

BEFORE THE
GOVERNING BOARD
ELK GROVE UNIFIED SCHOOL DISTRICT
COUNTY OF SACRAMENTO
STATE OF CALIFORNIA

In the Matter of the Reduction in Force of:

CERTAIN CERTIFICATED PERSONNEL
EMPLOYED BY THE ELK GROVE
UNIFIED SCHOOL DISTRICT,

Respondents.

OAH No. 2010020832

PROPOSED DECISION

Administrative Law Judge Stephen J. Smith, Office of Administrative Hearings, State of California heard this matter in Elk Grove, California on April 19, 20, 22 and 23, 2010.

Glen De Graw, Associate Superintendent for Human Resources and Brandon Krueger, Director of Certificated Personnel, appeared as the official representatives of the Elk Grove Unified School District (District), all of whom were represented by Karen M. Rezendes, Attorney at Law, Dulcinea A. Grantham, Attorney at Law and Leah Won, Attorney at Law, all of Lozano Smith, Attorneys at Law.

Margaret Geddes, Attorney at Law, of Beeson, Tayer and Bodine, Attorneys, and A. Eugene Huguenin, Jr., Attorney at Law, represented all certificated District employees receiving a preliminary notice that their services would not be required for the upcoming school year and who requested a hearing.

Annette Stringer appeared in pro per.

The matter was submitted on April 23, 2010.

FACTUAL FINDINGS

1. All respondents subject to this action are, and at all times relevant to this Decision were, certificated employees of the District. All respondents save one were represented by counsel identified above.

2. On or just before March 2, 2010, in accordance with Education Code sections 44949 and 44955, Steven M. Ladd, Ed.D., Superintendent of the District notified the Governing Board of the District (the Board) in writing of his recommendation that certain particular kinds of services would have to be reduced or eliminated for the upcoming school year. The Superintendent’s notice specified the particular kinds of services to be reduced or eliminated, as set forth in detail below.

3. The Superintendent also notified the Board that a corresponding number of certificated employees of the District would have to be laid off to effectuate the reduction or elimination of the enumerated particular kinds of services. The Superintendent notified the Board that certain respondent certificated employees of the District had been identified as persons to whom notice should be given that their services would not be required for the ensuing school year.

4. The recommendation that respondents’ services for the District would not be required for the upcoming school year was not related to their skills, abilities or competencies as teachers.

5. On March 2, 2010, the Board adopted Resolution No. 42, which resolved to follow the Superintendent’s recommendation to reduce 546.1 Full Time Equivalent (FTE) of particular kinds of services now being offered by the District. The Resolution authorized and directed the Superintendent to give notice to a corresponding number of certificated employees of the District that their services would not be required for the upcoming school year in order to effectuate the reduction. Resolution No. 42 authorized the elimination of the following services now offered in the District:

<u>Services</u>	<u>Number of Full-Time Equivalent Positions</u>	
1. Vice Principal—Elementary (K-8 Year-Round)	14.5	FTE
2. Vice Principal—Middle School	10.0	FTE
2. Vice Principal—High School	12.0	FTE
3. District Athletic/Facilities Utilization Coordinator	1.0	FTE
4. Director of Adult and Community Education	1.0	FTE
5. Program Administrator – Adult and Community Education	2.0	FTE
6. Director of Instructional Support	2.0	FTE
7. Program Specialist – Curriculum/Professional Learning	2.0	FTE
8. Program Specialist – Preschool	4.0	FTE
9. Instructional Coach – Preschool	2.0	FTE
10. Preschool Teacher	24.8	FTE
11. Elementary Teacher (K-3 Class Size Reduction)	257.0	FTE
12. K-6 Resource Teacher (Computer Lab)	39.0	FTE
13. Technology Integration Support Specialist	2.0	FTE
14. 9th Grade Class Size Reduction	14.10	FTE
15. Counselor - Secondary (AB 1802)	16.0	FTE

