

BEFORE THE  
BOARD OF TRUSTEES OF THE  
REEF-SUNSET UNIFIED SCHOOL DISTRICT  
KINGS COUNTY, CALIFORNIA

In the Matter of the Employment Status of:

TODD CONFORTH, et al.,

Respondents.

OAH No. 2009030850

**PROPOSED DECISION**

Robert Walker, Administrative Law Judge, State of California, Office of Administrative Hearings, heard this matter in Avenal, California, on April 16, 2009.

Roberta Rowe, Attorney at Law,<sup>1</sup> represented the complainant, Suzanne Monroe, Superintendent, Reef-Sunset Unified School District.

Joshua F. Richtel, Attorney at Law,<sup>2</sup> represented the respondents. There are 11 respondents, and they are listed in exhibit A.

For good cause, the matter was continued and the record was held open to provide the parties with an opportunity to submit briefs. Complainant submitted an opening brief that was marked as C 16 for identification. Respondent Randy Rowlett submitted a brief in opposition that was marked as R 1 for identification. Respondent failed to serve his brief on complainant. Complainant submitted a letter dated April 30, 2009, which contained additional briefing and a motion for an order that respondent Rowlett be deemed to have waived his claim. Complainant's letter of April 30, 2009, was marked as C 17 for identification. The motion was denied. Complainant submitted a reply brief that was marked as C 18 for identification. Complainant's reply brief was received on May 4, 2009.

The record was closed on May 4, 2009.

Pursuant to Education Code section 44949, subdivision (e),<sup>3</sup> the dates prescribed in Code section 44949, subdivision (c), and in Code section 44955, subdivision (c), shall be extended.

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## FACTUAL FINDINGS

### *GENERAL FINDINGS CONCERNING STATUTORY REQUIREMENTS*

1. Respondents are certificated district employees.
2. Not later than March 15, 2009, in accordance with Code sections 44949 and 44955, the superintendent of the school district caused the governing board of the district and respondents to be notified in writing that it was recommended that respondents be notified that the district would not require their services for the ensuing school year. The notice stated the reasons for the recommendation. The recommendation was not related to respondents' competency.
3. A notice was delivered to each respondent, either by personal delivery or by depositing the notice in the United States mail, registered, postage prepaid, and addressed to respondent's last known address.
4. The notice advised each respondent of the following: He or she had a right to a hearing. In order to obtain a hearing, he or she had to deliver a request for a hearing in writing to the person sending the notice. The request had to be delivered by a specified date, which was a date that was not less than seven days after the notice of termination was served.<sup>4</sup> And the failure to request a hearing would constitute a waiver of the right to a hearing.
5. Respondents timely filed written requests for a hearing to determine whether there was cause for not reemploying them for the ensuing year. An accusation was timely served on respondents. Respondents were given notice that, if they were going to request a hearing, they were required to file a notice of defense within five days after being served with the accusation.<sup>5</sup> Respondents filed timely notices of defense. All prehearing jurisdictional requirements were met.
6. The governing board of the district resolved to reduce or discontinue particular kinds of services. Within the meaning of Code section 44955, the services are "particular kinds of services" that can be reduced or discontinued. The decision to reduce or discontinue these services was not arbitrary or capricious but constituted a proper exercise of discretion.

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<sup>3</sup> All references to the Code are to the Education Code unless otherwise specified.

<sup>4</sup> Employees must be given at least seven days in which to file a request for a hearing. Education Code section 44949, subdivision (b), provides that the final date for filing a request for a hearing "shall not be less than seven days after the date on which the notice is served upon the employee."

<sup>5</sup> Pursuant to Government Code section 11506, a party on whom an accusation is served must file a notice of defense in order to obtain a hearing. Education Code section 44949, subdivision (c)(1), provides that, in teacher termination cases, the notice of defense must be filed within five days after service of the accusation.

*SERVICES THE DISTRICT INTENDS TO REDUCE OR DISCONTINUE*

7. The governing board of the district determined that, because particular kinds of services are to be reduced or discontinued, it is necessary to decrease the number of permanent or probationary employees in the district by 18 full time equivalents (FTE).

8. The particular kinds of services the governing board of the district resolved to reduce or discontinue are:

Assistant Principal	AES/RSMS	2 FTE
Physical Education	AES	2 FTE
Counselor	RSMS	1 FTE
Music Program	District	1 FTE
Elementary Teachers	K-6	9 FTE
District Librarian	District	1 FTE
Adult School Instructor	GED Prep. Basic Skills/ESL	1 FTE
Adelante High Teacher	Multiple Subject/Self-Contained	1 FTE

*USE OF TIE-BREAKING CRITERIA BASED ON THE CURRENT NEEDS OF THE DISTRICT AND STUDENTS*

9. Pursuant to Code section 44955, subdivision (b), the governing board of the district established criteria for determining the order of termination as between employees who first rendered paid service on the same day. The tie-breaking criteria are as follows:

A. Credentials and experience to teach or serve in a particular program or provide a particular service of need by the District. (Math, English, Science)

Rating: +1 per credential, +1 per year of experience

B. Credentials and experience to teach in a special categorical program. (Special Education)

Rating: +1 per credential, +1 per year of experience

C. Years of experience in a probationary/permanent, K-12 teaching situation in a public school previous to current employment as a full-time credentialed teacher.

