

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

In the Matter of the Accusation Against:

OAH No. 2009030224

Respondents listed in Appendix A.

**PROPOSED DECISION**

Donald P. Cole, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Upland, California on April 20, 2009.

Melanie A. Petersen, Fagen, Friedman & Fulfroost LLP, represented the Upland Unified School District.

Shirley Lee, Schwartz, Steinsapir, Dohrmann & Sommers, represented the respondents listed in Appendix A.

The matter was submitted on April 27, 2009.<sup>1</sup>

**FACTUAL FINDINGS**

1. Gary Rutherford, Ed.D., made and filed the accusation dated March 26, 2009, in his official capacity as the Superintendent of the Upland Unified School District.

2. Respondents<sup>2</sup> are certificated district employees.

3. On February 24, 2009, the board adopted Resolution 02-24-09(b), determining that it would be necessary to reduce or discontinue particular kinds of services at the end of

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<sup>1</sup> The parties submitted post-hearing briefs on April 27, 2009. On the same date, the district's brief was marked for identification and received as Exhibit 14, respondents' brief was marked for identification and received as Exhibit D, the record was closed and the matter was deemed submitted.

<sup>2</sup> The District initially identified 78 certificated employees for layoff. Due to attrition and for other reasons, the 28 individuals listed in Appendix A remain respondents in this proceeding.

the current school year. The board determined that the particular kinds of services that must be reduced for the 2009-2010 school year were the following full time equivalent (FTE) positions:

<u>Particular Kind of Service</u>	<u>Full-Time Equivalent</u>
Elementary Teacher	53
Counselors	3.5
Jr. High Business	1
Jr. High Drama	1
Jr. High English	1
Jr. High Physical Education	2
Jr. High Science	1
Jr. High Social Science	2
HS Business	1
HS English	4
HS Foreign Language – French	1
HS Life Science	3
HS Physical Education	2
HS Physical Science	1
HS Social Science	1
HS Wood Shop	1

The proposed reductions totaled 78.5 FTE positions.

4. The board directed the Superintendent to determine which employees' services would not be required for the 2009-2010 school year as a result of the reduction of the foregoing particular kinds of services. The board further directed the Superintendent to send appropriate notices to all certificated employees of the district who would be laid off as a result of the reduction of these particular kinds of services.

5. On or before March 15, 2009, the district timely served on respondents a written notice that the Superintendent had recommended that their services would not be required for the upcoming school year. The notice made reference to the resolution, which was enclosed, as setting forth the reasons for the recommendation. The notice advised respondents of their right to a hearing, that each respondent had to deliver a request for a hearing in writing to an identified district representative by the date specified in the notice, a date which in each case was more than seven days after the notice was served, and that the failure to request a hearing would constitute a waiver of the right to a hearing.

The recommendation that respondents be terminated from employment was not related to their competency as teachers.

6. Respondents timely filed written requests for hearing to determine if there was cause for not reemploying them for the upcoming school year.<sup>3</sup> The accusation, along with a notice of hearing and certain other documents, was thereafter timely served on all respondents, except for respondents Mark Alzamora, Kara Andersen, Sara Farnworth, Sarah Fash, Kristi Gates, and Kim Spears.<sup>4</sup> Respondents timely filed notices of defense.<sup>5</sup> All pre-hearing jurisdictional requirements were met.

7. Respondents are probationary or permanent certificated employees of the district.

8. The services the board addressed in Resolution No. 02-24-09(b) were “particular kinds of services” that could be reduced or discontinued within the meaning of Education Code section 44955. The board’s decision to reduce or discontinue these particular kinds of services was not arbitrary or capricious and constituted a proper exercise of discretion.

9. 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.

10. The board considered attrition, including resignations, retirements and requests for transfer, in determining the actual number of necessary layoff notices to be delivered to its employees. No evidence was presented that any known positively assured attrition was not considered.

11. The parties stipulated that Trisha Banks Noble and Jennifer Wagner, both of whom have an August 21, 2008, seniority date, have hire dates of May 5, 2008, and April 24, 2008, respectively. By virtue of those hire dates, they move up to the second and third positions on the tiebreaker list for August 21, 2008. Although these modifications do not allow the respondents to avoid these lay off proceedings, the modifications may play a significant role in their positions on any future rehire/reinstatement lists.