16.	Counselor – High School	37.7	FTE	
17.	Counselor – Middle School	24.5	FTE	
18.	Alternative Education Counselor	4.0	FTE	
19.	Librarians – High School	16.5	FTE	
20.	Vocational Education Specialist	4.0	FTE	
21.	Academic Intervention Teacher	10.4	FTE	
22.	Adult Education Teacher:			
	a. CalSAFE Services for Parenting Teens and Their Children	1.3	FTE	
	b. One Stop Career Center	1.3	FTE	
	c. Parent Participation Preschool	3.5	FTE	
	d. Even Start Family Literacy		1.0	FTE
	e. Adult Basic/Adult Secondary Education/ESL	1.0	FTE	
	f. Adult Basic/Adult Secondary Education	2.0	FTE	
	g. ESL	0.2	FTE	
	h. ESL/Family Literacy	1.0	FTE	
	i. Career Technical Education		1.7	FTE
	j. Adults in Correctional Facilities	8.8	FTE	
	k. WIA II/English Literacy & Civics Education	3.0	FTE	
	l. Department of Human Assistance	1.3	FTE	
23.	ROP Instructor:			
	a. Applied Natural Science	2.3	FTE	
	b. Industrial Technology	4.5	FTE	
	c. Business Technology	3.8	FTE	
	d. Public & Human Services	1.6	FTE	
	e. Health Sciences	1.5	FTE	
	f. Computer Technology	1.1	FTE	
	g. Performing & Visual Arts	3.7	FTE	

Total Full Time Equivalent reduction

545.1 FTE

TIMELY SERVICE OF PRELIMINARY NOTICES OF LAYOFF

6. The Associate Superintendent and his staff identified the corresponding number of respondents affected by the reduction or elimination of PKS identified in Resolution No. 42, and caused each to be timely served with a written Notice of Intention to Dismiss (Preliminary Notice of Layoff). The parties stipulated the District timely served all affected respondents with Preliminary Notices of Layoff. The District served 760 certificated employees with such Preliminary Notices. Respondents receiving a preliminary notice of layoff are listed in Attachment A to this Decision.

LONG-TERM SUBSTITUTES AND TEMPORARY EMPLOYEES RELEASED

7. The Governing Board adopted Resolution No. 47 on March 2, 2010. In Resolution No. 47, The Governing Board determined to non-reelect all long-term substitute teachers and to release all certificated employees teaching pursuant to temporary teaching

contracts effective at the end of the current school year. Resolution No. 47 directed the Superintendent or his designee to identify each of the certificated employees working in the District who were working pursuant to long term substitute or temporary teaching contracts, and submit a listing of the employees to the Governing Board for attachment to the Resolution. Resolution No. 47 directed the Superintendent or his designee to notify each certificated employee identified and listed on the attachment to Resolution No. 47 that they would be released from service for the District effective at the end of the 2009/2010 school year. The Associate Superintendent and his staff identified all long term substitutes and temporary employees serving in the District and compiled the list of their names for attachment to Resolution No. 47. There were 110 total certificated employees so identified and affected by the nonreelection of long term substitutes or termination of temporary teaching contracts.

PRECAUTIONARY NOTICES OF LAYOFF

8. In response to Resolution No. 47, and by direction of the Superintendent, the Associate Superintendent caused each respondent identified as serving as a certificated employee working under a temporary contract to be served with a written Precautionary Notice of Intention to Dismiss (precautionary notice of layoff) on March 9, 2010. There were 57 precautionary notices of layoff served on certificated employees of the District employed under temporary contracts.

RELEASE AND REASSIGNMENT OF CERTIFICATED ADMINISTRATORS

9. The Governing Board also adopted Resolution No. 44 on March 2, 2010. Resolution No. 44 authorized the Superintendent or his designee to notify certain certificated administrators serving in the District in administrative capacities who were identified in an attachment to the Resolution that they will be released from their present administrative assignments for the upcoming 2010- 2011 school year, effective June 30, 2010. There were 34 FTE of certificated employees serving in administrator positions affected by this Resolution.

ADDITIONAL RELEASE AND REASSIGNMENT OF CERTIFICATED ADMINISTRATORS

10. The Governing Board also adopted Resolution No. 54 on March 8, 2010. Resolution No. 54 authorized the Superintendent or his designee to notify additional certificated administrators serving in the District in administrative capacities who were identified in an attachment to Resolution No. 54 that they will be released from their present administrative assignments for the upcoming 2010- 2011 school year, effective June 30, 2010, and that they would be reassigned to different positions for the upcoming school year. There were 11 FTE of certificated employees serving in administrator positions affected by Resolution No. 54.

11. Resolutions Nos. 44 and 54 also provided that some of the released certificated administrators could and would be reassigned to a classroom teaching position for the 2010-

2011 school year, in accordance with Education Code section 44951. The release and reassignment of certificated administrators was available to some of the certificated administrators who had retained seniority rights and were able to “bump”, i.e., be reassigned to classroom teaching, displacing less senior certificated employees with similar credentials and competencies.

