effort to ensure teachers possessed appropriate EL authorizations was known throughout the district. Even if there was not an EL student in every classroom at the start of the school year, the district needed to have the flexibility to transfer teachers between classrooms and to meet the needs of ELs who might transfer into the district. There was no guarantee that persons holding emergency CLAD permits for the 2008-2009 school year would receive permits for the following year. If they did not, they would lack the required EL authorization. Alvarez's credible testimony was sufficient to establish the district's specific need to retain junior employees with EL current authorization over more senior employees who did not possess such authorization.

B. Community Day School:

Employees providing services at the district's community day school must hold a clear multiple subject teaching credential. The community day school provides educational services to a variety of students, many of whom have been expelled from traditional schools for severe behavioral problems and many of whom are on juvenile probation. The district advertised employment openings for experienced teachers for six months before the employees who now fill community day school positions were recruited and hired. The teachers currently holding the community day school positions had experience in other community day schools, managed students with a history of severe disciplinary problems, had training and skills in deescalating potentially violent behavior, had experience working with campus security officer before they were hired, and gained specialized knowledge and

³ Education Code section 44955, subdivision (d) provides:

“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.”

training all computer based-intervention software used at the community day school after they were hired. These criteria were identified in a memo. Two junior teachers who were recruited and hired to serve at the community day school following the advertising were retained over more senior teachers with similar credentials. These two employees were not given preliminary notices based on their specialized experience and training. Alvarez's credible testimony was sufficient to establish the district's specific need to retain the two junior employees it recruited to fill the community day school position over more senior employees who did not have similar training and experience.

C. ASB Advisor:

The current ASB advisor had eight years of experience as an ASB advisor at another school district before he was recruited and hired by FUSD. The current ASB advisor has held his position within the district for the past year, a position fully dedicated to providing services and supports to ASB projects; although the current ASB advisor holds a single subject teaching credential in Biological Sciences, he does not teach any classes. Alvarez's credible testimony established that the district retained the current ASB Advisor (i.e., did not serve him with a preliminary layoff notice) over more senior employees based upon FUSD's need for the specialized services the current ASB advisor provides and based upon his special training and experience which others with more seniority did not possess.

D. Naval ROTC Program:

The district asserted that a junior Naval ROTC teacher, Alphonso Jones, was retained on the basis of FUSD's need for Jones' specialized services in the Naval ROTC program at A. B. Miller High School. The district argued that Jones possessed special training and experience which a more senior employee, Eduardo Din, did not possess. Alvarez provided no specific information regarding Jones, Jones' training or experience, and he relied entirely on information that he obtained from Commander Kenneth A. Liles, Department of the Navy. To support its skipping of Jones, the district simply offered a letter signed by Commander Liles which stated, in part:

“During my recent evaluation of the NJROTC program at A. B. Miller in December 2008, it was apparent to me that if reductions had to be made, that CDR Alphonso Jones was the most capable to ensure the viability of the program and to initiate and pursue successful initiatives to increase enrollment to exceed minimum standards. My evaluation of Eduardo Dinn [sic] was graded as unsatisfactory due to lack of involvement and insufficient program management abilities. It would not be in the best interest and future viability of the NJROTC program at A. B. Miller High for Eduardo Dinn [sic] to be the single Naval Science Instructor leading the unit.”

Commander Liles was not a district employee. His December 2008 evaluation of the NJROTC program was not provided (Eduardo Din testified that Commander Liles never observed him on campus), nor was Commander Liles' evaluation of Eduardo Din provided. Nothing in Commander Liles' letter indicated the nature and extent of Jones' special training and experience. It was clear from Commander Liles' letter that he did not believe Din was as

competent as Jones. However, attempting to skip Jones over Din on this basis is no more than an effort to dismiss Din for cause without providing Din with the statutory protections to which he is entitled in such a for cause proceeding.⁴

E. Special Assignment – ESL:

The current employee holding the position of Special Assignment-ESL (English as a Second Language) had, based on Alvarez's personal knowledge, significant and unique qualifications and considerable experience in ESL. This employee was not employed in the classroom, but worked exclusively with staff and others in developing and instituting ESL programs. This individual was specifically hired by FUSD to fill this position. On the basis of Alvarez's competent and credible testimony, it was established that the district retained the current Special Assignment-ESL employee (i.e., the district did not serve that individual with a preliminary layoff notice) based upon FUSD's need for the specialized services that the current employee provides and based upon that individual's special training and experience which others with more seniority did not possess.

11. Alvarez testified that the district issued preliminary layoff notices to employees with a multiple subject credential who taught a particular kind of service mentioned in the board's layoff resolution even though some of these employees had supplemental credentials that authorized them to teach English, Social Studies or Math to 9th graders. Respondents argued that FUSD's failure to consider the employee's supplementary authorizations and the failure to reassign them to teach 9th grade classes rendered the preliminary layoff notices issued to these respondents defective because these respondents were certificated and competent to perform the duties of junior employees who were retained.

Alvarez credibly testified that permitting a teacher with a supplemental credential to teach students in 10th, 11th and 12th grades would constitute a misassignment, and that the only subject with courses and curriculum designed specifically for 9th graders was English and Language Arts. There were no required Social Studies, Math or Science courses designed exclusively for 9th graders, and it was common for 10th-12th graders to attend such classes. Alvarez established that creating a high school master schedule would be nearly impossible if employees with supplemental authorizations were retained to teach at the high school level. Issuing preliminary layoff notices to this class of employees was neither arbitrary nor capricious.

Alvarez's testimony about the need to retain high school teachers with single subject credentials was credible and competent, and it was not rendered unbelievable or unreliable because Alvarez's testimony was supplemented by what site administrators told him or because there may have been one high school teacher within FUSD who taught classes provided only to 9th graders.

⁴ A permanent employee may be dismissed for cause only after a dismissal hearing. (Ed. Code, §§ 44932, 44934, and 44944.) Under Education Code section 44944, subdivision (b), the dismissal hearing must be conducted by a three-member Commission on Professional Competence. Two members of the Commission must be non-district teachers, one chosen by the respondent and one by the district, and the third member of the Commission must be an administrative law judge from the Office of Administrative Hearings.

12. Alvarez testified that other than those junior employees and classes of junior employees with special education, training, and/or experience identified in Factual Findings 10 and 11, no junior employee was retained to render services which a more senior employee was qualified and competent to provide.

13. Each of the 339 respondents served with a preliminary layoff notice was a certificated employee of FUSD. On or before March 6, 2009, FUSD timely served each respondent with a preliminary notice which stated that the Superintendent of Schools had recommended that the individual not be re-employed in the upcoming 2009-2010 school year. The notice met all requirements and the notice advised the employee of a right to a hearing. One employee who should have received a preliminary layoff notice did not receive such a notice (Factual Findings 17 and 18).