12. No certificated employee junior to any respondent was retained to perform any services which any respondent was certificated and competent to render.

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<sup>3</sup> The district contended that seven individuals did not file requests for hearing on an individual basis. However, each of these seven individuals was identified and included in a joint request for hearing timely filed on behalf of all respondents by their counsel.

<sup>4</sup> Respondents did not assert any procedural defect based on the failure of the district to serve these six individuals, who were among the seven who did not file individual requests for a hearing. Further, by virtue of the joint notice of defense submitted on their behalf, these six respondents have waived any procedural defect relating to service of the accusation. By virtue of counsel’s appearance on their behalf at the hearing, these six respondents also waived any failure of the district to properly serve them with the notice of hearing.

<sup>5</sup> Most respondents filed individual notices of defense; all respondents were identified and included within a joint notice of defense filed on their behalf by their counsel.

### *COA and Davis Bill Authorization*

13. Approximately 16 district teachers are on assignments outside of their credential pursuant to Education Code section 44258.3 or 44258.7. These provisions permit a district to assign teachers outside of their credential on a temporary basis to meet specific district needs. The two categories of special assignments reflected in these Code provisions are sometimes referred to as “Davis bill” and “Committee on Assignments” (COA) authorization. Teachers must consent to being assigned outside of their credential pursuant to either option. For purposes of this lay off proceeding, the district ordered teachers by seniority, and did not distinguish between teachers assigned outside their credential and those assigned within their credential.

14. Robert DeJournett has a clear multiple subject credential; he also has COA authorization to teach physical education and Davis bill authorization to teach math. His seniority date is September 4, 1992. Since 2003, he has taught physical education at the high school level. Scott Robertson has a clear mild to moderate disabilities (special education) credential, and is COA authorized to teach physical education. He teaches RSP (resource specialist program), a special education course, at the high school level, and is also the head girls volleyball coach, for one period per day. His seniority date is August 30, 2000. John McNally has a clear single subject social science credential, and is COA authorized to teach physical education. He teaches social science (specifically economics and government) at the high school level, and is also the head boys and girls Varsity basketball coach (two periods per day). His seniority date is August 29, 2001. Dean Connor teaches physical education at Hillside Continuation High School. He has a clear single subject social science credential. He has neither a COA nor Davis bill authorization to teach physical education. His seniority date is September 3, 1992.<sup>6</sup>

Sarah Farnworth teaches physical education at the high school level. She has a clear single subject physical education credential. Her seniority date is August 22, 2007. Deborah Panattoni teaches physical education at the junior high level. She also has a clear single subject physical education credential. Her seniority date is Aug 24, 2005. Respondents assert that Farnworth and Panattoni should be retained because DeJournett, Conner, McNally, and others are teaching physical education or coaching sports teams outside their authorized credentials.

15. Kelly Hogan teaches Spanish and English at the high school level. She has a clear single subject credential in Spanish, and a Davis bill authorization to teach English. Her seniority date is September 5, 1991. Leslie Muradian teaches English at the junior high school level. She has a clear multiple subject credential, and a Davis bill authorization to teach English. Her seniority date is December 17, 1979.

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<sup>6</sup> Counsel for respondents asserted that Conner is teaching in an assignment that is outside the authorization of his credential. Counsel for the district argued that Conner is teaching within the authorization of his credential, since he is teaching at a continuation school. Neither party presented evidence or legal authority in support of their position.

Marc Alzamora, Daura Beard, Rebecca Coduto, Justine Peterson and Dana Shool all are English teachers at the secondary level and all have single subject English credentials. They are listed here in order of seniority, with Alzamora being the most senior. Respondents assert that Alzamora and Beard (the latter on a part-time basis) should be retained because Hogan and Muradian are teaching English outside their authorized credentials.

16. Kathy Kilsby teaches physical education and drama at the junior high school level. She has a clear single subject physical education credential, a clear LH/RSP (learning handicapped/resource specialist) certificate, and a COA authorization to teach drama. Her seniority date is September 2, 2003. Christine Kolb teaches drama at the high school level. She has a single subject English credential. Her seniority date is October 24, 2005. Kilsby was to be laid off pursuant to the junior high school drama PKS reduction. Because she had a LH/RSP (learning handicapped resource specialist) credential, the district determined that she could bump Leila Hage, who is assigned to an RSP position and who has a lower seniority date. Because of attrition, Hage's lay off notice was, however, rescinded; Hage will be assigned to a special education RSP position that has opened up. Accordingly, the district will lay off neither Kilsby nor Hage.

