

BEFORE THE
GOVERNING BOARD OF THE
TRACY UNIFIED SCHOOL DISTRICT

In The Matter Of The Accusation Against:

CERTAIN CERTIFICATED PERSONNEL
EMPLOYED BY THE TRACY UNIFIED
SCHOOL DISTRICT,

OAH NO.2009030852

Respondents.

PROPOSED DECISION

Karl S. Engeman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on May 20, 2009, in Tracy, California.

Paul J. Munoz, Attorney at Law, Kronick, Moskovitz, Tiedemann & Girard, represented the Tracy Unified School District.

Thomas J. Driscoll, Jr., Attorney at Law, Driscoll & Associates, represented all of the respondents who appeared at the administrative hearing.¹

Evidence was received at the administrative hearing, including a written stipulation resolving most of the issues presented. The terms of the stipulation are recited below. The parties agreed that Education Code section 44949, subdivision (e), requires submission of the Proposed Decision to the Governing Board and employees on or before June 3, 2009, and a final decision must be issued by the Governing Board on or before June 10, 2009.

FACTUAL FINDINGS

1. James Franco, Ed.D., is the Superintendent of the Tracy Unified School District of San Joaquin County, State of California, and made and filed the Accusation in his official capacity.
2. Each of the respondents is a certificated employee of the District.

¹ Two respondents, Valerie Haynes and Kenneth Lee, were not represented by Mr. Driscoll. Neither appeared at the administrative hearing. Absent any evidence to the contrary, it must be assumed that the District had statutory cause for the issuance of lay off notices to each of them. (Evid. Code, § 664.)

3. On February 24, 2009, and March 10, 2009, the Governing Board of the Tracy Unified School District adopted Resolution No. 08-20. The Governing Board determined to reduce or discontinue particular kinds of services and to give notice to decrease the number of certificated employees in the District accordingly. The Board directed the Superintendent to give notice to certificated employees that their services will not be needed for the 2009-2010 school year by reason of a reduction or elimination of particular kinds of service.

4. On or before March 15, 2009, a Recommendation That Services Will Not Be Required with respect to the 2009-2010 school year was sent to respondents² in the manner prescribed by law and the Board was advised that such notices were sent.

5. Each respondent, within the time limit specified in Education Code section 44949, subdivision (b), requested a hearing to determine if there is cause for not reemploying the respondent for the ensuing school year.

6. The parties entered into a written Stipulation between the Parties, the terms of which are:

A. The following certificated employees are theoretically bumped into the Alternative Programs at DR-Willow schools:

Fiaz Shah

De Ette Burton

Jill Toepfer

Rosie Fernandez

Emily Stroup

Brook Krusi

William Godinez

Respondents will not protest these theoretical bumps, and District will rescind the layoff notices to the certificated employees listed above.

² Two respondents, Kristina Afan and Colleen Cannon, were not served with the preliminary March 15, 2009 notice in a timely manner. The consequences of late notice to them are discussed below.

B. The following certificated employees possess single subject Spanish credentials and have a seniority date of July 30, 2007:

Millie Dahlgren

Jacqueline Khoonsirivong

Cecilia Zamora Ortiz

District applied the Board adopted tie-breaking criteria and the parties agree that Cecilia Zamora Ortiz (BCLAD permits her to teach ELD with primary language support and therefore has a broader credentialing under the fourth tie-breaking criterion) and Jacqueline Khoonsirivong (biology supplement under the fourth tie-breaking criterion) are more senior than Millie Dahlgren. District shall rescind the layoff notices to Khoonsirivong and Zamora Ortiz.

C. Based on staffing needs, District determined to rescind 16 multiple subject layoff notices. District and respondents agree that the 16 employees whose layoff notices shall be rescinded are:

Supplement) Megan Jimenez (in tie on 4/16/07), but breaks tie with English

Chinda Ban

Danette McDaniel

Dina Graves

Rene Velasco Garcia

Janice Hess

Heather Nielsen (Burns)

Desi Rosales

Amanda Lis

Janis Baker

Daryl Essenmacher

Lisa Coffman

Rocio Garcia

Nicole Booe

Justine Webb

Rochelle Gumpert

D. District and respondents agree that the following additional notices shall be rescinded:

Emily Lucas

Shauna Liel

Courtney Couveur

Lisa Marie Burns

E. District and respondents further agree to the following:

Eleazar Gonzalez is a probationary employee and not a temporary employee and remains subject to layoff.