14. On March 31, 2008, Mendoza signed the accusation in her official capacity. Thereafter, the accusation and other required jurisdictional documents were served on each certificated employee who had requested a hearing. FUSD concluded that all respondents who were served with a notice of hearing should be entitled to an administrative hearing, regardless of whether the respondent filed a notice of defense.

The Administrative Hearing

15. On April 2, 2009, the record in the administrative proceeding was opened. A signed Stipulation of Jurisdictional Facts was presented and received in evidence.

FUSD rescinded the preliminary layoff notices and dismissed the accusations previously filed and served on Maria Alcalá-Canto, Kim Auston, Camelia Bogdan-Olaru, Jennifer Callahan, William Cardosi, Kelsy Clifton, Robert Davis, Shauna Desouza, Latisha Easter, Debra Fisher-Hinshaw, Mary Gotte, Eric Groeber, Yuliana Guerra, Wayne Harkley, Virginia Johnson, John Knous, Rosa Kobulnik, Wendy Lu, Garth Masik, Tamara Moore, Elizabeth Morin, Ryan Murphy, Karen Nelsen, Eric Nelson, Lori Payne, Pamela Powers, Richard Rausch, Lindsey Riat, Eric Sahl, Omar Shaheed, Gideon Shuster, Anthony Silva, Jeffrey Steinberg, David Taylor, Kathryn Walker, Daniel Walker, Steven Whitley, Mark Younglove, and Loretta Zarow. There was no objection.

Stipulations were recited, sworn testimony was received, and documentary evidence was introduced. The record remained open through the close of business on April 8, 2009, to permit the submission of written closing argument. On April 8, 2009, the record was closed and the matter was submitted.

The Particular Kinds of Services

16. No factual issue was raised to dispute the district's contention that the services that were reduced or eliminated were particular kinds of services. The elimination of those positions was neither arbitrary nor capricious, but rather constituted a proper exercise of the governing board's discretion.

The Issuing of Preliminary Notices

17. Before issuing preliminary layoff notices, FUSD considered known positive attrition including resignations, retirements and probationary non-reelects.

No particular kinds of services were lowered to levels less than those levels mandated by state or federal law.

Each individual whom the district concluded was a permanent or probationary certificated employee who provided a particular kind of service identified layoff resolution was given a preliminary layoff notice as required, with the exception of Julie Cox (Cox).

18. Cox is a permanent full-time employee with a seniority date of February 15, 2005. She teaches at Cypress Elementary School. Approximately 20 teachers with more seniority than Cox received preliminary layoff notices. According to the district and as shown by the district's seniority list, the district's inadvertent failure to serve a preliminary layoff notice on Cox resulted in Cox being retained for the 2009-2010 school year⁵ over a more senior teacher.

Without implementing relief, the effect of the district's failure to serve Cox would be the undeserved layoff of the most senior elementary school teacher. The most reasonable remedy available to address this unintentional error is to rescind the layoff notice that was issued to the most senior elementary school teacher, and that is being recommended. The district's error in failing to issue a layoff notice to Cox does not require that all elementary teachers senior to Cox be retained.

19. Certain teachers were hired by the district as "temporary" employees to serve in categorically funded Quality Education Investment Act (QEIA) positions. The QEIA program will likely continue through 2014. The district did not issue preliminary layoff notices to QEIA-funded employees, but instead issued non-renewal notices to those employees, informing them that their employment with FUSD was ended.

Citing *Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist. (Bakersfield)* (2006) 145 Cal.App.4th 1260, respondents argued that these categorically funded employees were actually probationary employees, not temporary employees, and that the district's failure to serve them with preliminary layoff notices and to afford them other procedural rights will necessarily result in their reemployment.⁶ Respondents claim that the erroneous failure to include these individuals in the district's seniority list will have a rippling effect, rendering the entire layoff proceeding defective. Respondents' argument is

⁵ Under Education Code section 44955(c), if "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."

⁶ See the discussion regarding Julie Cox and Factual Findings 17 and 18.

based on that portion of the *Bakersfield* opinion which states “[C]ertificated teachers assigned to categorically funded programs may be laid off without the procedural formalities due a permanent teacher *only* if the program has expired.” (*Ibid.*, at 1287, original emphasis.)

The district argued that the portion of the *Bakersfield* opinion that respondents relied on was dictum, that the *Bakersfield* opinion itself was contradictory on the issue of the obligation to provide categorically funded employees with notice, and that *Haase v. San Diego Community College District* (1980) 113 Cal.App.3d and *Zalac v. Governing Board of the Ferndale Unified School District* remained good law and stood for the proposition that employment in a categorically funded program does not count towards permanent employment status.⁷

Regardless of the foregoing, these categorically-funded employees (and the local teachers association) were not served with the accusation and thus lacked standing in this administrative proceeding to raise the issue. Neither the administrative law judge nor the Office of Administrative Hearings have jurisdiction under the Education Code to resolve issues involving misclassification of persons not served with required process and afforded a right to a hearing. It is clear that the power to compel the district to reclassify categorically funded employees and to reinstate them to employment if there was misclassification rests with the Superior Court⁸ (see *Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist.*, *supra*, 145 Cal.App.4th 1260 and *California Teachers Assn. v. Vallejo City Unified School Dist. (Vallejo)* (2007) 149 Cal.App.4th 135, where the issue of misclassification and reinstatement was properly resolved through writ filed in the Superior Court).

The Seniority List

20. The FUSD assigned seniority dates to all credentialed employees. All seniority dates related to the employee’s first day of paid service with the District. There was some disagreement with the seniority dates assigned.

21. Colleen Gerke: Gerke is a permanent full-time employee whose seniority date was listed as November 26, 2007. Gerke currently teaches at West Randall Elementary School. FUSD originally employed Gerke on August 1, 2001. In late August 2007, Gerke’s employment was terminated as a result of her failure to pass a California Basic Educational Skills Test

⁷ Education Code section 44909 specifically provides that a governing board may employ categorically funded employees and that service in such a position may not be included for classification as a permanent employment unless (1) the employee served at least 75 percent of the school year, and (2) such person is subsequently employed as a probationary employee in a position requiring certification qualifications.

⁸ California Education Code section 44944, subdivision (c)(3) provides in part:

“ . . . 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”

(CBEST) examination.⁹ She did not request a leave of absence. She passed the third portion of the examination in September 2007, obtained the required certification, and was rehired in October 2007. In the interim, she worked as a day-to-day substitute in different classrooms.