Rating: +1 per year

D. Number of supplementary authorizations to serve in a particular area of need by the District (Math, English, Science)

Rating: +1 per supplementary authorization

E. Earned degrees beyond the BA/BS level.

Rating: +1 per degree

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.

10. Application of the tie-breaking criteria resulted in determining the order of termination solely on the basis of needs of the district and the students thereof.

*TEACHERS WITH INTERNSHIP CREDENTIALS WHO ARE NOT SUBSTITUTES OR TEMPORARY ARE PROBATIONARY EMPLOYEES ENTITLED TO THE PROTECTIONS OF CODE SECTIONS 44949 AND 44955.*

11. Randy Rowlett, one of the respondents, is a district intern who holds a multiple subject internship credential. He contends that the district improperly is retaining employees who are junior to him to render a service he is certificated and competent to render. He is entitled to the seniority protections afforded by Code sections 44949 and 44955.

12. *California Teachers' Association v. Golden Valley Unified School District* (2002) 98 Cal.App.4th 369, concerns a teacher who was dismissed during the school year. Thus, the case does not directly involve Code sections 44949 and 44955. Midyear dismissal of probationary employees is addressed in Code section 44948.3. That section provides for 30 days notice and the right to a hearing. Golden Valley Unified School District dismissed a teacher who was teaching on an emergency permit. The dismissal was midyear, but the district did not provide notice or the right to a hearing. The district contended the teacher was not entitled to the protections of section 44948.3 because, with only an emergency permit, she could not be a probationary employee. The Court of Appeal disagreed.

13. The court looked to a literal construction of Code section 44915, which concerns the classification of teachers. The court said:

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

Golden Valley did not classify Curran as a permanent or as a substitute employee. Therefore, under the plain language of section 44915, if Curran was employed in a "position . . . requiring certification qualifications," then Golden Valley was required to classify her as a probationary employee.<sup>6</sup>

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<sup>6</sup> *California Teachers' Association v. Golden Valley Unified School District* (2002) 98 Cal.App.4th 369, 378.

14. In a footnote, the court referred to California Code of Regulations, title 5, section 5501, subdivision (c), which recognizes a fourth classifications – temporary. The court said:

The classification of “temporary employee” is authorized by section 44920, but is inapplicable to the facts of this case because “temporary employees are only to be hired if there are long-term vacancies due to a teacher’s leave of absence.” (*Welch v. Oakland Unified School Dist.*, *supra*, 91 Cal.App.4th at p. 1431, 111 Cal.Rptr.2d 374.) Curran was not filling a long-term vacancy.

15. The court then reviewed other provisions in the Education Code to determine whether a literal construction of Code section 44915 was consistent with the way in which the Legislature has treated teachers with emergency permits throughout the Education Code. The court concluded that a literal construction was consistent with other provisions.<sup>7</sup>

16. The *Golden Valley* court’s analysis regarding teachers with emergency permits is equally applicable to teachers with internship credentials.

17. Thus, teachers with emergency permits and teachers with internship credentials, who are not permanent, substitute, or temporary, must be classified as probationary. And being probationary teachers, they are entitled to the protections of Code sections 44949 and 44955.

#### *BRIEF SUMMARY OF SENIORITY RIGHTS*

18. Code section 44955 concerns a reduction in the number of a school district’s employees. Job security is not inherent in seniority. In section 44955, however, the Legislature chose to provide teachers with limited job security according to their seniority. Students and society, in general, benefit from the Legislature’s choice. If school districts were permitted simply to choose which teachers not to rehire, one could expect some teacher to be much more cautious in deciding what to discuss and what ideas to express. In *Board of Education v. Round Valley Teachers Association* (1996) 13 Cal.4th 269, 278, the Supreme Court quoted with approval from *Turner v. Board of Trustees* (1976) 16 Cal.3d 818. The *Turner* court noted various interests that are affected by rules regarding the hiring and retention of teachers. The Court said, “Our school system is established not to provide jobs for teachers but rather to educate the young.” (*Turner, supra*, 16 Cal.3d at p. 825.) Students and society benefit from teachers’ willingness to promote critical discussions of important – and sometimes unpopular – topics. It is primarily for the benefit of students that the seniority rights provided in Code section 44955 must be protected.

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<sup>7</sup> *Id.* at p. 383.

19. A teacher's seniority rights are limited, generally, by what he or she is certificated and competent to teach and by the courses a district has chosen to offer. Subject to these limitations, a teacher, generally, has a right to be terminated according to his or her seniority.

20. Of course, seniority cannot be used to determine the order of termination of teachers who have the same date of hire because they all have the same seniority. In Code section 44955, the Legislature also dealt with the order of termination of teachers with the same date of hire. If there are teachers with the same date of hire and a district is going to terminate some but not all of them, the district must determine the order of termination.

21. The Legislature treated the two matters very differently. With regard to the limitations on job security among teachers with different dates of hire, the Legislature provided very specific standards that a school district must respect. With regard to the circumstance in which there is no seniority, however, the Legislature gave school districts a free hand to establish the order of termination according to any criteria the governing board chose so long as the criteria are based on needs of the district and students.

22. The Legislature also has provided a few justifications for terminating a senior teacher while retaining a junior teacher.<sup>8</sup> A school district may not create additional justifications for doing that. Creating additional justifications for terminating a senior teacher while retaining a junior teacher would deprive the senior teacher of his or her seniority rights.