Deborah Hunley-Seabrooks is a probationary employee and not a temporary employee and her layoff notice shall be rescinded.

Justin Gregory will be employed for the 2009-2010 school year as a probationary employee of the District and shall tack back the year of service for the 2008-2009 school year. His layoff notice shall be rescinded.

Erica Hillstead's layoff notice shall be partially rescinded to reflect that she will be returned to a .6 full time equivalent position.

Janis Baker's seniority date is August 11, 2006, and her status is permanent.

7. The parties further agreed that the layoff notice issued to respondent Donna Bonin (most senior Adult School teacher) shall be rescinded.

8. The parties submitted a document entitled PRELIMINARY DRAFT SENIORITY LIST 5/20/2009 as Exhibit 2. The document is attached as Attachment A, and fully incorporated herein by this reference. The parties agree that the asterisks adjacent to the six names of Adult School teachers denote those to whom a final layoff notice shall be issued. With respect to the remaining teachers on the list, the parties agree that yellow

highlighting denotes teachers whose notices shall be rescinded, red highlighting identifies teachers whom District does not reelect for the ensuing school year, and pink highlighting denotes teachers to whom a final layoff notice shall be issued by the Governing Board.

Late Preliminary Notice Findings

9. Respondent Kristina Afan is a second year probationary teacher with a seniority date of November 16, 2005. On or about January 29, 2009, District's Human Resources Department sent her a letter asking her to verify information contained in an attached document entitled "HIRE DATE AND CERTIFICATION VERIFICATION FORM." The form included her seniority date, probationary status, credentials on file with the District Human Resources office, No Child Left Behind "highly qualified" certifications, special certifications to teach English learners, and other items relating to her credentials and qualifications. The letter was sent to Ms. Afan's correct address at the time in Dublin, California. Human Resources received the signed verification document back from Ms. Afan on February 3, 2009. On the same date, Ms. Afan submitted to Human Resources a District form entitled: "CHANGE OF ADDRESS/INFORMATION FORM." Ms Afan listed a new Oakland, California address, and signed the form. In the portion of the document entitled "DISTRICT USE ONLY," the form indicates that the form was received in person and that the information was changed in the human resources and payroll systems on February 4, 2009.

10. On March 14, 2009, District sent by certified mail the preliminary notice of Recommendation That Services Will Not Be Required to Ms. Afan. However, the notice was sent to Ms. Afan's old address in Dublin and was returned to District by the Post Office after a second unsuccessful attempt to deliver it on March 23, 2009. On March 23, 2009, the preliminary notice and other related documents were hand delivered to Ms. Afan in the District's Human Resources office. Ms Afan requested a hearing in writing on a form provided by the District on the same date. District served her with the Accusation and related documents and Ms. Afan filed a timely Notice of Defense.

11. Respondent Colleen Cannon is a second year probationary teacher in the District with a seniority date of June 13, 2007. She filled out the verification form described in Finding 9 above. A preliminary notice bearing her name was sent by certified mail by the District on March 14, 2009. However, the notice was inadvertently sent to an address belonging to another teacher. Ms. Cannon was called into the District's Human Resources office on March 23, 2009. She was presented with the preliminary notice documents and acknowledged their receipt in writing. She also requested a hearing in writing at the same time. She was served with the Accusation and related documents. She filed a timely Notice of Defense.

12. Neither Ms. Afan nor Ms. Cannon offered any evidence demonstrating actual prejudice by reason of the late delivery of the preliminary notices. Respondents contend, however, that the failure to serve a timely preliminary notice upon them bars their layoff as a matter of law. District counters that the inadvertent late notices, without a showing of actual

prejudice, constitute nonsubstantive procedural errors of the type excused by the language of Education Code section 44949, subdivision (c) (3).

LEGAL CONCLUSIONS

Late Notices

1. The sole legal issue is whether by virtue of the inadvertent late preliminary notices to respondents Afan and Cannon, such respondents are deemed reemployed for the 2009-2010 school year. The answer requires the interpretation of Education Code section 44949 in conjunction with Education Code section 44955.

2. Education Code section 44949 reads, in pertinent part:

(a) 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 for the reasons specified in Section 44955, the governing board and the employee shall be given written notice by the superintendent of the district or his or her designee, or in the case of a district which has no superintendent by the clerk or secretary of the governing board, that it has been recommended that the notice be given to the employee, and stating the reasons therefor.