Gerke believed that August 1, 2001, was her proper seniority date since there was no change in her pay, there was no change in her duties, and there was no new additional paperwork required after she was rehired in October 2007. Gerke received a stipend for training that was required before she was rehired, but not a salary.

Gerke's seniority date as set forth on the district's final seniority list was correct.

Erika Sunamoto: Sunamoto is a permanent full-time employee who teaches at Maple Elementary School. Sunamoto and several others have a seniority date of August 21, 2006. FUSD first employed Sunamoto on July 26, 2004. She resigned on June 30, 2006, due to a "family emergency." She did not request a leave of absence. After seven weeks, the family emergency resolved to the extent Sunamoto returned from Ohio to California. FUSD rehired her at that time.

Sunamoto's seniority date as set forth on the district's final seniority list was correct.¹⁰

22. Jonathan Crane: Crane is a probationary II employee whose seniority date is August 31, 2007. He teaches at Fontana High School. Crane argued that his seniority date was incorrect, that he actually began paid service with the district on August 27, 2007, when he attended training for which he was paid. The training was not mandatory and was not associated with Crane's first day of paid probationary service, and attendance at buy-back days is voluntary. Crane did not attend the New Teacher Orientation on August 30, 2007. Crane's first day of service in a paid probationary position was on August 31, 2007.

Crane's seniority date as set forth on the district's final seniority list was correct.¹¹

⁹ California Education Code sections 44252 and 44252.6 specify that candidates for a teaching credential demonstrate, in English, proficiency in basic reading, writing, and mathematics skills. Generally speaking, a person seeking the issuance of a first teaching credential or the renewal of an emergency permit, a provisional internship permit, or short-term staff permit, or a position as a day-to-day substitute must take and pass the CBEST. Applicants for the renewal, reissuance, or upgrading of a non-emergency credential, certificate or permit are exempt from taking the CBEST, as are persons who teach adults in apprenticeship programs, teachers at children's centers, persons who teach subjects that do not require a baccalaureate degree, and any added authorization to teach.

¹⁰ *San Jose Teaches Assoc. v. Allen* (1983) 144 Cal.App.3d 627, 641, affirmed that when a permanent employee is reemployed within 39 months, the employee retains permanent status but does not regain the original hire date.

¹¹ Education Code section 44845 provides that a person is deemed to have been employed on the date on which they first rendered paid service in a probationary position.

CLAD and BCLAD Certifications and Permits

23. The district's need to retain teachers with EL authorizations was well established (Factual Findings 2 and 10A). The district introduced an exhibit entitled EL Authorization (Exhibit 5) which contained information about 16 employees who were given preliminary layoff notices based on their lack of EL authorization. Exhibit 5 was based on records maintained by public employees in the ordinary course of business (Evid. Code, § 1280). The respondents identified in Exhibit 5 included Mitzi Aguilera, Robert Boul, Eloise Choice, Jennifer Daniels, Louise Fredrick, Cristel Marie Garaix, Shirley Gay, Jorge Gerado, Janey Griffin, Robert Hall, Gary Kirby, Garth Masik, Raymond Murphy, Nestor Navarrete, Christopher Northrop, Andrea Olivera-Taylor, Mark Schulte, Pam Tan, Steven Whitley, and Grey Whitney. The exhibit contained a summary of notes related to district contact with these individuals concerning their EL authorizations.

Several employees who were not retained because they did not hold a CLAD or BCLAD certification or emergency CLAD permit claimed they held such permits and should have been retained because they were senior to others who did not receive preliminary layoff notices.

24. Eloise Choice: Choice, a permanent full-time employee, teaches English at Kaiser High School. She does not hold an EL authorization and was misassigned for the 2008-2009 school year. Choice has a seniority date of January 29, 1996. Choice testified she took coursework to get her CLAD certification through the Los Angeles Unified School District, but admitted that she did not take the required examination for certification. Choice testified that she did not know until 2008 that she did not have CLAD certification; until then, she thought CLAD certification was embedded in her credential; this mistaken belief was based on what she claimed she was told by Los Angeles Unified School District. There was nothing presented to corroborate this testimony. Choice did not take the CLAD test in 2008 as a result of family problems. She currently does not hold a CLAD certification or an emergency CLAD permit. She plans to take the CLAD examination in June 2009.

The district established that it sent Choice a letter in September 2007 inquiring about her EL status. In October 2007, the district advised Choice that CLAD certification needed to be completed by January 31, 2008. On January 15, 2008, Choice advised the district that she had not completed the requirements.

The evidence does not support the rescission of the preliminary layoff notice issued to Choice.

25. Louise Fredrick: Fredrick, a permanent full-time employee, teaches at Sequoia Middle School. She does not hold an EL authorization and was misassigned for the 2008-2009 school year. She has a seniority date of September 15, 1997. She holds a clear multiple subject teaching credential, which expires on June 1, 2004 (authorized subject: General Subjects; supplemental authorization: Mathematics). A CLAD certification is not embedded in her credential. The CCTC website does not indicate that Fredrick currently holds any kind of EL authorization.

Fredrick testified that she had an emergency CLAD permit that expired on November 1, 2008, that she took required CLAD training, and that she tested for CLAD authorization in January 2008, but that the results of the testing were nullified as a result of a substitute proctor improperly administering the examination and a testing “mix up.” Fredrick provided a letter from Evaluation Systems which confirmed that Fredrick had complained about CLAD testing at Ganesha High School in Pomona in December 2008 and the approval of a voucher to permit Fredrick to take a CLAD examination at a later date. Fredrick currently plans on taking the CLAD examination offered in June 2009. The district was in no way responsible for the testing “mix-up.”

The district’s file indicates that Mendoza sent a letter to Fredrick in September 2007 regarding Fredrick’s EL authorization, and that the district sent forms for an emergency CLAD permit in October 2007 that resulted in Fredrick being issued a temporary CLAD permit on October 1, 2007. That permit expired on November 1, 2008. In January 2008 and September 2008, the district sent e-mails and other notifications to Fredrick regarding her lack of EL authorization.

The evidence does not support the rescission of the preliminary layoff notice issued to Fredrick.

26. Robert Hall: Hall, a permanent full-time employee whose seniority date is January 25, 2005, teaches at Fontana High School. Hall has a single subject teaching credential in Math and a single subject teaching credential in Health Sciences. Hall testified that he held an emergency CLAD permit, which he thought was valid through December 31, 2009. He testified that he applied to the University of California, Riverside (UCR) for the issuance of a CLAD certificate on March 25, 2009. Hall produced a copy of an email dated April 1, 2009, sent to the UCR CLAD coordinator that stated “Everything on my end is done!”