23. The Legislature has provided two limitations on a *permanent* teacher's right to be retained over a probationary or junior teacher. First, the teacher must be *certificated* to render the service the probationary or junior teacher is rendering. Second, the teacher must be *competent* to render the service.<sup>9</sup> A subsequent provision that limits the rights of both permanent and probationary employees speaks in terms of the services their "qualifications" entitle them to render.<sup>10</sup>

24. A teacher either is or is not *certificated* to render a service. A school district may not require a higher certification than the law requires. Creating a super-certification requirement for a senior teacher who is certificated to render a service would deprive the teacher of his or her seniority rights.

25. The question of whether a teacher is *competent* to render a service has to do with his or her specific training and experience as they relate to the duties of a position. In determining whether a teacher is competent to render a service, a district exercises discretion.

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<sup>8</sup> Code § 44955, subd. (d).

<sup>9</sup> *Id.* at § 44955, subd. (b).

<sup>10</sup> *Id.* at § 44955, subd. (c).

But a district may not, based on some policy that is not focused on competency, determine that a senior teacher is not competent. To permit a district to do that would deprive the teacher of his or her seniority rights.

26. As noted above, when there are teachers among whom there is no seniority, a district has a rather free hand in ranking them for termination so long as the criteria are based on needs of the district and students. As among teachers with different employment dates, however, the Legislature has specified the needs that must be the focus of decisions that impact their seniority rights. The Legislature has specified (1) the need to have a teacher who is certificated to render a service, (2) the need to have a teacher who is competent to render a service, and (3) the need to have a teacher who has the special training and experience necessary to teach a course for which a district demonstrates a specific need.

*ANALYSIS OF CODE SECTION 44955*

27. Section 44955, subdivision (b), concerns the seniority rights of permanent employees. That subdivision prohibits a school district from terminating a permanent employee while retaining a probationary employee to render a service the permanent employee is certificated and competent to render. That subdivision also prohibits a school district from terminating a permanent employee while retaining any other employee with less seniority to render a service the permanent employee is certificated and competent to render.

28. The first paragraph of section 44955, subdivision (c), concerns the seniority rights of both permanent and probationary employees. That paragraph provides that employees shall be terminated in the inverse order in which they were employed. This adds nothing to the seniority rights provided to permanent employees by subdivision (b), but it does establish seniority rights for probationary employees.

29. The second paragraph of section 44955, subdivision (c), applies to “employees.” Thus, it applies to both permanent and probationary employees. That subdivision requires a district to retain senior employees to render services their “qualifications entitle them to render.” There is no definition of “qualifications.” It is reasonable to interpret that term as referring back to the language requiring permanent employees to be “certificated and competent.” With that interpretation, the limitation on the seniority rights of probationary employees is the same as the limitation on the seniority rights of permanent employees. They must be certificated and competent to render the service.

30. The third paragraph of section 44955, subdivision (b), deals with teachers hired on the same date, that is, teachers who have the same seniority. A governing board must develop “specific criteria” to be used in determining the order of termination of teachers with the same date of hire, and the criteria must be based on “needs of the district and the students.” Such criteria are commonly referred to as tie-breaking criteria.

31. The second paragraph of section 44955, subdivision (c), does not add to teachers' seniority rights. It does, however, make it clear that governing boards must make assignments in such a way as to protect seniority rights. Employees must be retained to render any service their seniority and qualifications entitle them to render. As noted above, it is reasonable to interpret the term "qualifications" as meaning "certificated and competent." Thus, if a senior teacher whose regular assignment is being eliminated is certificated and competent to teach a junior teacher's courses, the district must reassign the senior teacher to render that service. This is commonly referred to as bumping. The district must then either reassign or terminate the junior employee.<sup>11</sup>

32. In Code section 44955, subdivision (d), the Legislature has established four justifications for a school district's skipping over a junior employee, not terminating him or her, but terminating a more senior employee. That is, the Legislature has established four justifications for deviating from terminating employees according to their seniority. First, a district may skip over a junior teacher and terminate a senior teacher if "the district demonstrates a specific need for personnel to teach a specific course or course of study." Second, a district may skip if "the district demonstrates a specific need for personnel . . . to provide the services authorized by a services credential with a specialization in . . . pupil personnel services." Third, a district may skip if "the district demonstrates a specific need for personnel . . . to provide the services authorized by a services credential with a specialization in . . . health for a school nurse." Fourth, a district may skip to maintain or achieve "compliance with constitutional requirements related to equal protection . . . ."

33. A school district may not create justifications for skipping. The only permissible justifications are the four listed in Code section 44955, subdivision (d). Creation of other justifications for skipping would deprive teachers of their seniority rights.

#### WHAT THE DISTRICT DID IN THE PRESENT CASE

34. The Board of Trustees adopted a resolution that it characterized as establishing "competency standards." The resolution provided, in part:

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<sup>11</sup> The second paragraph of section 44955, subdivision (c), speaks of the duty of a school board to make assignments in such a manner that employees will be retained to render any service "their *seniority* . . . [entitles] them to render." (Italics added.) A teacher's entitlement to bump a junior teacher out of his or her assignment derives from the senior teacher's *seniority*. A teacher's seniority does not entitle him or her to bump a more senior teacher out of his or her assignment just because the more senior teacher could move into some other position. *Duax v. Kern Community College District* (1987) 196 Cal.App.3d 555, concerned the seniority rights of teachers in community colleges. The bumping rights are similar to those provided by the second paragraph of section 44955, subdivision (c). Mr. Duax, a community college teacher who was being terminated, contended that the college was required to bump a more senior teacher out of his position because Mr. Duax was qualified to fill that position, and the more senior teacher had a right to move into a different position. The court rejected Mr. Duax's claim that he had a right to "inverse bumping." The court said the district's "obligation to make assignments and reassignments . . . is limited to attempting to place an employee who would otherwise be terminated in a position being held by another employee with *less seniority*." (Italics added.) (*Duax, supra*, 196 Cal.App.3d at p. 568.)

