

BEFORE THE GOVERNING BOARD OF THE  
MONROVIA UNIFIED SCHOOL DISTRICT

In The Matter Of The Accusations Against:

OAH No. 2010020069

Arabelle Aguirre, Rochelle Brown, Carol Burrill, Tomeika Carter, Ann Casey, Jeffrey Crowell, Narine Dekermejian, Sandra DeSurra, Natasha Diephuis, Joy Dunn, Megan Esquer, Annete Freitas, Chloe Hamlow, Hollie Hardwick, Spring Hills-Durose, Erin Iler, Yvonne Koskela, Melissa Lazarian, Filiberto Lujan, Teresa Macias, Ryan Maddox, Ilin Magran, Jennifer Maljian, Marita McCarthy, Kathleen Mejia, Marcela Molina, Kelly Montgomery, Lynne Dee Newton, Theresa Peterson, Heather Povinelli, Rachael Rodriguez, Susan Rubio, Tasha Seibert, Kathleen Selinga, Sharon Socha, Jennifer Tubbs, Stacy Wilkins, and Heidi Wilson,

Respondents.

**PROPOSED DECISION**

Julie Cabos-Owen, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 26, 2010, at the Monrovia Unified School District Offices in Monrovia, California.

Margaret Chidester, of Margaret Chidester & Associates, represented the Monrovia Unified School District (District). Jean Shin of Rothner, Segall, Greenstone & Leheny represented all Respondents, except as follows: for a portion of the hearing, Respondent Lynne Dee Newton was represented by Lorraine Grindstaff, of Patten, Faith & Sandford; for a portion of the hearing regarding the issue of bumping, Respondents Jennifer Maljian, Melissa Lazarian, Yvonne Koskela, Natasha Diephuis, Arabelle Aguirre, and Kathleen Selinga represented themselves<sup>1</sup>; with regard to bumping and placement of teachers at

---

<sup>1</sup> Although all six of these teachers indicated that they were representing themselves regarding the bumping issue, only Jennifer Maljian and Melissa Lazarian testified at the hearing.

Canyon Oaks High School and Mountain Park School, Respondent Marita McCarthy represented herself and Respondents Annette Freitas and Filiberto Lujan<sup>2</sup>;

Oral and documentary evidence was received. The record was left open to allow counsel and Respondents representing themselves to submit simultaneous written closing arguments, which were timely filed. Respondent Lynne Dee Newton’s Closing Argument was marked as Respondent’s Exhibit D and lodged. The closing argument from the Canyon Oaks High and Mountain Park School Teachers was marked as Respondent’s Exhibit E and lodged. The District’s Closing Argument was marked as District’s Exhibit 10 and lodged. The record was closed, and the matter was submitted for decision on April 30, 2010.

### FACTUAL FINDINGS

1. Complainant, Deborah L. Collins, Ed.D, filed the Accusation while acting in her official capacity as the Associate Superintendent of Human Resources for the District.
2. Respondents are certificated employees of the District.
- 3(a). On February 24, 2010, the Governing Board (Board) of the District adopted a resolution (Resolution 10-15) to reduce and discontinue the following particular kinds of services provided by the District no later than the close of the 2009-2010 school year:

<u>Services</u>	<u>Number of Full-Time Equivalent (FTE)Positions</u>
K-5 Elementary Classroom Teachers	18.0 FTE
9-12 English Teachers	2.0 FTE
9-12 Foreign Language, Spanish Teacher	1.0 FTE
9-12 Mathematics Teacher	1.0 FTE
K-5 Physical Education Teachers	3.25 FTE
Counselors:	
Elementary (4 FTE)	
Middle School (1 FTE)	
High School (2.8 FTE)	
Independent Study Program (1FTE)	
Adult Education (1 FTE)	9.8 FTE
K-12 School Psychologists	1.5 FTE
K-12 In-District Suspension Class Teacher	.5 FTE
Adult/Vocational Education Accounting	.11 FTE
Adult/Vocational Education Adult Basic Education	.10 FTE
Adult/Vocational Education Ceramics Teacher	.93 FTE

---

<sup>2</sup> Respondent McCarthy also spoke on behalf of Katie Woodrick, John Russell, Manny Lopez, and Roger Wu, who were not Respondents.