Respondents assert that in this instance, the district properly determined that Kilsby, who lacks a credential in English, was designated for lay off in lieu of the less senior Kolb, who possesses such a credential.<sup>7</sup>

#### *Project Lead the Way*

17. David Smith teaches industrial arts at the junior high level. He has a preliminary credential in industrial arts and education. His seniority date is August 21, 2008. Smith was initially designated for layoff, since he was bumped by a more senior industrial arts teacher. However, another position became available for the more senior teacher, so that the latter no longer needed to bump Smith; for this reason, the district rescinded Smith's lay-off notice.

Pursuant to the rescission of his lay off notice, Smith is scheduled to teach three periods of industrial arts (more specifically, wood shop) next year, and two periods in a program new to the district, "Project Lead the Way" (PLTW).<sup>8</sup> PLTW is a program that promotes pre-engineering courses for secondary school students. PLTW is considered an "elective" course at the junior high level, i.e., it cannot be used to take the place of a required science or math course.

The district's assistant superintendent for human resources testified that she believed either a technology, computer science, or industrial arts credential would be necessary to

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<sup>7</sup> Respondents' contentions pertaining to COA and Davis bill authorization issues are discussed in Legal Conclusion 6.

<sup>8</sup> Like most teachers, Smith has one period reserved for preparation.

teach PLTW. She did not know whether a science or math credential would be sufficient. When Smith's lay off notice was rescinded and he was brought back to teach industrial arts, the district determined that he was "the best fit" for PLTW. The determination that Smith was "the best fit" was made on the basis of his credential and the recommendation of his site administrator. The district did not attempt to compare Smith to other potential candidates, and did not inquire, for example, whether any other teacher had a science, engineering, or math background.

Neither the assistant superintendent for human resources nor the district's credential technician had much (if any) familiarity with PLTW. On the date of the hearing, the technician spoke to a representative of the San Bernardino County Office of Education, who told her that an industrial technology, math, and/or science credential could be sufficient to teach PLTW, *depending on what specific subject was being taught*.

18. Marizka Rivette teaches science at the high school level. She has a preliminary single subject credential in business and a current Davis bill authorization to teach science. Rivette has a bachelor of science degree in Management Information Systems. She has had experience working with Cal Tech scientists, e.g., as a system's administrator in a space radiation lab. She has a seniority date of August 21, 2008.

Early in the current school year, Rivette attended a meeting with her school principal and another teacher (a math teacher) to discuss plans to commence offering PLTW at that site. Both Rivette and the other teacher were "slotted" to teach two periods each of PLTW in the 2009-2010 school year. Rivette attended a one-day PLTW seminar at Cal Poly Pomona, where it was stated that a teacher with any single subject credential could teach PLTW, because a two-week summer training program would be offered.

Rivette and Smith have the same seniority date. The district determined Rivette to have higher seniority than Smith by virtue of the tiebreaking process.

19. Lisa Cheung has a preliminary single subject credential in biology. She majored in biology at UCLA, and took, *inter alia*, physics, chemistry, and math courses during her undergraduate studies. Cheung's seniority date is August 22, 2007. She is thus senior to both Smith and Rivette.

20. Rivette and Cheung are deemed to contend that they are eligible to bump Smith's part-time (0.33) PLTW position, on the basis that they are certificated and competent to render services in that position. No contention was made that either Rivette or Cheung are certificated and competent to render services in Smith's part-time industrial arts assignment.

Based on the evidence presented, Cheung is certificated and competent to teach PLTW.<sup>9</sup> This gives rise to the question whether Cheung may bump into the PLTW portion of Smith's assignment, thus in effect compelling the district to split Smith's position. Based

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<sup>9</sup> Since Cheung is senior to Rivette, it is not necessary to determine whether Rivette is likewise certificated and competent to teach PLTW.

on *Hildebrandt v. St. Helena Unified School District* (2009) 172 Cal.App.4th 334, the district argues that she may not. The court's holding in *Hildebrandt* was based primarily on the premise that the district had considered and concluded in the exercise of its discretion that not splitting a full-time position was in the best interest of the district and its students. In contrast, no evidence was presented that the district in the present proceeding actually considered and exercised its discretion in this deliberate and careful way. To the extent the holding in *Hildebrandt* was based on the district's careful consideration and exercise of its discretion, it seems distinguishable from the factual context here. However, *Hildebrandt* also articulated a second concern, namely the administrative problems that would be caused by the compelled splitting of Smith's position. This second concern was not based on any specific evidence the district offered in that case. Accordingly, on the basis of this second point, *Hildebrandt* seems applicable to and dispositive of the present case: the district may not be compelled to split Smith's assignment to permit Cheung to bump into Smith's part-time PLTW position.