[T]he Board . . . recognizes that, to make effective layoff decisions, objective criteria as to competency must be established.

[¶] . . . [¶]

[T]he District may deviate from the order of least seniority when laying off a certificated employee, to fill a demonstrated specific need for fully credentialed personnel and for personnel to teach a specific course or course of study . . . .

[¶] . . . [¶]

[D]eviation from the layoff . . . in order of least seniority can include, but shall not be limited to:

1. Teachers who currently hold a preliminary or clear credential.
2. Certificated employees who are teaching special education regardless of credential.

35. Based on the board’s “competency standards,” the district skipped five teachers who hold either preliminary or clear multiple subject credentials but sent a layoff notice to Mr. Rowlett, a district intern who holds a multiple subject internship credential.

*MR. ROWLETT’S CONTENTIONS*

36. At the hearing, Mr. Rowlett contended that he has a right to bump into a position held by one of the junior teachers.

37. If this were a case in which Mr. Rowlett were subject to layoff, he would be correct in his bumping argument. But as is found and explained below, the district improperly skipped a junior employee while serving Mr. Rowlett with a layoff notice. The district may not do that, so the bumping issue does not arise.

38. Mr. Rowlett also contends that the district may not apply “competency standards” to him because the requirement that a teacher be “certificated and *competent*” is found only in Code section 44955, subdivision (b), and applies only to permanent employees.

39. It is true that the requirement that a teacher be “certificated and competent” is found only in Code section 44955, subdivision (b), and it is true that, in that subdivision, it applies only to permanent employees. As pointed out above, however, there is a limitation in the second paragraph of section 44955, subdivision (c), that applies to both permanent and probationary employees. Teachers have a right to be retained to render any service “their

seniority and qualifications entitle them to render.” As also pointed out above, it is reasonable to interpret the term “qualifications” as including certification and competency. Thus, Mr. Rowlett’s contention that the district cannot make a determination concerning the competency of a probationary employee is rejected. If, for example, there were a question as to Mr. Rowlett’s right to bump into a position held by an employee who was junior to him, the issue of his competency to provide the service would become relevant, and the district could make a determination as to his competency. It is true, however, that the facts of this case do not raise an issue concerning Mr. Rowlett’s competency.

40. Mr. Rowlett contends that the district, in effect, is impermissibly refusing to recognize that he is certificated to render the services in question. Mr. Rowlett is correct in this contention. As is found and explained below, the district is doing that by imposing a super-certification requirement under the guise of determining competency. Moreover, the district is impermissibly using its competency standard as a justification for skipping.

41. Mr. Rowlett contends that the district used its “competency standards” as a justification for skipping without demonstrating that it has a specific need for teachers who hold preliminary or clear credentials. As is found and explained below, the district is not permitted to create justifications for skipping. Therefore, whether the district demonstrated a need for the purported justification is irrelevant.

*COMPLAINANT’S CONTENTIONS CONCERNING MR. ROWLETT*

42. At the hearing, Suzanne Monroe, District Superintendent, testified that the district skipped over junior teachers who had clear or preliminary credentials and sent a layoff notice to Mr. Rowlett, a more senior teacher who holds only an intern credential. Counsel for complainant contended that the district could adopt a competency criterion and use it as a justification for skipping. Counsel said that skipping criteria and competency criteria are “basically the same thing, as far as [the district] would look at the competency in determining who would receive the layoff notice.”

43. Matters that may be considered in determining competency, on the one hand, and justifications for skipping, on the other hand, are not “basically the same thing.” As will be held and explained below, the four statutory justifications for skipping and a school district’s discretion in determining competency are discrete.

44. Complainant contends that the district may terminate a senior teacher who does not hold a preliminary or clear credential while retaining a junior teacher who does because the district may lawfully exercise discretion in determining competency.

45. It is true that, in determining matters regarding a teacher’s experience and other matters of competency, a school district exercises discretion. But there is nothing in Code section 44955 that would permit a district to use a competency determination as a means of ignoring a senior teacher’s certification to render a particular service. If a teacher

is certificated to render a service, he or she has passed the certification hurdle. Competency, then, becomes a separate question.

46. Complainant contends that, Code section 44955 has a “plain meaning” that allows school districts to establish criteria concerning competency, qualifications, and training in order to retain one employee over another. In the opening brief, complainant says:

The plain meaning of Education Code section 44955 is that the Legislature intended for school district governing boards to establish criteria to determine whether teachers are competent and qualified, and have the particular training needed, in order to retain one employee over another for a particular assignment.

[¶] . . . [¶]

[T]he district retained junior employees who possessed the specified “competency” requirement, a preliminary or clear credential, that was not held by the more senior employee with an Internship Credential who was laid off. The District properly exercised the discretion allowed under Education Code section 44955 when it laid off an intern while retaining less senior teachers with preliminary or clear . . . credentials.