Adult/Vocational Education Clinical Medical Assisting Teacher	.75 FTE
Adult/Vocational Education Computer Teachers	2.42 FTE
Adult/Vocational Education Curriculum & Development	.89 FTE
Adult/Vocational Education Digital Photography Teacher	.10 FTE
Adult/Vocational Education Drive Education Teacher	.20 FTE
Adult/Vocational Education English as a Second Language/ Citizenship Teachers	4.08 FTE
Adult/Vocational Education Jewelry Teacher	.07 FTE
Adult/Vocational Education Job Developers	1.83 FTE
Adult/Vocational Education Medical Billing & Coding Teacher	1.0 FTE
Adult/Vocational Education Medical Office Services/Terminology Teacher	.92 FTE
Adult/Vocational Education Parent Education Teachers	.17 FTE
Adult/Vocational Education Pharmacy Tech Teacher	.23 FTE
Adult/Vocational Education Photography Teacher	.10 FTE
Adult/Vocational Education Sculpture Teacher	.07 FTE
Adult/Vocational Education Sewing Teacher	.10 FTE
Adult/Vocational Education Spanish Teacher	.30 FTE
Adult/Vocational Education Upholstery Teacher	.97 FTE
Adult/Vocational Education Watercolor Painting Teacher	.23 FTE
Adult/Vocational Education Workability/Transition Partnership Program (TPP) Teacher	1.0 FTE
Adult/Vocational Education Yopalates Teacher	.07 FTE
Regional Occupation Program Administration of Justice Teacher	.17 FTE
Regional Occupation Program Banking /Business Finance Teacher	.33 FTE
Regional Occupation Program Certified Nurse Assistant Teacher	1.0 FTE
Regional Occupation Program Clerical Aide Teachers	1.17 FTE
Regional Occupation Program Culinary Arts Teachers	1.25 FTE
Regional Occupation Program Fashion Merchandising Teachers	.67 FTE
Regional Occupation Program Film Production Teacher	1.0 FTE

Regional Occupation Program Forensic Science Teacher	.67 FTE
Regional Occupation Program Loss Prevention Teacher	.25 FTE
Regional Occupation Program Play Production Teacher	.17 FTE
Regional Occupation Program Recreation Leader Dance Teacher	.16 FTE
Regional Occupation Program Coordinator	1.0 FTE
Regional Occupation Program Small Business Teacher	1.0 FTE
Regional Occupation Program Stage Production Teacher	.17 FTE

Total FTE Reduction: 62.70 FTE

3(b). On March 10, 2010, the Board adopted a resolution (Resolution 10-15a), which added 1.0 FTE Preschool Special Day Class Teacher to the list of particular kinds of services to be reduced or discontinued. This brought the total FTE reduction to 63.70 FTE.

4. The Board further determined that the reduction in services necessitated a decrease in the number of certificated employees at the close of the 2009-2010 school year by a corresponding number of FTE positions, and directed the Superintendent/designee to notify the appropriate employees to implement the Board's determination. The Board also authorized the Superintendent/designee to issue additional notices to afford employees whose rights may be affected the opportunity to be heard.

5. On or before March 1, 2010, the District gave notice to each Respondent of the potential elimination of his/her position for the 2010-2011 school year. On March 15, 2010, the District served the Accusation on Respondents who requested a hearing.

6. All Respondents served with the Accusation filed requests for hearing and Notices of Defense to determine if there was cause for not reemploying them for the 2010-2011 school year.<sup>3</sup>

7. The services set forth in Factual Finding 3 are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 44955. The Board's decision to reduce or discontinue the identified particular kinds of services was neither arbitrary nor capricious, and constituted a proper exercise of discretion.

---

<sup>3</sup> All employees served with preliminary notices of layoff timely filed requests for hearing, except Tomeika Carter, Leonard Cheung, and Heidi Wilson. However, Tomeika Carter and Heidi Wilson, but not Leonard Cheung, were served with the Accusation.

8. The reduction or discontinuation of particular kinds of services was related solely to the needs and welfare of the District and its pupils.

9. The Board considered all known attrition, resignations, retirements and requests for transfer in determining the actual number of necessary layoff notices to be delivered to its employees.

10. In Exhibit B to Resolutions 10-15 and 10-15a, the Board established tie-breaker criteria for determining the relative seniority of certificated employees who first rendered paid service on the same date. According to Exhibit B, the order of termination shall be based on the needs of the District and its students in accordance with the following points system:

- [1] a. Two (2) points for an earned Doctoral degree.
- b. Two (2) points for an earned Masters degree.
- c. One (1) point for each additional current, valid credential held (excluding credential used by unit member in their 2009-2010 assignment).
- d. One point (1) for possession of National Board certification.
- e. One-half (1/2) point for each supplemental subject matter authorization.
- f. One-half (1/2) point for possession of BCLAD or BCC certification.