The California Commission on Teacher Credentialing (CCTC) website, which the parties stipulated was a reliable source of credentialing information, showed Hall held a preliminary single subject teaching credential, which expires on December 1, 2009 (authorized subjects: Foundational Level Math, Health Science), a clear single subject teaching credential which expires on July 1, 2010 (authorized subjects: Foundational Level Math, Health Science), and a certificate of eligibility for the administrative services credential. No information was posted on the website related to a CLAD certificate.

The district’s files showed that an original emergency CLAD permit was issued on December 1, 2007, and that it has been renewed. On December 4 2008, the district sent Hall a third request to provide the district with proof of his EL status. On March 30, 2009, after preliminary layoff notices were issued, Hall presented the district with evidence that he had completed the CLAD requirement. Hall was advised that the district could not update his records until there was confirmation from CCTC.

The evidence does not support the rescission of the preliminary layoff notice issued to Hall.

27. Pamela Tan: Tan, a probationary II employee whose seniority date is August 20, 2007, provides special education services at Ruble Middle School.

The district's files indicates that Tan received an emergency CLAD permit that was effective on September 15, 2007, and thereafter Tan thought she had completed all classes required to apply for a clear CLAD credential. Tan was then informed she needed one more class. In response, the district's notes indicated that, "We applied for a renewal eff: 10/18/08. Renewal returned for new CL-469 to be completed by APU. This form was not required at time of renewal, but CCTC wanted new form anyways. APU applied for Clear CLAD eff: 3/1/09."

According to the CCTC website, Tan holds a preliminary level I education specialist instruction credential (mild/moderate disabilities), which expires on October 1, 2009, a certificate of eligibility for the administrative services credential, a clear CLAD certificate, which was issued on March 2, 2009, and an emergency CLAD permit, which will expire on October 1, 2009.

Under these circumstances, it would not be fair, just or equitable to terminate Tan's employment. Tan's failure to obtain a clear CLAD certification before the preliminary layoff notices were issued was as much the responsibility of the district as it was Tan's responsibility. It is recommended that the preliminary layoff notice issued to Tan be rescinded and that the accusation be dismissed.

Teaching High School with a Multiple Subject Teaching Credential/Special Authorization

28. Permitting a teacher with a supplemental credential to teach 10th, 11th and 12th grade students is inappropriate. The district maintains a curriculum designed specifically for 9th graders in English/Language Arts, but not in courses in Social Studies, Math or Science, which 10th, 11th and 12th graders may attend. Establishing a high school master schedule would be nearly impossible if employees with multiple teaching credentials and supplemental authorizations were retained to teach at the high school level. The district's need to retain high school teachers with single subject credentials was established (Factual Finding 11).

There was no showing that the district's policy of retaining high school teachers with less seniority to teach at the high school level over teachers with more seniority who could not teach above 9th grade level was applied in anything other than even-handed manner. The policy was not discriminatory; it applied to all certificated employees who were similarly situated.

29. Carlos Avina: Avina is a probationary II employee who is employed at Redwood Elementary School. He holds a clear multiple subject teaching credential, which expires on February 1, 2014 (CLAD embedded; authorized subject: General Subjects; supplemental authorization: Social Sciences). Avina has a seniority date of October 20, 2006. Avina taught social sciences at the high school level at the Marshall Fundamental Secondary School in Pasadena, but then resigned from that position.

Avina believed that he was competent to teach Social Science at the high school level and that he should have bumped Elizabeth Morin (a probationary II employee with a single subject

teaching credential in Social Science who teaches at Wayne Ruble Middle School, and who has a seniority date of August 3, 2007), Duran Valdez (a probationary II employee with a single subject teaching credential in Social Science who teaches at Summit High School, and who has a seniority date of August 30, 2007), and William Cardosi (a probationary II employee with a single subject teaching credential in Social Science who teaches at Kaiser High School, and who has a seniority date of August 30, 2007).

There is no specific 9th grade Social Science curriculum at the high school level within FUSD. Avina was not credentialed to teach above the 9th grade level. No one less senior to Avina who holds the same authorizations was retained.

The evidence does not support the rescission of the preliminary layoff notice issued to Avina or those similarly situated.

30. David Baker: Baker, a permanent full-time employee, is employed at Almeria Middle School and has a seniority date of December 1, 2004. Baker holds a clear multiple subject credential with BCLAD certification and a clear specialist instruction credential in reading and language arts. Baker has applied for subject matter authorization in Introductory English, English Composition, and Literature. Baker's credentials do not authorize him to teach English or Language Arts in a departmentalized setting. After the start of the 2008-2009 school year, Baker's class was collapsed and he was required to teach multiple subjects by the district.

Baker was issued a preliminary layoff notice while Loretta Zarow, a permanent full-time employee who teaches at the Sequoia Middle School who has a seniority date of January 30, 2006, was retained. Zarow holds a clear multiple subject teaching credential with a supplemental authorization in English and a clear CLAD certificate, which authorize her to teach in a departmentalized setting. Zarow currently teaches English at Sequoia Middle School. Zarow's preliminary layoff notice was rescinded, while Baker's was not, because he is not eligible to teach in a departmentalized setting.

Others, including Sahar Yahya, a permanent full-time teacher at Fontana Middle School (who has a seniority date of November 28, 2005), were also given preliminary layoff notices. Yahya holds a clear multiple teaching credential with an embedded CLAD certification. Yahya is authorized to teach general subjects and has a "Crosscultural, Language & Academic Development Emphasis" according to the CCTC website. Like Baker, Yahya is not authorized to teach in a departmentalized setting.

The evidence does not support the rescission of the preliminary layoff notice issued to Baker or to those (such as Yahya) who are similarly situated.

31. Richard Gallardo: Gallardo, who grew up in Fontana and was educated at FUSD, lives in Fontana and has children who attend FUSD. He holds a clear single subject teaching credential, which expires on September 1, 2010 (authorized subjects: CLAD embedded, Physical Education, supplemental authorization in Biological Sciences). These credentials do not permit Gallardo to teach Health (except in a P.E. class), or Earth Science or any Physical Science at any

grade level, but only Biological Science. Gallardo is a probationary II employee whose seniority date is July 24, 2007.

Gallardo previously taught for eight and a half years in the Pomona Unified School District and he had experience teaching in the fields of Physical Education, Biology, Earth Science, and Health Education. He taught Physical Science at Fontana Middle School for seven days (July 31, 2006 through August 8, 2006), but he was unable to be released from a contract (which he then fulfilled) requiring him to teach the 2006-2007 school year with the Pomona Unified School District (PUSD).