12. There was no issue identified with respect to any certificated administrator being released or being able to bump back into a classroom assignment.

PRELIMINARY AND PRECAUTIONARY NOTICES OF LAYOFF CONTENTS

13. The written preliminary and precautionary notices of layoff advised respondents of the Superintendent’s recommendation to the Board that their services would not be required for the upcoming school year. The preliminary and precautionary notices set forth the reasons for the recommendation, and had attached the following: a copy of either Resolution 42 or 47, as appropriate; a copy of the list of the PKS the Board has determined to reduce or eliminate as set forth in resolution number 42; a blank copy of a Request for a Hearing; and copies of Education Code sections 44949 and 44955. The precautionary notices also added a list of those District employees receiving a precautionary notice.

SERVICE OF PRELIMINARY AND PRECAUTIONARY NOTICES AND RESPONSES JURISDICTIONAL REQUIREMENTS LEADING TO EVIDENTIARY HEARING

14. As set forth above, a total of 760 certificated employees were served with preliminary notices of layoff. A total of 57 temporary employees were served with precautionary notices of layoff. The parties stipulated that all preliminary and precautionary notices of layoff were timely served.

15. A total of 661 certificated employees who were timely served with a preliminary notice of layoff filed a Request for Hearing with the District. Four of those filing Requests for Hearing failed to file timely. A total of 20 certificated employees who were timely served with a precautionary notice of layoff timely filed a Notice of Hearing with the District. The parties stipulated that those certificated employees who failed to timely file a Request for Hearing with the District after having been timely served with a preliminary or precautionary notice of layoff had waived their right to an evidentiary hearing on whether cause exists for them to not be reemployed in the upcoming school year, and that those persons were not entitled to a hearing.

16. Glen De Graw, acting in his official capacity only as Associate Superintendent for Human Resources (the Associate Superintendent) for the District made and filed the Accusations. The parties stipulated that the Accusations were timely served upon each respondent who filed a Request for a Hearing (below). It was not disputed that the Assistant Superintendent was duly delegated and authorized by the Superintendent of the District to make the Accusations and issue the notices set forth in this Decision. The District served the Accusations upon the 657 certificated employees who had timely filed Requests for Hearing

after having received preliminary notices of layoff. The District also prepared Accusations and caused the Accusations to be timely served upon the 20 certificated employees who had timely filed Requests for Hearing after having received precautionary notices of layoff.

17. A total of 597 certificated employees who had been served preliminary notices of layoff and who were served Accusations timely filed Notices of Defense to the Accusations. A total of 60 certificated employees who were served preliminary notices of layoff failed to timely file Notices of Defense to the Accusations they had received. A total of 15 certificated employees who had been served precautionary notices of layoff and who were served Accusations timely filed Notices of Defense to the Accusations. A total of five certificated employees who were served preliminary notices of layoff failed to timely file Notices of Defense to the Accusations they had received. Those employees who were timely served Accusations but who failed to timely file Notices of Defense to the Accusations waived their right to an evidentiary hearing.

MR. CANNELORA

18. Mr. Cannelora is a counselor serving in the District. He was served a preliminary notice of layoff. Mr. Cannelora failed to timely file a Request for a Hearing with the District. Accordingly, he was not served an Accusation. A Notice of Defense was filed on his behalf by counsel for the Association on April 5, 2010. The Notice of Defense was ineffective to preserve Mr. Cannelora's right to an evidentiary hearing due to his failure to file a Request for a Hearing with the District.

19. Nevertheless, Mr. Cannelora was permitted to testify at the evidentiary hearing and he was present to the extent he chose to be during the proceedings. He offered no evidence regarding his failure to file a Request for a Hearing with the District in response to having been served with a preliminary notice of layoff. He was not entitled to participate further in the evidentiary hearing. His testimony in all other respects was therefore disregarded. Even had it been considered, the seniority date claim he raised was untimely and was uncorroborated with any documentation.

20. The parties stipulated that all prehearing jurisdictional requirements were met. There was no issue raised regarding timeliness of response or the right to a hearing for those employees who were served preliminary or precautionary notices of layoff and who failed to timely file a Request for Hearing or a Notice of Defense.

RESCISSION OF PRECAUTIONARY NOTICES OF LAYOFF

21. At the close of the evidentiary hearing and before closing statements, the parties stipulated that there were no claims pending regarding status or seniority dates among those 15 certificated employees who have been teaching under temporary employment contracts in this past school year and who had been served with precautionary notices of layoff. Based upon this stipulation, the District rescinded the 15 remaining precautionary notices of layoff.