[¶] . . . [¶]

- 4. Employees who receive a notice and who share the same date of service shall be ranked by point totals. Low point totals will indicate low seniority for that seniority date. . . .
- 5. If the criteria listed above do not break a tie, the District shall hold a lottery prior to April 1, 2010. Each group of tied employees shall have the right to attend the lottery and pick a lottery number. In the absence of the employee, the Superintendent or designee will select a lottery number on behalf of the employee. The teachers association shall have a representative in attendance at the lottery.

6. As between tied employees, low lottery numbers will indicate low seniority for that seniority date.

11. The District maintains a Seniority List which contains employees' seniority dates, current assignments, and credential and certificate information.

12. The District used the Seniority List with seniority dates to develop a proposed layoff list of the least senior employees currently assigned in the various services being reduced. The District also considered each teacher's credentials and certifications.

13(a). The District used information from the District's Seniority List to apply the tie breaking criteria of Exhibit B to Board Resolutions 10-15 and 10-15a.

13(b). No Respondent established that the tie breaking criteria were improperly applied or that his/her placement on the Seniority List after application of the tie breaking criteria was incorrect.

14. The District determined that nobody less senior than Respondents was being retained to render services which Respondents are certificated and competent to render.

*Respondent Lynne Dee Newton – Permanent / Probationary Status*

15. Respondent Lynne Dee Newton contested her status as a probationary employee, asserting instead that she should be classified as permanent. Although she is the most senior elementary school teacher among Respondents, her current probationary status places her in the first position for layoff.

16(a). Respondent Newton appeared at the 2009 layoff hearing in OAH Case Number 2009030192, after which the Administrative Law Judge (ALJ), dismissed the Accusation against her based on lack of proper notice. In the 2009 Proposed Decision, the ALJ made the following factual findings, which are set forth verbatim, as follows:

17. a. Respondent Lynne Dee Newton is a first-grade teacher. She originally worked full-time with the District from 1971 through 1978, when she resigned. Respondent Newton returned to the District on August 31, 1999, as a temporary employee. In the 1999-2000 school year, she worked full-time. Thereafter, from 2000 [-2001 school year] through 2008 [- 2009 school year], Respondent Newton worked part-time in a job share assignment, working at 60 percent of the school days.

b. The District provided Respondent Newton with a temporary contract for the 1999-2000 school year. The following year, 2000, Respondent Newton's contract stated that she was a "certificated employee in a regular position." It did not indicate that she was a

temporary employee. Each year thereafter, including the 2008 school year, Respondent Newton's contracts noted that she was employed in a "regular position" or that she was tenured; none indicated that she was a temporary employee.

c. Upon review of her personnel file several days before the [2009] hearing, Superintendent Collins realized that the District's classification of Respondent Newton as "tenured" had been a mistake. The District concluded that since her re-hire in 1999, Respondent Newton had not worked for two complete consecutive years; i.e., at least 75 percent of the days in a school year; and thus, she was not tenured. The District believed that Respondent Newton was a temporary employee, and as such, she was not entitled to notice of the layoff proceeding. With sincere regret, Superintendent Collins informed Respondent Newton, two days prior to the hearing, that she would be laid off.

16(b). The evidence at the instant hearing corroborated the findings set forth above in Factual Finding 16(a), and those findings are adopted herein.

17. The evidence at the instant hearing further established the following:

(a). For the 1999-2000 school year, Respondent Newton was first hired under a temporary contract teaching third grade at 40 percent. From October 25, 1999, until the end of the 1999-2000 school year, her temporary contract was changed to include a 60 percent, newly-open first grade teaching position, thus becoming a full-time (100 percent) temporary contract. Respondent Sandra DeSurra took the remaining 40 percent of the first grade teaching position on a temporary contract. Respondent Newton worked 60 percent of the school days for the school years 2000-2001 through 2008-2009.

(b). For the 2000-2001 school year, Respondent Newton's contract stated that she was a "certificated employee in a Regular position," with a handwritten notation of "Prob II" at the top of the contract. For the 2001-2002, 2002-2003 school years, Respondent Newton's contract again stated that she was a "certificated employee in a Regular position." This was reiterated in her contracts for the 2003-2004 through 2008-2009 school years, with the added notation that she was "Tenured."