Gallardo claimed he could teach a variety of subjects in grades nine and below and that persons who were junior were being retained to perform services he was authorized and competent to perform. In fact, no one less senior than Gallardo who held the same authorizations was retained.

The evidence does not support the rescission of the preliminary layoff notice issued to Gallardo or to those who are similarly situated.

32. Angela Holguin: Holguin, a permanent full-time employee, teaches second grade at Curtis Elementary School. Holguin holds a preliminary multiple subject teaching credential, which expires on August 1, 2012 (authorized subject: General Education; supplemental authorizations: Science, Mathematics, and English). Holguin has a seniority date of September 1, 2006 (as do many others). Holguin wondered why she was not being retained when Debra Fisher-Hinshaw, a permanent full-time employee with a seniority date of September 5, 2006, who teaches at the Sequoia Middle School, was retained.

Fisher-Hinshaw currently teaches English/Language Arts at Sequoia Middle School. She holds a multiple subject/SB 2042 credential, with a subject matter authorization in English. Fisher-Hinshaw is authorized to teach 9th grade English to any grade level student at the high school level. Her authorization permitted her to bump into an existing position, a position Holguin was not authorized to fill.

The evidence does not support the rescission of the preliminary layoff notice issued to Holguin or to those who are similarly situated.

33. Riste Simnjanovski: Simnjanovski is a probationary II employee with has a FUSD seniority date of January 2, 2007. He holds a clear multiple subject teaching credential, which expires on September 1, 2010 (CLAD embedded; authorized subject: General Subjects; supplemental authorization: Social Sciences). He teaches at Fontana Middle School, in a program funded through QEIA. Simnjanovski has never taught at the high school level, although he currently teaches or has taught at the undergraduate level at California Baptist University, the University of Redlands, and at the University of LaVerne. He hopes to receive a Ph.D. in Public Administration in 2010.

Simnjanovski claimed he could teach Social Science in grades nine and below and that persons who were junior were retained to perform services he was authorized and competent to

perform. Simnjanovski was not credentialed to teach above the 9th grade level, and there is no specific 9th grade Social Studies curriculum open only to 9th grade students at FUSD.

Travis Ewers, a teacher referred to at the hearing, currently teaches Social Science at Fontana Middle School. Ewers holds a single subject Social Science credential and SB 2042 authorization, which permits Ewers to teach in all areas of Social Science to all grade levels. Simnjanovski does not hold such authorization. Ewers did not receive a layoff notice.

No one less senior than Simnjanovski who held the same authorizations was retained. The evidence does not support the rescission of the preliminary layoff notice issued to Simnjanovski or to those who are similarly situated.

Culinary Arts is a PKS

34. Lori Chavez: Chavez is a permanent full-time employee who teaches Culinary Arts at A. B. Miller High School. She holds a clear single subject teaching credential, which expires on January 1, 2011 (authorized subject: Home Economics). Chavez received a preliminary layoff notice as a result of the governing board reducing one full time equivalent position in Culinary Arts. Chavez testified that she was unaware that the culinary arts class at Miller High School was going to be eliminated. She did not know if anyone junior to her in seniority was being retained to teach Culinary Arts elsewhere within the district.

The district is eliminating a Culinary Arts position at Kaiser High School. The Culinary Arts instructor at Kaiser High School has more seniority than Chavez, and will move to Miller High School to continue employment there. Chavez, the least senior Culinary Arts instructor, was not retained.

The district was authorized to reduce one full-time equivalent position of Culinary Arts. Chavez did not establish that a teacher who was more junior was being retained by FUSD to provide education in Culinary Arts.

The evidence does not support a rescission of the preliminary layoff notice that was issued to Chavez.

The Skipping of a Junior NROTC Instructor

35. Eduardo Din: Din is a permanent full-time ROTC instructor at Miller High School. He holds a designated subject teaching credential. He has a seniority date of January 21, 1996.

FUSD asserted that it had cause to “skip” a more junior ROTC instructor, Alphonso Jones, a more junior employee. To support its claim that Jones was more qualified, FUSD submitted a letter signed by Commander Liles.

Din contested FUSD’s attempt to skip Jones. Din claimed that Commander Liles served together overseas in the United States Navy and were good friends. Although Din’s testimony

concerning Commander Liles' motivation in writing the letter was based on hearsay and may have been speculative, his objection was nevertheless well founded. First, no objective factors were provided in Commander Liles' letter or in Alvarez's testimony to support the skipping. Second, the attempt to skip Jones over Din appeared to be no more than an effort to dismiss Din for cause without affording him the statutory protections to which he is entitled in such a for-cause termination proceeding.

It is recommended that the services of Eduardo Din be retained because he is senior to Alphonso Jones and it was not established that Jones possessed special education, training, or experience that justified his being skipped over Din.

Others

36. Festus Vanjah: Vanjah is a probationary I employee who teaches at Sequoia Middle School. Vanjah holds a preliminary designated subjects Adult Education teaching credential (this credential authorizes Vanjah to teach elementary and secondary basic skills, English as a Second Language, life science including general science, agriculture, and physical science in courses organized primarily for adults). Vanjah also holds a preliminary single subject teaching credential, which expires on May 1, 2013 (authorized subjects: Biological Sciences and Chemistry). Counsel for the district stipulated that Vanjah was a highly qualified instructor. Vanjah's seniority date is March 26, 2008.

Vanjah failed to establish that any employee who was junior was retained to render the services for which he was employed. He offered two examples, but in both instances those individuals, like Vanjah, received preliminary layoff notices.

The evidence does not support a rescission of the preliminary layoff notice that was issued to Vanjah.

37. Hsin-Min Lee: Lee is a permanent full-time employee who teaches at Juniper Elementary School. She holds a clear multiple subject teaching credential, which was issued on September 4, 2003, before she was hired by the district, which expires on October 1, 2013 (CLAD embedded; authorized subject: General Subjects; supplemental authorization: English). Her seniority date is November 4, 2004. Several teachers with less seniority than Lee who hold exactly the same credential and EL authorization (e.g., Karen Nelson, Esther Macias, Loretta Zarow, Shelly Coakley, and Debra Fisher-Hinshaw) were retained to provide services which Lee, a more senior employee, is competent to render.

On the basis of the evidence, it is recommended that Hsin Min-Lee's notice of rescission and accusation be withdrawn.