[¶] . . . [¶]

The District can lawfully utilize its discretion to retain a junior employee over a more senior employee when that junior employee has a particular training or experience needed by the District. [¶] . . . [¶] Education Code section 44955, subdivision (d), does not define the term “special training and experience.”

47. This contention ignores a great deal of the “plain meaning” of section 44955 – the plain meaning that protects seniority rights. Also this contention treats unlike things as though they were alike. A district’s having a preference for teachers with a clear credential is not the same as a district’s not being able to use someone because he or she does not have the “special training and experience necessary to teach” a particular course. Mr. Rowlett and the junior teachers who were skipped all hold multiple subject credentials. There is no distinction between the courses he can teach and the courses they can teach. It is true that Education Code section 44955, subdivision (d), does not define the term “special training and experience.” But it is clear that the focus of the inquiry must be on a district’s “specific need” and on what is “necessary” to qualify a teacher to teach a course that requires “special training and experience.” Under section 44955, subdivision (d), the inquiry is focused on whether the senior teacher does “not possess” the “special training and experience necessary to teach [a] course . . . .”

*THE ONLY PERMISSIBLE JUSTIFICATIONS FOR SKIPPING ARE THE FOUR THE LEGISLATURE HAS ESTABLISHED IN CODE SECTION 44955, SUBDIVISION (d).*

48. In *Alexander v. Delano Joint Union High School District* (1983) 139 Cal.App.3d 567, the court held that a school district may not create a skipping justification so as to avoid the seniority protection afforded to teachers with different dates of hire. More than one-half of the students in the Delano school district spoke Spanish or a Philippine dialect, and the district had established a bilingual education program. For financial reasons, it became necessary to reduce particular kinds of services and terminate a certain number of teachers. The district established tie-breaking criteria to use in determining the order of termination of employees who had the same seniority date. The criteria included language needs. The district contended that it had not applied that criterion except to break ties among teachers with the same seniority date. The court, however, found that the district had used language needs as a justification for skipping junior teachers and terminating senior teachers. The court found, “[T]he fact is that junior teachers were skipped because of language skills.”<sup>12</sup>

49. The *Alexander* court examined Code section 44955, subdivision (b), and compared the language that limits seniority rights with the language concerning the adoption of tie-breaking criteria. Tie-breaking criteria are to be based on “needs of the district and the students.”<sup>13</sup> But nothing in the Code provides that a district may rely on such needs to develop justifications for skipping. A district may not, based on needs of the district and students, create justifications for skipping because that, in effect, would place all teachers in a single group without regard for seniority. The court concluded that, “[F]or teachers having different employment dates, ‘the needs of the district and students’ is not a proper measure of priority.”<sup>14</sup> (Italics added.) The court went on to point out that a contrary construction of the statute would, in effect, do away with any protection of seniority. “A contrary construction would place all teachers in a single group measured by the sometimes vague needs of the district and pupils as determined by the school board.”<sup>15</sup>

*COMPLAINANT HAS CITED NO CASE THAT STANDS FOR THE PROPOSITION THAT A SCHOOL DISTRICT CAN EXPAND ON THE STATUTORY JUSTIFICATIONS FOR SKIPPING*

50. Complainant cites a number of cases and points to various statements concerning a school district’s discretion. No case, however, even suggests that a school district can add to the statutory justifications for skipping.

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<sup>12</sup> *Alexander v. Delano Joint Union High School District* (1983) 139 Cal.App.3d 567, 576.

<sup>13</sup> *Id.* at 573.

<sup>14</sup> *Id.* at 574.

<sup>15</sup> *Ibid.*

51. *King v. Berkeley Unified School District* (1979) 89 Cal.App.3d 1016, concerns preferential reappointment rights of teachers who have been terminated pursuant to Code sections 44949 and 44955. Code section 44956 (formerly 13448) provides that, for 39 months, a teacher who has been terminated has a preferred right of reappointment to render a service the teacher “is certificated and competent to render.” In *King*, teachers with reappointment rights contended the school district had hired less senior teachers to render services they were certificated and competent to render. The teachers petitioned for a writ of mandate. The trial court denied relief, finding that the school district had not abused its discretion. The Court of Appeal upheld the decision. The trial court concluded that the statute required school districts to consider not only appropriate credentials but also actual competence. That is, a district must consider a teacher’s specific training and experience and the duties of the available position. The Court of Appeal noted that, in determining matters concerning a teacher’s experience, school districts exercise discretion. The court said:

In determining matters of actual experience, school districts and their governing boards are invested with the power to make *discretionary* decisions for which they have a special competence. Courts of law should not, and cannot, overturn such decisions in the absence of a clear showing that such discretion *has been abused*. (Italics added by the Court of Appeal.)<sup>16</sup>

52. The Court of Appeal carefully considered whether the district had abused its discretion. Regarding a mathematics position, there was evidence that teachers who were not rehired were certificated to teach mathematics but had limited academic background in the subject. Regarding a physical education position, a teacher who was not rehired was certificated to teach physical education but did not have training and experience in remedial physical education for the physically handicapped, which was the position the district had filled.

53. Thus, *King* stands for the proposition that, when a statute requires a teacher to be “certificated and competent,” a school district must look at more than certification. Also, when a district determines that a teacher is not competent, a court will determine whether the evidence shows that the district exercised its discretion properly in making that determination. A court will not, however, substitute its own judgment for that of a district unless the district abused its discretion.