(c). From the 2000-2001 school year and thereafter, prior to the commencement of each school year, the District required that Respondent Newton complete a Request for Unpaid Leave of Absence, requesting a 40 percent leave of absence in order to "job share" with Respondent Sandra DeSurra. Respondent Newton was told she had to request a leave of absence for the time she did not want to work because she was employed as a regular teacher at 100 percent.

(d). Based on the notations in her contracts, she believed that she was tenured beginning at the commencement of the 2001-2002 school year. Respondent Newton first learned that the District did not consider her tenured last year just prior to the 2009 layoff hearing.

(e). Following the 2009 layoff hearing, the Administrative Law Judge (ALJ) dismissed the Accusation against Respondent Newton based on the inadequate notice given to her as a probationary employee.

(f). For the 2009-2010 school year, the District offered, and Respondent Newton accepted, a Probationary II contract under which she is working 75 percent, in order to obtain tenure.

### *Elementary and English Teachers*

18. Following the adoption of Resolution 10-15a, the District determined that several of the reduced FTEs would be addressed by way of positively assured attrition. These included three FTE K-5 Elementary Classroom Teachers and two FTE 9-12 English Teachers. Consequently, the number K-5 Elementary Classroom Teachers to be reduced/discontinued was decreased to 15 FTE, and the need to decrease two FTE 9-12 English Teachers was eliminated.

19. Given the facts set forth in Factual Finding 18, only 15 K-5 Elementary Classroom Teachers are subject to elimination of his/her K-5 Elementary Classroom teaching position for the 2010-2011 school year. They include probationary employee, Respondent Lynne Dee Newton (#155, seniority date 9/2/1999; see Factual Findings 15, 16 and 17 and Legal Conclusions 4 through 14), three permanent employees who received preliminary notices of layoff,<sup>4</sup> and permanent employees as follows: Respondents Sharon Socha (#265, seniority date 8/28/06), Stacy Wilkins (#264, seniority date 8/28/06; but see Factual Finding 16, below), Megan Esquer (#263, seniority date 8/28/06), Rachael Rodriguez (#262, seniority date 8/28/06), Chloe Hamlow (#253, seniority date 8/21/06), Jeffrey Crowell (#245, seniority date 8/29/05), Susan Rubio (#195, seniority date 8/22/02; but see Factual Finding 16, below), Teresa Macias (#194, seniority date 8/22/02; but see Factual Finding 16, below), Rochelle Brown (#187, seniority date 10/1/01), Jennifer Tubbs (#184, seniority date 8/23/01), and Ann Casey (#183, seniority date 8/23/01). More senior Respondents, including, Kelly Montgomery (#182, seniority date 8/23/01), Heather Povinelli (#175, seniority date 8/23/01), and Erin Iler (#173, seniority date 8/23/01) should not be issued final notices of layoff.

20. Since the need to need to decrease 2 FTE 9-12 English Teachers was eliminated, the two 9-12 English Teachers who received preliminary notices of layoff, including Respondent Melissa Lazarian (#242, seniority date 8/22/05), should not be issued final notices of layoff.

---

<sup>4</sup> Bhavini Bhakta (#254, seniority date 8/21/06), Pamela Gibba (#201, seniority date 8/22/02) and Edward Gibba (#199, seniority date 8/22/02) did not file requests for hearing.

### *Bumping of Junior Employees*

21. Respondent Stacy Wilkins (#264, seniority date 8/28/06) teaches K-5 Elementary, and is subject to layoff due to reduction in those particular kinds of services. However, in addition to her multiple subject credential, Respondent Wilkins holds an authorization in Business (K-9), which allows her to “bump” junior employee, Cynthia Hine (#302, seniority date 2/15/09), teaching Middle School Computers. Consequently, the Accusation against Respondent Wilkins should be dismissed.

22(a). Respondent Susan Rubio (#195, seniority date 8/22/02) teaches K-5 Elementary, and is subject to layoff due to reduction in those particular kinds of services. However, in addition to her multiple subject credential (deemed “highly qualified” per the California Commission on Teacher Credentialing (CTC)), Respondent Rubio holds an authorization in Introductory English (“highly qualified” per CTC), which allows her to “bump” junior employee, Respondent Jennifer Maljian (#256, seniority date 8/21/06), teaching Middle School English/College Prep.