Application of the Tie-Breaking Criteria

38. Nicole Dzama: Dzama is a permanent full-time employee who teaches at Alder Middle School. Vanjah holds a certificate of clearance (a document issued by the CTC to an individual whose moral and professional fitness meets standards established by law) and a clear

multiple subject teaching credential which expires on October 1, 2011 (authorized subject: General Subjects). Dzama’s seniority date is July 26, 2004, the same date of hire as many other FUSD employees including Latisha Easter, for whom the preliminary layoff notice was rescinded.

It was established that the district properly applied the tie-breaker criteria (Factual Finding 8) to determine who should receive a layoff notice between those elementary school teachers having the same date of service. The application of the tie-breaker was in the best interest of the district and the students.

The evidence does not support a rescission of the preliminary layoff notice issued to Dzama and to the other elementary school teachers whose seniority date is July 26, 2004.

LEGAL CONCLUSIONS

Statutory Authority

1. Education Code section 44944 provides in part:

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

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

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

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

. . .

(3) The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof. The proposed decision shall be prepared for the

governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition. None of the findings, recommendations, or determinations contained in the proposed decision prepared by the administrative law judge shall be binding on the governing board. Nonsubstantive procedural errors committed by the school district or governing board of the school district shall not constitute cause for dismissing the charges unless the errors are prejudicial errors. Copies of the proposed decision shall be submitted to the governing board and to the employee on or before May 7 of the year in which the proceeding is commenced. . . .”

2. Education Code section 44955 provides in part:

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

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

. . .

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

. . .

(c) Notice of such termination of services shall be given before the 15th of May . . . and services of such employees shall be terminated in the inverse of the order in which they were employed, as determined by the board in accordance with the provisions of Sections 44844 and 44845. In the event that a permanent or probationary employee is not given the notices and a right to a hearing as provided for in Section 44949, he or she shall be deemed reemployed for the ensuing school year.

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

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

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

(1) The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess.

(2) For purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws.”

Jurisdiction

3. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied as to all respondent employees who were identified in Exhibit 1 to the accusation.

The Reduction of Particular Kinds of Services

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

5. A reduction of kindergarten through sixth grade classes constitutes a reduction of a particular kind of service, and the termination of elementary school teachers who provide those services is permitted under Education Code section 44955. (*California Teachers Association v. Board of Trustees (Goleta)* (1982) 132 Cal.App.3d 32, 34-37.)

6. The services identified by FUSD's governing board were "particular kinds of service" within the meaning of Education Code section 44955, subdivision (b). The board's reduction of particular kinds of services was not based on fraudulent, arbitrary, or capricious motivation.

Bumping and Skipping

7. Education Code section 44955 provides that seniority determines the order of dismissals, and that as between employees with the same first date of paid service, the order of termination is determined on the basis of the needs of the district and its students. Senior employees are given “bumping” rights and their employment will not be terminated if there are junior employees retained who are rendering services which the senior employee is certificated and competent to render. Conversely, a district may move employees upward from the bottom of the seniority list, “skipping” and retaining junior employees who are certificated and competent to render services which more senior employees are not. (*Alexander v. Board of Trustees* (1983) 139 Cal.App.3d 567, 571-572.)

The district initiated and followed a systematic procedure for identifying employees in the services most directly affected by the reduction and elimination of particular kinds of services. Careful evaluation of each employee’s credentials and seniority dates preceded the determination of what bumping rights, if any, an employee had. Adjustments were made to the seniority list where indicated.

The district’s skipping of junior employees holding EL authorizations, two junior employees providing community day school instruction, one junior employee providing services as an ASB advisor, and one junior employee on special assignment providing ESL services was reasonable and was in the best interest of the district and its students. The district’s decision to retain employees with a single subject teaching credential to teach high school over more senior employees with multiple subject teaching credentials and a special authorization, which limited their competency to teach all high school students, was reasonable and was in the best interests of the district and its students.

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

The Domino Theory

8. Respondents argued that because Julie Cox was retained as a result of the district’s inadvertent failure to serve her with a preliminary layoff notice, the clear language of Education Code section 44955, subdivision (b) required that all employees senior to Cox be retained because: “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.”

Respondents’ argument is frequently made in these kinds of proceedings and is known as “the domino theory.”

In determining which respondents must be retained, the district need not retain all senior employees to the junior employees who were not noticed. The service of notice error was not a basis for invalidating the entire layoff or imposing a “domino effect.” Education Code section 44949, subdivision (c)(3), specifically provides: “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.”

Alexander v. Board of Trustees (1983) 139 Cal.App.3d 567 adopted a “corresponding number” approach in not applying the over-inclusive remedy of forcing the school district to retain all senior employees to junior employees who were not noticed. The remedy was tailored to correct the mistake to identify only those employees who were directly prejudiced by the error. The Court held:

“Because at least some of the persons skipped should have received the notices, a corresponding number of the most senior of the employees who were not reemployed must have been improperly given notices. The trial court must determine which of the Teachers suffered prejudicial error in this case.” (*Id.* at p. 576.)

Thus, the adjustment to be made in this case is limited to reinstatement of only the most senior elementary school teacher who received a preliminary layoff notice, the only employee who was actually prejudiced by the mistake.

Determination

9. The charges set forth in the accusation were sustained by the preponderance of the evidence and were related to the welfare of the Fontana Unified School District and the pupils thereof. FUSD’s staff made assignments and reassignments in such a manner that employees were retained to render any service which their seniority and qualifications entitled them to render except as otherwise noted herein.

This determination is based on all factual findings and on all legal conclusions. Any matter not specifically addressed herein was considered and rejected.

RECOMMENDATION

It is recommended that the governing board rescind the preliminary layoff notices and accusations issued to the most senior elementary school teacher who was served with a preliminary layoff notice which has not yet been rescinded and to respondents Maria Alcala-Canto, Kim Auston, Camelia Bogdan-Olaru, Jennifer Callahan, William Cardosi, Kelsy Clifton, Robert Davis, Shauna Desouza, Eduardo Din, Latisha Easter, Debra Fisher-Hinshaw, Mary Gotte, Eric Groeber, Yuliana Guerra, Wayne Harkley, Virginia Johnson, John Knous, Rosa Kobulnik, Wendy Lu, Hsin Min-Lee, Garth Masik, Tamara Moore, Elizabeth Morin, Ryan Murphy, Karen Nelsen, Eric Nelson, Lori Payne, Pamela Powers, Richard Rausch, Lindsey Riat, Eric Sahl, Omar Shaheed, Gideon Shuster, Anthony Silva, Jeffrey Steinberg,

David Taylor, Pamela Tan, Kathryn Walker, Daniel Walker, Steven Whitley, Mark Younglove, and Loretta Zarow.

It is recommended that the governing board issue layoff notices to the certificated employees whose names appear in the list set forth below that their employment will be terminated at the close of the current school year and that their services will not be needed for the 2009-2010 school year.