## 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. 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.)

3. A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated and competent to fill. In doing so, the senior employee may displace or "bump" a junior employee who is filling that position. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469.) Junior teachers may be given retention priority over senior teachers if the junior teachers possess superior skills or capabilities which their more senior counterparts lack. (*Santa Clara Federation of Teachers, Local 2393, v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831, 842-843.)

4. Education Code section 44258.3 provides in part:

"(a) The governing board of a school district may assign the holder of a credential, other than an emergency permit, to teach any subjects in departmentalized classes in kindergarten or any of grades 1 to 12, inclusive, provided that the governing board verifies, prior to making the assignment, that the teacher has adequate knowledge of each subject to be taught and the teacher consents to that assignment. The governing board shall adopt policies and procedures for the purpose of verifying the adequacy of subject knowledge on the part of each of those teachers. The

governing board shall involve subject matter specialists in the subjects commonly taught in the district in the development and implementation of the policies and procedures, and shall include in those policies and procedures both of the following:

(1) One or more of the following ways to assess subject matter competence:

(A) Observation by subject matter specialists, as defined in subdivision (d).

(B) Oral interviews.

(C) Demonstration lessons.

(D) Presentation of curricular portfolios.

(E) Written examinations.

(2) Specific criteria and standards for verifying adequacy of subject matter knowledge using any of the methods in paragraph (1). The criteria shall include, but need not be limited to, evidence of the candidate's knowledge of the subject matter to be taught, including demonstrated knowledge of the curriculum framework for the subject to be taught and the specific content of the course of study in the school district for the subject, at the grade level to be taught.

(b) Teaching assignments made pursuant to this section shall be valid only in that school district. The principal of the school, or other appropriate administrator, shall notify the exclusive representative of the certificated employees for that school district, as provided under Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code, of each instance in which a teacher is assigned to teach classes pursuant to this section. Any school district policy or procedures adopted and teaching assignments made pursuant to this section shall be included in the report required by subdivisions (a) and (e) of Section 44258.9. The Commission on Teacher Credentialing may suspend the authority of a school district to use the teaching assignment option authorized by this section upon a finding that the school district has violated the provisions of this section.

(c) Nothing in this section shall be construed to alter the effect of Section 44955 with regard to the reduction by a school district governing board of the number of certificated employees.”

5. Education Code section 44258.7 provides in part:

“(b) A person who holds a teaching credential in a subject or subjects other than physical education may be authorized by action of the local governing board to coach one period per day in a competitive sport for which students receive physical

education credit, provided that he or she is a full-time employee of the school district and has completed a minimum of 20 hours of first aid instruction appropriate for the specific sport.

(c) A teacher employed on a full-time basis who teaches kindergarten or any of grades 1 to 12, inclusive, and who has special skills and preparation outside of his or her credential authorization may, with his or her consent, be assigned to teach an elective course in the area of the special skills or preparation, provided that the assignment is first approved by a committee on assignments. For purposes of this subdivision an “elective course” is a course other than English, mathematics, science, or social studies. The membership of the committee on assignments shall include an equal number of teachers, selected by teachers, and school administrators, selected by school administrators.

(d) Assignments approved by the committee on assignments shall be for a maximum of one school year, but may be extended by action of the committee upon application by the schoolsite administrator and the affected teacher. All initial assignments or extensions shall be approved prior to the assignment or extension. . . .”

6. Respondents contend that the district improperly retained certain senior teachers whose current assignments are outside their credentials pursuant to COA or Davis bill authorization, while the district laid off more junior teachers who possess the proper credential to teach in those assignments. Respondents’ arguments in support of this contention have all been considered and are rejected. Respondents’ main arguments in this regard are addressed immediately below.