22(b). By virtue of her single subject credential in English and her experience teaching Middle School English/College Prep (“highly qualified”), Respondent Maljian in turn “bumps” junior employee Katie Woodrick (#291, seniority date 8/20/08), teaching Alternative Education English.

22(c). Consequently, the Accusations against Respondents Rubio and Maljian should be dismissed.

23. Respondent Teresa Macias (#194, seniority date 8/22/02) teaches K-5 Elementary, and is subject to layoff due to reduction in those particular kinds of services. However, in addition to her multiple subject credential (deemed “highly qualified” per the CTC), Respondent Macias holds an authorization in Introductory English (“highly qualified”), which allows her to “bump” junior employee, Respondent Arabelle Aguirre (#299, seniority date 8/25/08), teaching Middle School Language Arts. Consequently, the Accusation against Respondent Macias should be dismissed.

24(a). At the administrative hearing, Respondent Marita McCarthy spoke on behalf of teachers assigned to alternative education settings who had received notices of layoff. She pointed out that “highly qualified” includes one’s experience and training at specific grade levels, not just their credentials.

24(b). Pursuant to Respondent McCarthy’s request, official notice was taken of the arguments made in the 2009 layoff hearing regarding the special training and experience of teachers at the District’s continuation high school. Factual Finding 12 of the 2009 Proposed Decision is forth verbatim as follows:

12. Respondent Filiberto Lujan is a health science teacher at the District's continuation high school. He testified on behalf of himself and Respondents . . . Annette Frietas . . . regarding their special training and experience. This includes the Respondents' "highly qualified" status, as defined by 34 C.F.R. § 200.56, under the No Child Left Behind (NCLB) Act of 2001 (Pub.L. No. 107-110 (Jan. 8, 2002) 115 Stat 1425). The continuation school recently received accreditation by the Western Association Schools and Colleges (WASC), which provides college education opportunities, including funding and admission assistance, to minority students. The WASC accreditation was based in part on the District's retention of highly qualified teachers; if the District does not have highly qualified teachers, it risks losing its WASC accreditation. Although Respondents Lujan, . . . [and] Frietas . . . , the District seeks to "skip" them from the layoff order because they possess special training and experience, including their highly qualified designation. No employees with higher seniority dates possess this qualification, or the same special training and experience. The District has demonstrated a specific need to retain Respondents Lujan, [and] Frietas . . . and the employees have the special training and experience to provide the needed services.

24(c). At the current hearing, the District did not seek to skip any junior teachers teaching at the alternative settings. Moreover, although the junior teachers from the alternative settings collectively established that they may have specialized experience by way of their assignments, no individual Respondent established that he/she should be skipped by virtue of his/her individual training or experience. Additionally, at hearing, the District established that the senior Respondents were certificated and competent to render services of the junior Respondents, and the junior Respondents did not provide evidence which contradicted the competence of the senior Respondents. Although the senior Respondents may be moving from other school sites and may not have identical experience to the junior Respondents, the evidence did not establish that this rendered the senior Respondents incompetent to provide services for which they are certificated and have been providing instruction.

#### *Seniority Dates*

25. Respondent Megan Esquer (#263, seniority date 8/28/06) challenged the seniority date assigned to her by the District. Respondent Esquer began working for the District under a temporary contract during the 2005-2006 school year. She was employed under a temporary contract for the 2006-2007 school year, and then employed as a Prob II for the 2007-2008 school year, having received probationary credit for her temporary service in 2006-2007. Therefore, the District properly determined the seniority date for Respondent Esquer.

26. Respondent Stacy Wilkins (#264, seniority date 8/28/06) challenged the seniority date assigned to her by the District. She began working in the District in August 2004, attending new teacher training. She then taught under a temporary contract for the 2004-2005 school year. She also taught under temporary contracts for the 2005-2006 and 2006-2007 school years. She was employed as a Prob II for the 2007-2008 school year, having received probationary credit for her temporary service in 2006-2007. She argued that she should have been notified of the 2006 new teacher training so that she could have attended that training to move her seniority date back to the first date of the training. However, since she had already attended new teacher training in 2004, the 2006 training was not mandatory, and she was not entitled to receive credit for the 2006 training. Therefore, the District properly determined the seniority date for Respondent Wilkins.