DATED: _____

JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings

NOTICES TO BE SERVED UPON:		
Last	First	Site
Abrego	Ana	Hemlock
Abundis	Valerie	R-P
Aguilar	Cris	Summit HS
Aguilera	Mitzi	Summit HS
Ahmed	Konan	Almond
Aldridge	Sylvia	Oleander
Allen	Jennifer	Sierra Lakes
Altamirano	Martha	R-P
Amador	Perry	Summit HS
Anaya	Patricia	Beech
Andersen	Adam	So Tamarind
Anderson	Marco	Redwood
Angelo	Richard	Fontana HS
Anguiano	Alcira	Redwood
Annesser	Andrea	Sequoia MS
Aragon	Starlena	Oak Park
Arbizo	Michael	Beech
Arratia	Angel	Binks
Aston	David	Fontana HS

Atilano	Madeline	Porter
Au	Cynthia	Chaparral
Avina	Carlos	Redwood
Bahramand	Sweeta	Grant
Baker	David	Almeria MS
Barnett-Mendoza	Sommer	Canyon Crest
Barrera	Melissa	Poplar
Bartels	Kevin	Ruble MS
Bautista	Caren	Binks
Bees	Michael	Ruble MS
Belikoff	Jennifer	Oleander
Belmontez	Mary	Fontana HS
Belmore	Davi	Kaiser HS
Bennett	Amy	Citrus El
Beno	Caroline	R-P
Bernal	Cynthia	Oleander
Binks	Alicia	Primrose
Blocker	Jennifer	Beech
Boul	Robert	AB Miller
Bradshaw	Jessica	Citrus El
Braggins	Elena	Birch HS
Brannum	Robill	Poplar
Brewart	Lauren	Cypress
Brewer	Karla	R-P
Bride	Jenny	Canyon Crest
Briseno	Richard	West Randall
Bristel	Renee	Alder MS
Brown	Carolyn	Porter
Buchanan	Cynthia	Sierra Lakes
Buchanan	Michael	AB Miller
Burciaga	Miroslava	Hemlock
Burris	Jacqueline	Fontana MS
Butorac	Christopher	Truman MS
Caballero	April	Beech
Caceres	Maria	Redwood
Caires	Stephanie	Poplar
Callister	Lindsey	R-P
Caraway	Shayna	R-P
Carlos	Ana	R-P
Carter	Michael	Fontana HS

Carter	Natalie	Fontana HS
Castillo Jr	Jose	Ruble MS
Cerda	Jesse	Sequoia MS
Champine	Kimberly	Fontana HS
Chavez	Lori	AB Miller
Cherniss	Rebekah	West Randall
Chiek	Tessa	Primrose
Choice	Eloise	Kaiser HS
Church	Donna	Comp Hlth
Clemans	Barbara	So Tamarind
Coburn	Kathleen	R-P
Concepcion	Angelita	Redwood
Conriquez	Victoria	Almond
Coonce	Candice	Binks
Cordero	Alice Faye	Maple
Cordura	Patricia	Porter
Countz	Victoria	So Tamarind
Crane	Jonathan	Fontana HS
Crayne	Danielle	Beech
Crump Jr	David	Ruble MS
Danganan	Michelle	Sierra Lakes
Daniels	Jennifer	Inst Svs
Davis	Jack	Sequoia MS
Davis-Fox	Brittney	Citrus El
Dawson	Marajha	Southridge
De Bruhl	Michael	Ruble MS
Deem	Jacob	So Tamarind
Deitz	Jamie	Porter
Del Castillo	Anel	Summit HS
Dennis	Kelly	Citrus El
Devine	Lydia	Alder MS
Diaz	Edier	Citrus El
Diaz	Jose	Primrose
Dolven	Tiffany	Summit HS
Dominguez	Jodi	Alder MS
Dort	Summer	R-P
Dougan	Brenda	Southridge
Downey	Sherrie	Canyon Crest
Dragoon	Danielle	Sierra Lakes
Duguay	Jason	Fontana MS
Dunn	Shavon	Porter

Dupas	Amy	Alder MS
Dzama	David	Alder MS
Dzama	Nicole	Alder MS
Eacret	Megan	Summit HS
Eagan	Michelle	West Randall
Edmiston	Jodie	Fontana MS
Edmiston	Lisa	Ruble MS
Edwards	Jessica	Fontana HS
Edwards	Maria Cristina	Fontana HS
Elias	Christine	Citrus El
Ellis	Debra	Southridge
Esquivias	Elizabeth	Palmetto
Felton	Lana	Oleander
Figueroa	Jennifer	R-P
Fleischmann	Kimberly	Sierra Lakes
Flores	Jennifer	Sierra Lakes
Flores	Kristen	Fontana HS
Flores	Shannon	Comp Hlth
Flynn-Bento	Lisa	Truman MS
Franco	Marcela	West Randall
Fredrick	Louise	Sequoia MS
Freeman	Lauren	Southridge
Fresquez Jr	Armando	Fontana HS
Fukuhara	Shirley	R-P
Gallardo	Richard	Fontana MS
Garaix	Christel Marie	Fontana HS
Garces	Ana	Porter
Garces	Maria	Sierra Lakes
Garcia	Adriana	Date
Garcia	Leticia	Sch of LD
Gay	Amber	Fontana MS
Gay	Shirley	Fontana MS
Gepford	Timothy	Summit HS
Gerardo	Jorge	Summit HS
Gerke	Colleen	West Randall
Goetting	Jane	Kaiser HS
Gomez	Theresa	Mango
Gonzales	Christina	Juniper
Gonzalez	Blanca	Sequoia MS

Gonzalez	Rosa	Almond
Griffin	Janey	Fontana HS
Grijalva	Steven	Poplar
Guggisberg	Keri	Binks
Gutierrez	Conseulo	Tokay
Gutierrez	Robert	Fontana HS
Gutierrez-Keating	Arlett	Southridge
Guzman	Liliana	So Tamarind
Hackenmiller	Teressa	Palmetto
Hall	Mirna	Maple
Hall	Robert	Fontana HS
Haston	Christine	Date
Herbert	Pamela	Poplar
Hernandez	Arcelia	Poplar
Hernandez	Beatriz	Porter
Hernandez	Deserea	Citrus El
Hernandez	Kristina	R-P
Hernandez	Priscilla	Primrose
Hernandez	Tamara	Primrose
Heyes	Jamie	West Randall
Higa	Erina	West Randall
Hillquist	Kristi	West Randall
Holguin	Angela	Citrus El
Howry	Teva	Kaiser HS
Huth	Jason	Fontana MS
Huyen	Mimi	So Tamarind
Jimenez	Edith	Grant
Jimenez	Patsy	Oleander
Joh	Jung	R-P
Jolivette	Monica	Alder MS
Jones	Korina	Maple
Jordan	Redwood	Porter
Juback	Alexander	Fontana HS
Kavianian	Reza	Alder MS
Kennebrew	Cynthia	Comp Hlth
Kennedy	Jerry	Porter
Kim	Taemi	Sierra Lakes
Kirby	Gary	Almeria MS
Knapp	Lindsey	Oleander
Knecht	Kathryn	Oleander