54. In *Moreland v. Kurze* (1980) 109 Cal.App.3d 648, the court dealt with a number of matters, including bumping. The court emphasized that, before a senior teacher can bump into the position of a junior teacher, the senior must demonstrate competency. If the senior teacher cannot demonstrate competency, the junior employee having the ability to

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<sup>16</sup> *King v. Berkeley Unified School District* (1979) 89 Cal.App.3d 1016, 1019.

serve the needs of a program may be retained.<sup>17</sup> The court spoke of the circumstance in which a junior employee “possesses a special skill or credential” so that terminating him or her would cause the district to be “compelled to rehire him or someone else with the needed skill.”<sup>18</sup> Thus, *Moreland* holds simply that a senior teacher cannot bump into a junior teacher’s position without demonstrating that he or she is certificated and competent to render the service. *Moreland* says nothing about how to measure competency, and it does not suggest that a district can create justifications for skipping.

55. *Martin v. Kentfield School District* (1983) 35 Cal.3d 294, concerned an elementary school teacher who had been terminated pursuant to Code sections 44949 and 44955. As did *King*, this case concerned Code section 44956 and the preferred right of reappointment. The school district created a teaching position in a middle school and required prior middle school teaching experience. The issue was whether Martin, who had no middle school teaching experience, was certificated and competent to render the required service. If she was, she had a right to be rehired to fill the new position. Citing *King* with approval, the Court noted that determining whether a teacher is competent involves discretionary decisions that are within the special competence of school districts. The Court said the district’s requirements could properly take into account prior experience teaching middle school programs and students. Thus, on this point, the case stands for the proposition that the district, in requiring prior middle school experience for a middle school science position, did not abuse its discretion. The Court remanded the case for resolution of a factual matter.

56. *Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399, is another case concerning a terminated teacher’s preferred right of reappointment. In 1981, the Tamalpais Union High School District reduced or discontinued certain services. Mr. Poppers, after having taught for the district for many years, was terminated. At the same time, the district skipped Olene Sparks for termination in spite of the fact that she had one year less seniority than Mr. Poppers had. The district found that no one who was being terminated and who was senior to Ms. Sparks was certificated and competent to perform her duties as the district grants coordinator and project writer. Two years later, the district created a new multi-subject teaching position, eliminated Ms. Sparks’s position as grants coordinator, and assigned her to the new position. Mr. Poppers contended that his preferred right of reappointment entitled him to the new position. The school district pointed to language in Code section 44956 that the district contended limited the right of reappointment to two circumstances – the circumstance in which the number of employees is increased and the circumstance in which a discontinued service is reestablished. Tamalpais had not increased the number of teachers, and it had not reestablished any of the services that had been reduced or discontinued. The Court of Appeal interpreted the language of section 44956 and held that a terminated teacher’s preferred right of reappointment was not limited

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<sup>17</sup> *Moreland v. Kurze* (1980) 109 Cal.App.3d 648, 655.

<sup>18</sup> *Ibid.*

to the circumstance in which a district increased the number of employees or reestablished the discontinued service. The district was required to reappoint Mr. Poppers.

57. *Bledsoe v. Biggs Unified School District* (2009) 170 Cal.App.4th 127, as modified on denial of rehearing, concerns skipping and tie-breaking. The district skipped two junior teachers who were teaching in the district's community day school, a special school for students who had been expelled or who had behavior problems that had prevented them from being in a regular classroom. Mr. Bledsoe, who was certificated and competent to teach the day school classes, was senior to the teachers the district skipped. Nevertheless, the district served him with a layoff notice. The court held that, pursuant to Code section 44955, subdivision (d)(1), the district had demonstrated a specific need for personnel to teach in the day school and that in order to teach there special training and experience were necessary. There was substantial evidence that the two teachers the district skipped had the necessary special training and experience. Mr. Bledsoe had some special training and experience. The district contended that he, however, did "not possess" the "special training and experience necessary" to teach in the day school. The court found that Mr. Bledsoe did "not possess the special training and experience" the junior teachers possessed.<sup>19</sup> This finding is ambiguous. It could mean that Mr. Bledsoe did not possess the special training and experience that was *necessary*. But it also could mean that his special training and experience were not as extensive or not as current as that of the junior teachers – which is not the issue presented by section 44955, subdivision (d)(1). It is unfortunate that the court did not make an express finding as to whether Mr. Bledsoe did "not possess" the "special training and experience necessary." Nevertheless, there is nothing in the decision to suggest that a district may create justifications for skipping. The district demonstrated, within the terms of section 44955, subdivision (d)(1), that it had a specific need for personnel to teach a specific course of study for which special training and experience were necessary.

58. A tie-breaking issue arose because Mr. Bledsoe and another teacher had the same date of hire, but the district failed to apply the tie-breaking criteria before sending Mr. Bledsoe a lay-off notice. At the administrative hearing, the district proved that application of the tie-breaking criteria resulted in a termination ranking that caused Mr. Bledsoe to be subject to lay-off. The court held that the district's failure to apply the tie-breaking criteria before sending the lay-off notice was not a prejudicial error.

59. In none of these cases is there is even a suggestion that a school district may create justifications for skipping.

*CODE SECTION 44225.7 DOES NOT ESTABLISH A SKIPPING JUSTIFICATION*

60. In complainant's reply brief, complainant contends that Code section 44225.7 required the district to skip fully prepared teachers and terminate a more senior intern. Complainant said:

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<sup>19</sup> *Bledsoe v. Biggs Unified School District* (2009) 170 Cal.App.4th 127, 142.