27. Although her PKS was not being reduced/discontinued, Respondent Yvonne Koskela (#912, seniority date 8/22/02) was issued a precautionary layoff notice, in case a more senior teacher subject to layoff asserted that he/she could bump into Respondent Koskela's position as a Program Advisor. The District anticipated that, if Respondent Koskela was bumped, her single subject credential in Science/Biological Sciences, and her authorization in Geosciences would allow her, in turn, to bump junior teacher, Ana Madariaga (#316, seniority date 8/25/009), teaching Middle School Physical Sciences. However, none of the Respondents asserted that he/she could bump Respondent Koskela. Consequently, the Accusation against Respondent Koskela should be dismissed.

### *Temporary Employees*

28. The District established that Respondents Ilin Magran (whose position is primarily categorically funded), Sandra DeSurra (who is covering the 40 percent leave of absence for Respondent Newton), Joy Dunn, Theresa Peterson and Tasha Seibert were properly classified as temporary employees.

## LEGAL CONCLUSIONS

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

2. Cause exists to reduce the number of certificated employees in the District due to the reduction and discontinuation of particular kinds of services. Cause for the reduction or discontinuation of services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code sections 44955.

3(a). Education Code section 44955, subdivision (b), provides, in pertinent part:

[T]he services of no permanent employee may be terminated . . . while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.

[¶] . . . [¶]

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

3(b). The language of this statute is clear that a probationary employee, even if more senior, cannot be retained to perform a service that a permanent employee is certificated and competent to render.

4. Education Code section 44915 provides:

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.

5. Education Code Section 44916 provides, in pertinent part:

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

6. Failure to provide notice of temporary employment as required by Section 44916 results in probationary service as a matter of law. (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 926; See also, *Vasquez v. Happy Valley Union School Dist.* (2008) 159 Cal.App.4th 969, 983; and *Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist.* (2006) 145 Cal.App.4th 1260, 1279-1281 and 1299.)

7. Education Code section 44918 (substitute or temporary employee deemed probationary employee; reemployment rights) provides, in pertinent part:

(a) Any employee classified as a substitute or temporary employee, who serves during one school year for at least 75 percent of the number of days the regular schools of the district were maintained in that

school year and has performed the duties normally required of a certificated employee of the school district, shall be deemed to have served a complete school year as a probationary employee if employed as a probationary employee for the following school year. (Emphasis added.)

8. In the case at hand, Respondent Newton's contract for the 2000-2001 school year indicated that she was a "certificated employee in a Regular position," with a handwritten notation of "Prob II" at the top. These facts, along with Education Code 44915 and 44916, establish that Respondent Newton was a probationary employee at the commencement of the 2000-2001 school year. Furthermore, pursuant to Education Code section 44918, Respondent Newton should have been given credit for a full year (1999-2000) of probationary service, thus making her a Probationary II employee at the commencement of the 2000-2001 school year. Thereafter, Respondent Newton was required to meet statutory requirements to obtain permanent status.

9(a). The District may not waive statutory tenure requirements if a teacher does not meet the specifications of Education Code. (*Fleice v. Chualar Union Elementary School Dist.* (1988) 206 Cal.App.3d 886, 890-894.)

9(b). In *Fleice*, the teacher taught the Spring 1985 semester, and then taught the full 1985-1986 school year. The District offered to rehire her for the 1986-87 school year as a permanent employee, and she signed a contract reflecting her tenured classification. However, in March of 1987, Fleice was notified that her tenure had been erroneously granted and that she had been reclassified as a second-year probationary employee. Fleice served the remainder of her second full year, but the District did not elect to retain her for the next school year. (*Id.* at 888-889.)

9(c). The *Fleice* Court held that the District acted beyond its statutory power in granting tenure, stating:

[T]enure statutes, like all statutes, reflect a balance of interests. In *Turner v. Board of Trustees* (1976) 16 Cal.3d 818, 129 Cal.Rptr. 443, 548 P.2d 1115, the Supreme Court identified the competing interests that this State's tenure statutes have sought to balance. The Court wrote: "In considering the student's need for education, the teacher's need for job security, and the school board's need for flexibility in evaluating and hiring employees who may remain 40 years, the Legislature may determine whether a teacher's vested right shall be granted, postponed or denied. [Citation omitted.] Our school system is established not to provide jobs for teachers but rather to educate the young. Establishing a test period for teachers to prove themselves is essential to a good education system." (*Turner v. Board of Trustees, supra*, 16 Cal.3d 818, 825, 129 Cal.Rptr. 443, 548 P.2d 1115.) . . .