Konkel	Audrey	Ruble MS
Kuntz	Amy	Oleander
Lance	Heidi	So Tamarind
Leach	Christopher	Sequoia MS
Leogrande	Deborah	Birch HS
Lew	Aubry	Alder MS
Lewis	Rhonda	No Tamarind
Litwinski	Theresa	R-P
Logiudice	Shenee	Fontana HS
Lopez	Ermelinda	Binks
Lopez	Nick	Sequoia MS
Luna	Angelica	Grant
Luszeck	Reid	Citrus HS
Mabrie	Cheri	Fontana MS
Macmillan	Cristy	Citrus El
Magana	Cynthia	Primrose
Makkawi	Jihad	Fontana MS
Mann	Stephen	AB Miller
Marchan-Greiner	Valentine	Almeria MS
Marenco	Sarah	Locust
Marquez	Ricardo	Maple
Martin	Carla	Comp Hlth
Martinez	Sonia	Citrus El
Matsukawa	Mika	Oleander
Mc Coy	Melissa	Maple
Mc Intire	Stacey	Beech
Mcmaster	Crystal	Primrose
Mejico-Dixon	Elena	Sierra Lakes
Mendoza	Joann	R-P
Miranda	Leticia	Palmetto
Moore	Brandon	Fontana HS
Mora	Armando	Tokay
Moreno	Rey	Oleander
Murillo	Albert	Summit HS
Muro	Hector	Redwood
Murphy	Raymond	Ruble MS
Muttukumar	Melissa	Fontana HS
Nafius	Danielle	Canyon Crest
Navarrete	Nestor	Southridge
Nelson	Elizabeth	Date

Ness	Michele	Sierra Lakes
Northrop	Christopher	Fontana HS
Okonkwo	Beatrice	Comp Hlth
Oliveira-Taylor	Andrea	Summit HS
O'Neill	Daniel	Live Oak
Orison	Jonathan	Summit HS
Ortega	Isela	Truman MS
Ortiz	Martha	Beech
Owens	Nikia	Canyon Crest
Pagliero	Deborah	Locust
Palasek	Dwayne	Cypress
Patel	Lina	Palmetto
Patel	Neelu	Palmetto
Perkins	Natalie	Comp Hlth
Persky	Christopher	Canyon Crest
Phaneuf	Ashleigh	Primrose
Picon	Ena	Beech
Pierce	Amanda	Alder MS
Plunkett	Lisa	Beech
Porrirt	Suleika	Live Oak
Preciado	Nancy	Palmetto
Prieto	Marlene	Sequoia MS
Proctor	Robin	Beech
Ragan	Patricia	Palmetto
Ramaglia	Kristin	Alder MS
Ramirez	Michaela	Oleander
Rana	Sonia	Fontana HS
Raymond	James	Southridge
Reaser	Jacqueline	Tokay
Reed	Erica	Poplar
Reeves	Michelle	Fontana HS
Rehage	Virginia	Beech
Reyes	Cristina	So Tamarind
Rivera	Cynthia	Primrose
Rivera	Lisa	Southridge
Roberts	William	Mango
Rodriguez	Noel	Oleander
Rodriguez	Olivia	So Tamarind
Rogers	Ami	Hemlock
Rose	Nancy	Poplar

Rowe	Cynthia	Maple
Rundlett	Valeriana	Kaiser HS
Russo	Rose	So Tamarind
Salas	Gloria	Alder MS
Salazar	Rosalie	Summit HS
Sanchez	Argelia	Redwood
Sanchez	Irene	Alder MS
Sanchez	Sam	Maple
Sandoval	Vilma	Canyon Crest
Santiago	Felishia	Truman MS
Sarreal-Dam	Rachel	Summit HS
Scates	Julie	Almond
Schoenherr	Diana	Primrose
Schuett	Sarah	Tokay
Sewell	Teresa	West Randall
Sharp	Laura	Porter
Simnjanovski	Riste	Fontana MS
Sjol	Diana	Maple
Smith	Daniela	Citrus El
Solis	Victor	Summit HS
Soria	Jamie	No Tamarind
Soriano	Robert	So Tamarind
Soto	Louise	Grant
Stuhrmann	Sharon	Oleander
Sullenger	Amanda	Ruble MS
Sullivan	Pamela	Fontana MS
Sunamoto	Erika	Maple
Takemoto	Connie	Citrus El
Tatum Jr	Michael	AB Miller
Temple	Nancy	Palmetto
Tessitore	Karolyn	Alder MS
Tibbetts	Amy	Oleander
Tisler	Tamara	Summit HS
Titus	Eugene	Maple/So Tam
Torres	Maricela	Porter
Torres	Tina	Fontana HS
Trejo	Nadia	Fontana MS
Tuttle	Rebecca	Maple
Uribe	Pamela	Oleander
Uribe	Sandra	Citrus El
Van Heerde	Suzanne	R-P

Vanjah	Festus	Sequoia MS
Vazquez	Melissa	Juniper
Velasco	Jennifer	Cypress
Velasquez	Farida	Maple
Votruba	Emily	West Randall
Washburn	Polly	Comp Hlth
Watson-Rodgers	Leah	Hemlock
Weidemann	Carolyn	Palmetto
Weischedel	Lauren	Locust
Wheeler	Rachel	Poplar
Whitcomb	Kristi	Summit HS
Whitley	Steven	Birch HS
Whitney	Gregory	Alder MS
Willard	Donna	Almond
Williams	Heather	Oleander
Williams	Yvette	R-P
Willis	Elonda	Maple
Willis	Thomas	Fontana HS
Willy III	John	Alder MS
Wilson	Nubia	Locust
Windham	Marianne	Summit HS
Wislofsky	Chelsea	Sequoia MS
Woltz	Courtney	AB Miller
Yahya	Sahar	Fontana MS
Yamarone	Melina	Maple
Yelin	Timothy	Alder MS
Zarate	Kiry	Date
Zimmer	Jean	Palmetto
Zubia	Robert	Ruble MS