Until the employee has requested a hearing as provided in subdivision (b) or has waived his or her right to a hearing, the notice and the reasons therefor shall be confidential and shall not be divulged by any person, except as may be necessary in the performance of duties. However, the violation of this requirement of confidentiality, in and of itself, shall not in any manner be construed as affecting the validity of any hearing conducted pursuant to this section.

(b) The employee may request a hearing to determine if there is cause for not reemploying him or her for the ensuing year. A request for a hearing shall be in writing and shall be delivered to the person who sent the notice pursuant to subdivision (a), on or before a date specified in that subdivision, which shall not be less than seven days after the date on which the notice is served upon the employee. 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. The notice provided for in subdivision (a) shall advise the employee of the provisions of this subdivision.

(c) In the event a hearing is requested by the employee, the proceeding shall be conducted and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of 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.

(2) The discovery authorized by [Section 11507.6 of the Government Code](#) shall be available only if request is made therefor within 15 days after service of the accusation, and the notice required by [Section 11505 of the Government Code](#) shall so indicate.

(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. All expenses of the hearing, including the cost of the administrative law judge, shall be paid by the governing board from the district funds.

The board may adopt from time to time such rules and procedures not inconsistent with provisions of this section as may be necessary to effectuate this section.

(d) Any notice or request shall be deemed sufficient when it is delivered in person to the employee to whom it is directed, or when it is deposited in the United States registered mail, postage prepaid and addressed to the last known address of the employee.

(e) If after request for hearing pursuant to subdivision (b) any continuance is granted pursuant to [Section 11524 of the Government Code](#), the dates prescribed in subdivision (c) which occur on or after the date of granting the continuance and the date prescribed in [subdivision \(c\) of Section 44955](#) which occurs after the date of granting the continuance shall be extended for a period of time equal to the continuance. (Emphasis added.)

3. Education Code section 44955, subdivision (c), reads:

(c) Notice of such termination of services shall be given before the 15th of May in the manner prescribed in [Section 44949](#), 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. (Emphasis added.)

4. There is no question that before 1983 legislative changes to Education Code section 44949, a school district's failure to serve the preliminary notice on or before March 15 automatically resulted in the reemployment of the affected certificated employee for the ensuing school year. *Ward v. Fremont Unified School Dist.* (1969) 276 Cal.App.2d 313, at page 321, ruled that the May 15 deadline (in an earlier version of Education Code section 44955) was "jurisdictionally mandatory." The Court recited the legal principle, followed in California and the majority of other jurisdictions, that "when a consequence is enunciated for failing to comply with an act on a given date, that date is deemed to be jurisdictionally mandatory, not directory." (citing *Thomas v. Driscoll* (1940) 42 Cal. App.2d 23, 27, and *Shaw v. Randall* (1860) 15 Cal. 384.) In *Karbach v. Board of Education* (1974) 39 Cal.App.3d 355, the Court held that the "notices" in Education Code section 13447 (later renumbered section 44955) which must be served to avoid the consequence that the employee "be deemed reemployed," include the March 15 notice of recommendation and the required specifications of reasons. (*Id.* at page 363.) In general accord are *Rutherford v. Board of Trustees* (1974) 37 Cal. App.3d 775 and *Degener v. Governing Board* (1977) 67 Cal. App.3d 689, 698.

5. In 1983 the Legislature added the language in section 44949 relied upon by the District: "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." District contends that because both respondents were ultimately served with the preliminary notice on March 23 and were permitted to file a request for hearing and enjoy all of the due process rights afforded others timely served, no prejudice occurred and the initial errors were cured. In order for District to prevail, the

harmless error provision must be read to include the failure to serve a timely preliminary notice. Even then, the omission must be construed as “nonsubstantive.” If those conditions are met, the District would prevail because no prejudice was established apart from the absence of the earlier notice contemplated by the statute. District’s position is untenable for the reasons explained below.