[I]f the tenure statute does reflect a legislative decision to “[e]stablish[ ] a test period for teachers to prove themselves” (16 Cal.3d at p. 825, 129 Cal.Rptr. 443, 548 P.2d 1115), school boards must respect that decision. . . .

(*Id.* at 891-892.)

9(d). The *Fleice* Court concluded that its holding “that the District acted beyond its statutory power in granting tenure leaves no room to apply the estoppel doctrine.” The Court stated that “the common-law doctrine of equitable estoppel does not authorize us to rewrite the Education Code,” and reasoned:

To be sure, “ [t]he doctrine of equitable estoppel may be applied against the government where justice and right require it.” ( *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 493, 91 Cal.Rptr. 23, 476 P.2d 423, quoting from *U.S. Fid. & Guar. Co. v. State Bd. of Equal.* (1956) 47 Cal.2d 384, 388-389, 303 P.2d 1034.) This general principle, however, has two important qualifications. The first is “the well-established proposition that an estoppel will not be applied against the government if to do so would effectively nullify ‘a strong rule of policy, adopted for the benefit of the public....’ ” ( *City of Long Beach v. Mansell, supra*, 3 Cal.3d at p. 493, 91 Cal.Rptr. 23, 476 P.2d 423, quoting from *County of San Diego v. Cal. Water Etc. Co.* (1947) 30 Cal.2d 817, 829-830, 186 P.2d 124.) The second qualification is the rule that estoppel cannot expand a public agency’s powers. Thus, principles of estoppel are not invoked to contravene statutes and constitutional provisions that define an agency’s powers. [Citations omitted.]

Both qualifications apply here. The tenure statute, as already discussed, limits the District’s powers by establishing a mandatory two-year probationary period. The probationary period itself serves the strong policy articulated in *Turner*: “[e]stablishing a test period for teachers to prove themselves is *essential* to a good education system.” ( *Turner v. Board of Trustees, supra*, 16 Cal.3d 818, 825, 129 Cal.Rptr. 443, 548 P.2d 1115, *emphasis added.*)

(*Id.* at 893-894.)

10. Education Code section 44929.1 provides, in pertinent part:

(b) Every employee of a school district of any type or class having an average daily attendance of 250 or more who, after having been employed by the district for two complete consecutive school years in a position or positions requiring certification qualifications, is reelected

for the next succeeding school year to a position requiring certification qualifications shall, at the commencement of the succeeding school year be classified as and become a permanent employee of the district.

The governing board shall notify the employee, on or before March 15 of the employee's second complete consecutive school year of employment by the district in a position or positions requiring certification qualifications, of the decision to reelect or not reelect the employee for the next succeeding school year to the position. In the event that the governing board does not give notice pursuant to this section on or before March 15, the employee shall be deemed reelected for the next succeeding school year.

This subdivision shall apply only to probationary employees whose probationary period commenced during the 1983-84 fiscal year or any fiscal year thereafter.

11. Education Code section 44908 provides:

A probationary employee who, in any one school year, has served for at least 75 percent of the number of days the regular schools of the district in which he is employed are maintained shall be deemed to have served a complete school year. In case of evening schools, 75 percent of the number of days the evening schools of the district are in session shall be deemed a complete school year.

12. Education Code section 44975 states:

No leave of absence when granted to a probationary employee shall be construed as a break in the continuity of service required for the classification of the employee as permanent. The time during which the leave of absence is taken shall not be considered as employment within the meaning of Sections 44882 to 44891, inclusive, Sections 44893 to 44900, inclusive, Sections 44901 to 44906, inclusive, and Sections 44908 to 44919, inclusive.

13(a). Education Code section 44929.21 is read in conjunction with Education Code section 44975. (*Griego v. Los Angeles Unified School Dist.* (1994) 28 Cal.App.4th 515, 517-521.)

13(b). In *Griego*, the teacher taught a complete school year (more than 75 percent of the number of days regular school was maintained) in 1989-1990 as a probationary employee. In the 1990-1991 school year, Griego's second year as a probationary employee, she taught slightly less than 75 percent of the days, due to a work-related injury for which she was on approved industrial leave of absence. In the 1991-1992 school year, Griego again

taught a complete school year as a probationary employee. In concluding that Griego had served “two complete consecutive” years, the Court determined that Griego’s middle year with a leave of absence maintained her “continuity of service,” and that her first and third years must be treated as “consecutive” within the meaning of section 44929.21. (Id.)