The District's decision to retain teachers holding preliminary and clear credentials over interns was not merely a "preference," as asserted by Respondents, but was a requirement under Education Code section 44225.7. Under this section, the District can employ an intern only when other fully prepared teachers (i.e., those holding preliminary or clear teaching credentials) cannot be located to fill vacancies.

61. Code section 44225.7 requires a school district to make reasonable efforts to recruit fully prepared teachers for assignments. If a fully prepared teacher is not available, a district must make a reasonable effort to recruit a candidate who is scheduled to complete initial preparation requirements within six months. If a district's reasonable effort fails to produce such a candidate, a district must make a reasonable effort to recruit a candidate who is qualified to participate in an internship program. As the supply of interns increases, the Commission on Teacher Credentialing is to advise school districts that state policy directs the assignment of interns when they are available. As the supply of fully prepared teachers increases, the Commission on Teacher Credentialing is to advise school districts that state policy directs the assignment of fully prepared teachers when they are available.

62. Complainant reads section 44225.7 as requiring a school district to replace an intern with a fully prepared teacher any time the district has an opportunity to do that. That, however, certainly is not a clear, unambiguous, and necessary reading. Section 44225.7 does require an annual resolution of governing boards who recruit other than fully prepared teachers. A board that does that must certify in an annual resolution that it has made reasonable efforts to recruit fully prepared teachers. There is no explicit requirement that, after a district is unable to recruit a fully prepared teacher and does hire an intern, the district must replace the intern if a fully prepared teacher becomes available.

63. If section 44225.7 were read that way, it would be in direct conflict with Code section 44955. It would, in the case of interns, cause a comparison of credentials to become a fifth justification for skipping. That would substantially dilute the seniority rights of one category of probationary employees – interns.

64. It would be contrary to established principles of statutory construction to read such a meaning into Section 44225.7. When seeming inconsistencies appear in codes, the codes must be considered as blending into each other and constituting a single statute for purposes of statutory construction. (*Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors* (1986) 263 Cal.App.2d 41. For purposes of statutory construction, various sections of all codes must be read together and harmonized if possible. (*Channel v. Superior Court of Sacramento Co.* (1964) 226 Cal.App.2d 246.) Statutes dealing with the same subject matter must be construed together in light of each other so as to harmonize them if possible. (*People v. Derby* (1960) 177 Cal.App.2d 626.

65. The two sections can be read as being consistent and harmonious. A school district must make a reasonable effort to recruit fully prepared teachers before recruiting interns. Once a district has found itself in a position of having to hire an intern for an assignment, however, the intern, subject to a district's right not to reelect probationary employees,<sup>20</sup> has a right to the protections of Code section 44955.

*COMPLAINANT FAILED TO PROVE THAT COMPLIANCE WITH "NO CHILD LEFT BEHIND" REQUIRED THE DISTRICT TO SKIP FULLY PREPARED TEACHERS AND TERMINATE A MORE SENIOR TEACHER BECAUSE HE IS AN INTERN*

66. In complainant's reply brief, complainant contends that compliance with "No Child Left Behind" required the district to skip fully prepared teachers and terminate a more senior intern. Complainant said:

[A]s Superintendent Moore explained . . . the District is in "program improvement status" under California Department of Education ("CDE") guidelines. As part of meeting compliance requirements under the No Child Left Behind Act ("NCLB"), school districts are expected to ensure that poor or minority children are not taught by under-qualified teachers. The District must report to the CDE that it has policies in place that ensure poor and underperforming students "are not taught by teachers holding . . . internship credentials" in greater numbers than students who are assigned to schools with higher achievement. (CDE, Equitable Education: Equity Plan Criteria for LEAs, [www.cde.ca.gov/nclb/sr/tq/equity\\_plan](http://www.cde.ca.gov/nclb/sr/tq/equity_plan), last reviewed 4/17/09.) Therefore, under . . . requirements for NCLB compliance, the District was obligated to retain as many fully credentialed teachers as possible.

67. The district did not prove that it could not meet its obligations under NCLB without terminating Mr. Rowlett. There was no evidence that interns teach poor and underperforming students in greater numbers than interns teach students in schools with higher achievement. There was no evidence that retaining Mr. Rowlett would prevent the district from reporting to the CDE that the district has requisite policies in place. The district did not show that it was obligated to retain as many fully credentialed teachers as possible.

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<sup>20</sup> Code section 44929.21 concerns a district's right not to reelect a probationary teacher for a succeeding school year. In *Board of Education v. Round Valley Teachers Assn.* (1996) 13 Cal.4th 269, the Court affirmed a school district's right not to reelect a probationary teacher. A district may do that without any showing of cause and without providing a hearing. But a district must comply with time limitations on notice to the teacher.

*A BOARD MAY NOT, IN THE NAME OF DETERMINING COMPETENCY, REFUSE TO RECOGNIZE A TEACHER'S CERTIFICATION*

68. In providing for a certification requirement, the Legislature has, in effect, chosen a need that serves the interests of a district and its students – the need to have teachers who are certificated to teach the subjects they are assigned.

69. A teacher either is or is not certificated to teach a subject or course. If a senior teacher is certificated to teach a course, he or she has a right to be retained to do that if he or she can demonstrate competency. A district may not take away that right by requiring a higher credential. No case stands for the proposition that a school district, in the guise of determining competency, can refuse to recognize a senior teacher's satisfaction of the certification requirement.