Respondents argue that that in implementing this PKS layoff, the district must lay off teachers pursuant to a three-step process: (i) first laying off teachers who do not have the proper certification to teach in a particular assignment; (ii) second, as to teachers with the same certification, the district must determine lay offs based on classification (first temporary, then probationary, then permanent); and (iii) third, as to employees in the same classification, the district must lay off employees according to seniority. Despite respondents’ contention, the Education Code does not prescribe such a three-step layoff procedure. Instead, the fundamental principle reflected in section 44955 is that lay offs are, with certain prescribed exceptions, pursuant to inverse seniority. (Ed. Code, § 44955, subds. (c) and (d).)

Respondents argue further that section 44258.3 cannot be applied so as to alter the effect of section 44955. This is correct, if construed to mean that section 44258.3 cannot be applied in a manner inconsistent with the requirements of 44955. However, the district’s retention of DeJournett and other senior teachers whose current assignments are outside their credentials pursuant to COA or Davis bill authorization is not inconsistent with the requirements of section 44955. For example, section 44955 generally prohibits a district from laying off a more senior teacher when the district has retained a more junior teacher to render services the senior teacher is certificated and competent to render. Respondents have

not, however, identified any senior teacher whom the district has designated for layoff under such circumstances.

Respondents argue further that the district's retention of teachers assigned outside their credential pursuant to COA and Davis bill authorization is contrary to the overall intent of the layoff statute and undermines the entire state and federal educational statutory scheme, which is intended to retain highly qualified credentialed teachers over non-credentialed teachers. Respondents' argument ignores section 44955, subdivision (d)(1), which provides that a district "may" deviate from terminating a teacher in order of seniority if the district demonstrates a specific need to teach a specific course and the teacher has special training and experience necessary to teach that course. Subdivision (d)(1) does not, however, require the district to deviate from seniority for this purpose.

Respondents argue further that in one instance the district properly laid off the more senior employee (Kilsby), who was teaching in an English assignment though without an English credential, and retained the more junior employee (Christine Kolb), who held an English credential. However, while the district initially planned to lay off Kilsby, the district ultimately retained her, because she was able to bump another employee. Accordingly, the alleged inconsistency remained potential only and was never effectuated as such. More fundamentally, even if Kilsby had been laid off, such a lay off may have been appropriate pursuant to section 44955, subdivision (d)(1) or, if not, then the district would have, at worst, made a mistake in its treatment of Kilsby vis-à-vis Kolb. A single mistake does not constitute the sort of pervasive inconsistencies that might conceivably amount to arbitrary and capricious action on the part of the district.

7. A preponderance of the evidence sustained the charges set forth in the accusation. Cause exists under Education Code sections 44949 and 44955 for the district to reduce or discontinue particular kinds of services. The cause for the reduction or discontinuation of particular kinds of services related solely to the welfare of the schools and the pupils thereof. Cause exists to reduce the number of certificated employees of the district due to the reduction and discontinuation of particular kinds of services. The district identified the certificated employees providing the particular kinds of services that the Board directed be reduced or discontinued. It is recommended that the board give respondents notice before May 15, 2009, that their services are no longer required by the district.

ADVISORY DETERMINATION

The following advisory determination is made:

The accusations served on respondents are sustained. Notice shall be given to the 28 respondents listed in Appendix A, before May 15, 2009, that their services will not be required because of the reduction or discontinuation of particular services as indicated.

DATED: \_\_\_\_\_

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DONALD P. COLE  
Administrative Law Judge  
Office of Administrative Hearings

## Appendix A

1. Marc Alzamora
2. Kara Andersen
3. Janell Aven
4. Trisha Banks Noble
5. Daura Beard
6. Bridget Carter-Santoyo
7. Celina Cervantes
8. Lisa Cheung
9. Rebecca Coduto
10. Steve Curtis
11. Sarah Farnworth
12. Kristi Gates
13. Melanie Kirk
14. John Madunich
15. Christine Mendez
16. Stacy Olguin
17. Deborah Panattoni
18. Justine Peterson
19. Randolph Pratt
20. Marizka Rivette
21. Carol Ross
22. Dana Shool
23. Melody Simons
24. Kelley Smith
25. Lee Taylor
26. Nora Valenzuela
27. Jennifer Wagner
28. Samar Yassine