14. Here, Respondent Newton was employed at 100 percent during the 1999-2000 school year; this constituted her first complete year of probationary service. In order to meet the requirements of Education Code section 44929.21, Respondent Newton must have been employed for another “complete consecutive” year. The District acted beyond its statutory power in designating Respondent Newton as tenured prior to completion of that second “complete consecutive” year. Although Respondent Newton served nine consecutive years of employment (2000-2001 through 2008-2009), they did not constitute “complete” years, as defined by Education Code section 44908, since she served less than 75 percent. Nevertheless, as in *Griego*, Respondent Newton’s leaves of absence were not construed as a break in the continuity of her service. Consequently, her 75 percent service in the current school year (2009-2010) constitutes her second “complete” year within the meaning of Education Code section 44929.21. However, this service comes too late to avoid the current layoff based on her probationary status.

15(a). Respondent Newton contends that the District should be estopped from revoking her previously granted tenure because justice requires it and because it will not contravene public policy. Respondent Newton asserts that, by virtue of her ten years of service, she has sufficiently met the two-year “test period” for teachers to prove themselves. These arguments, while well-principled, cannot overcome the mandates of the Education Code and the holdings in *Fleice*.

15(b). Despite the unfortunate consequence of the late discovery of its error, the District, just as in *Fleice*, cannot act in contravention to the Education Code by granting tenure without satisfaction of the statutory requirements. Although her nine years of service at 60 percent come to a total of 5.40 years of cumulative teaching, there is no statute or case law authorizing the District to calculate a teacher’s probationary period in this cumulative manner. Nor is there any authority for the District to consider substantial compliance with the statutorily-prescribed “testing period.” To the contrary, Education Code section 44908 specifically defines a “complete” year as 75 percent of the days “in any one school year.” Consequently, Respondent Newton’s nine years at 60 percent service cannot be counted toward satisfaction of her second year of “complete” (i.e. 75 percent) service.

15(d). As the *Fleice* Court pointed out, “the common-law doctrine of equitable estoppel does not authorize us to rewrite the Education Code.” (*Fleice, supra*, at 893-894.) As such, the doctrine of equitable estoppel cannot be applied to grant Respondent Newton permanent status for purposes of this layoff proceeding.

///  
///  
///

16. Education Code section 44955, subdivision (b), provides, in pertinent part:

[W]henever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year . . . , and when in the opinion of the governing board of the district it shall have become necessary by reason of any of these conditions to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year.

17. No certificated employee junior to any Respondent is being retained to perform any services which any Respondent is certificated and competent to render.

18. Temporary employees Ilin Magran, Sandra DeSurra, Joy Dunn, Theresa Peterson and Tasha Seibert were properly classified as temporary employees. As such, they are not entitled to receive notice under this layoff proceeding.

19. Cause exists within the meaning of Education Code section 44955 for terminating or reducing Respondents' employment for the 2010-2011 school year, as set forth in Factual Findings 1 through 28 and Legal Conclusions 1 through 18.

#### ORDERS

1. The Accusations served on Respondents Stacy Wilkins, Susan Rubio, Teresa Macias, Melissa Lazarian, Kelly Montgomery, Heather Povinelli, Erin Iler, Jennifer Maljian, Tomeika Carter, Natasha Diephuis, Spring Hills-DuRose, Hollie Hardwick, Filiberto Lujan, Annette Freitas, Yvonne Koskela, Ryan Maddox, Kathleen Seling, Marita McCarthy and Heidi Wilson are dismissed.

2. The Accusations served on Respondents Lynne Dee Newton, Sharon Socha, Megan Esquer, Rachael Rodriguez, Chloe Hamlow, Jeffrey Crowell, Rochelle Brown, Jennifer Tubbs, Ann Casey, Arabelle Aguirre, Carol Burrill, Narine Dekermenjian, Marcela Molina and Kathleen Mejia are sustained. Notice may be given to these Respondents that their services will be reduced or terminated for the 2010-2011 school year because of the reduction or discontinuation of particular services as indicated.

3. Notice shall be given in inverse order of seniority.

//  
///  
///  
///  
///  
///  
///

4. The District's classification of Joy Dunn, Ilin Magran, Sandra DeSurra, Teresa Peterson and Tasha Seibert as temporary employees is upheld.

Dated: May 5, 2010

---

JULIE CABOS-OWEN  
Administrative Law Judge  
Office of Administrative Hearings