*IN DETERMINING COMPETENCY, A BOARD MAY NOT CHANGE THE FOCUS OF THE INQUIRY IN ORDER TO PURSUE SOME POLICY NOT RELATED TO A TEACHER'S TRAINING AND EXPERIENCE*

70. In providing for the competency determination, the Legislature has, in effect, chosen a need that serves the interests of a district and its students – the need to have teachers who are competent to teach the subjects they are assigned. It is true that a district cannot avoid exercising discretion in determining whether a teacher is competent to teach a particular subject or course, but a district may not use that as an excuse to change the focus of the inquiry. A senior teacher has a right to have competence determined with a view to courses and programs. A senior teacher has a right to have a competency determination focused on his or her specific training and experience as they relate to the duties of a position.<sup>21</sup> A school district may not, in the guise of determining whether a teacher is competent, promote some policy that is not focused on that question.

71. If a senior teacher is competent, that is the end of the inquiry, and a district may not change the focus of the inquiry in order to pursue a policy of retaining the *most* competent teacher. As noted above, *Martin v. Kentfield School District*<sup>22</sup> concerned a former elementary school teacher who had been terminated pursuant to Code sections 44949 and 44955 and the teacher's preferred right of reappointment pursuant to Code section 44956. The Court observed that employers have adopted a broad spectrum of policies regarding the weight to be given to seniority in making personnel decisions. The Court said, however, that the California Legislature has clearly stated the preferred right of reappointment of teachers on lay-off status.

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<sup>21</sup> In *King v. Berkeley Unified School District* (1979) 89 Cal.App.3d 1016, 1019, note 2, the Court of Appeal noted the trial court's conclusions of law – one of which was that competence has to do with "the correlation between [a teacher's] specific training and experience and the duties of the available position."

<sup>22</sup> *Martin, supra*, 35 Cal.3d 294.

[T]he Legislature has made seniority the *sole* determinant as to which tenured teachers on lay-off status should be appointed to a vacant position. The only limitation is that the teacher selected be “certificated and competent” to render the service required by the vacant position. *Among the employees who met this threshold limitation, there is not room in the statutory scheme for comparative evaluation. Thus, . . . which of the two employees under consideration . . . was “better” qualified for the job is not the question* here, nor was it properly the question before the board. The question for the board’s determination was simply whether Martin, the senior tenured teacher on layoff status, was “certificated and competent” to render the required service.

Such determinations, it has been held, involve “discretionary decisions” which are within the “special competence” of the school districts.<sup>23</sup> (Italics added.)

*THE STATUTORY DEVICE FOR TIE-BREAKING MAY NOT BE USED AS AN EXCUSE TO CHANGE THE STANDARDS THAT APPLY TO DETERMINING CERTIFICATION AND COMPETENCY, BUMPING RIGHTS, OR JUSTIFICATIONS FOR SKIPPING.*

72. In order to protect the seniority rights guaranteed to teachers by Code sections 44949 and 44955, criteria based on “needs of the district and students” must be restricted to the use provided in the statute. Using criteria based on “needs of the district and students” is unique to tie-breaking. Not only may a district not use that standard for justifying skipping, a district may not use it to change the focus of determining *certification*. And a district may not use it to change the focus of determining *competency*.

*SUMMARY OF FINDINGS REGARDING RETENTION OF EMPLOYEES*

73. With regard to respondents who are permanent employees, the district is not retaining any probationary employee to render a service that such a respondent is certificated and competent to render.

74. With regard to respondents who are permanent employees, the district is not retaining any employee with less seniority than such a respondent has to render a service that the respondent is certificated and competent to render.<sup>24</sup>

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<sup>23</sup> *Id* at p. 299.

<sup>24</sup> Code section 44955, subdivision (b), provides seniority protection for a *permanent* employee in terms of the services the employee is “*certificated and competent to render*.”

75. With the dismissal of the accusation against Mr. Rowlett, it is the case that the district is not retaining any employee with less seniority than a respondent has to render a service that the respondent's qualifications entitle him or her to render.<sup>25</sup>

*STIPULATION TO DISMISS ACCUSATIONS*

76. The parties stipulate to the dismissal of the accusations against Todd Conforth and Daniel Martinez.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Code sections 44949 and 44955. All notice and jurisdictional requirements contained in those sections were satisfied.

2. Within the terms of Code sections 44949 and 44955, the district has cause to reduce or discontinue particular kinds of services and to give notices to certain respondents that their services will not be required for the ensuing school year. The cause relates solely to the welfare of the schools and the pupils.

ORDER

The accusations against Todd Conforth and Daniel Martinez are dismissed.

The accusation against Randy Rowlett is dismissed.

The district may give notice to the remaining respondents that the district will not require their services for the ensuing school year.

Dated: May 6, 2009

  
ROBERT WALKER  
Administrative Law Judge  
Office of Administrative Hearings

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<sup>25</sup> Code section 44955, subdivision (c), provides seniority protection for both *permanent and probationary* employees in terms of the services an employee's "qualifications entitle [him or her] to render."

Exhibit A

Conforth, Todd  
Frazer, John  
Griffin, Roberta  
Jacobs, Luke  
Jimenez, Maribel  
Martinez, Daniel  
Rowlett, Randy  
Smith, Jeffrey  
Stepps, Shelly  
Valdez, Stella  
Young, Sandra

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