6. The Legislature did not alter the language in section 44955 which “deemed [certificated employees] reemployed for the ensuing school year” if a school district fails to provide such employees the notices required by Education Code section 44949. Nothing in the changes to Education Code section 44949 suggests that the automatic consequence of late notice was being altered. It must be assumed that the Legislature knew that state appellate courts had consistently ruled that such notices were mandatory. Moreover, as the Legislature has not changed the language in section 44955 providing a specific consequence for failure to timely serve the preliminary and final notices, the long standing principle articulated in *Ward* and *Karbach* still requires consideration of such notices as “jurisdictionally mandatory.”

7. It is possible to reconcile the language in section 44949, subdivision (c) (3), with the mandatory notices in section 44955, subdivision (c). Although the court was faced with a different issue,³ the language in *Cousins v. Board of Education* (1994) 24 Cal. App.4th 1846, at pages 1853 and 1854, is instructive:

Because sections 44929.21⁴, 44949 and 44955 are in pari materia, we must construe them together as one statute. As expressed in *City of Huntington Beach v. Board of Administration* (1992) 4 Cal.4th 462, 14 Cal.Rptr.2d 514, 841 P.2d 1034], ‘In this regard, all parts of a statute should be read together and construed in a manner that gives effect to each, yet does not lead to disharmony with the others.’ (*Id.* at p. 468.) ‘Moreover, every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect. [Citation.] If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose. [Citation.] Such purpose will not be sacrificed to a literal construction of any part of the act.’ [Citation.]

8. The language in subdivision (c)(3) of Education Code section 44949 upon which District relies may be harmonized with the language of section 44955 upon which respondents rely. Education Code section 44949 includes many procedural obligations including those specified in the formal hearing provisions of the California Administrative Procedure Act (APA) adopted by reference in the statute. These include notice provisions

³ The issue addressed by the court was whether a school district could use the non-reelection process where it conceded that the reason for terminating a probationary teacher was purely economic. The court held that the teacher was entitled to the due process afforded probationary teachers in a layoff proceeding and at least implied that it was too late to commence such a process. (*Cousins*, at page 1854.)

⁴ This is the section dealing with non-reelection of probationary certificated employees.

relating to the filing of the accusation and notice of defense, discovery rights, and procedures relating to the administrative hearing and issuance of a proposed decision. None of these procedures includes language mandating a particular consequence for failure to comply. By limiting the application of section 44949, subdivision (c) (3), to procedures other than the notice requirements for the preliminary and final notices, statutory harmony is promoted. More importantly, this interpretation gives continued significance to the clear language in Education Code section 44955 requiring the reemployment of a teacher if the preliminary notice is not provided in a timely manner.⁵

9. This reading is also consistent with the rule that specific provisions are paramount over general ones. ([Code Civ. Proc., § 1859](#); [Taylor v. Board of Trustees \(1984\) 36 Cal.3d 500, 513.](#)) Section 44955, subdivision (c), is a specific provision dealing with the consequences for a school district's failure to give timely preliminary or final notices to teachers. As such, it prevails over the general provisions of Education Code section 44949, subdivision (c) (3), addressing procedural errors generally.

10. Finally, the characterization of the preliminary and final notice provisions of Education Code section 44949 as “jurisdictionally mandatory” by courts based on the Legislature’s inclusion of a specific remedy makes such notices “substantive” procedural requirements. As such, they are not subject to the harmless error rule added to section 44949.

General Legal Conclusions

11. The parties have agreed that cause exists under Education Code sections 44949 and 44955 to provide notice to the respondents designated for layoff in Attachment A, other than respondents Afan, Cannon, and Jillian Woodford, that their services will not be required in the ensuing school year. Such cause relates solely to the welfare of the District and the pupils thereof.

12. Cause does not exist under Education Code sections 44949 and 44955 to provide notice to respondents Kristina Afan, Colleen Cannon and Jillian Woodford that their services will not be required in the ensuing school year. The parties agree that Woodford shall not receive a final layoff notice because she is senior to Ms. Cannon who is being retained.

13. All notice and jurisdictional requirements set forth in the California Education Code sections 44949 and 44955 were met.

⁵ The language upon which District relies bars “dismissing the charges” based on harmless error; however, 44955, subdivision (c), precludes a school district from even pursuing such “charges” without a timely preliminary notice, so this situation should not ordinarily arise.

ORDER

Notice shall be given to the identified respondents that their services will not be required for the 2009-2010 School Year because of the reduction and discontinuance of particular kinds of services.

Dated: June 1, 2009

KARL S. ENGEMAN
Administrative Law Judge
Office of Administrative Hearings