RESCISSIONS OF PRELIMINARY NOTICES IN 12 ROUNDS

22. Just prior to the commencement of the evidentiary hearing on April 19, 2010, and from time to time as the District gathered evidence or circumstances appeared warranting such action, the District moved to withdraw the preliminary notices of layoff served on certain certificated employees. Throughout the proceedings, the District rescinded preliminary notices on 12 separate occasions, including a last round of rescissions that took place on the last day of the hearing. Many of the rescissions were the product of the adoption and acceptance of an Early Retirement Incentive Plan (the Plan) by the Governing Board for certain senior certificated employees, freeing up positions that could be filled in the upcoming school year by certificated employees who had received preliminary notices of layoff.

23. In the sixth round of rescissions, starting in the afternoon of the second day of the evidentiary hearing, the District began rescinding preliminary notices of layoff issued to certain employees due to finalization of the Plan, and acceptance of the Plan and early retirement by certain District employees not named here. The District also announced additional rescissions in the areas of Social Sciences and Counselors that were the result of the Plan, as well as other rescissions not related to the Plan in later rounds.

RESCISSIONS "ON THE FLY" BASED UPON VALID CLAIMS BY INDIVIDUAL RESPONDENTS

24. Some of the District's rescissions unrelated to the Plan were made in response to individual respondents presenting testimony and documentation regarding their credentials, certifications or seniority date claims that the District was able to confirm and verify during the proceedings. The District's team of counsel and representatives did not hesitate to rescind preliminary notices of layoff that had been issued to individual respondents upon receipt of credible and reliable evidence that a mistake had been made with respect to any individual respondent who made a credible claim.

25. By the same token, the District declined to rescind where such claims were not supported with credible, reliable evidence supporting a claim that a legal or factual mistake had been made with respect to any claiming respondent regarding seniority dates, credentials, certifications, authorizations, tie breaking points awarded, or assignments.

TOTAL RESCISSIONS FROM ALL CAUSES

26. Following the 12 rounds of such rescissions, preliminary notices of layoff issued to 317 certificated employees had been rescinded. The final list of such rescissions, in alphabetical order, effective as of the close of the evidentiary hearing, is attached to this Decision as Exhibit B.

EFFECT OF RESCISSIONS ON RESOLUTION NO. 42 PKS REDUCTIONS /ELIMINATIONS

27. During the course of the evidentiary hearing, the District restored some services slated for elimination or reduction in Resolution No. 42 due to rescissions. During the hearing, preliminary notices of layoff were rescinded to certain respondents serving as counselors in the District. The rescissions were effectuated in order to restore 29.0 FTE of Counselors. The rescissions and restorations of 29.0 FTE of Counselors had the effect of reducing the total number of FTEs slated for elimination or reduction by Resolution No. 42 to 516.1 FTE.

SKIPPING

28. The Governing Board adopted Resolution No. 46 on March 2, 2010. Resolution No. 46 is entitled, “Resolution to Determine Criteria for Deviation from Terminating a Certificated Employee In Order of Seniority (“Skipping Criteria”). Resolution No. 46 (the Skipping Resolution) cited Education Code section 44955 as authority for the District to deviate from the strict termination requirements for certificated employees based upon seniority, contending the District has identified a specific need for personnel to teach specific course or courses of study, and certain certificated employees have special training and experience necessary to teach that course or courses of study that others with more seniority do not possess.

29. The Skipping Resolution set forth three types of courses of study where the District has identified special needs for trained and credentialed certificated personnel that the District identified should be skipped for the purposes of this layoff:

- A. Individuals who are fully credentialed to serve in special education assignments;
- B. Individuals who are fully credentialed to serve in secondary schools classrooms mathematics assignments; and
- C. Individuals who are fully credentialed to serve in secondary schools classrooms in physical sciences assignments.

30. The Skipping Resolution defined “fully credentialed” for the purposes of skipping in the secondary mathematics and physical sciences groups to mean “an employee who possesses a preliminary, clear or internship credential.”

RESOLUTION OF SKIPPING ISSUES GENERALLY

31. There was no issue regarding any respondent with respect to the skipping of employees with special education credentials. The one respondent with a potential issue was resolved by a correction made by the District’s counsel during the proceedings.

32. Mindful of potential objections by certain groups of potential respondents to the skipping of fully credentialed secondary mathematics and physical sciences teachers, the District preempted the issue by determining to give full bumping rights to any senior respondent who believed he or she could teach one of the assignments for which a junior employee was being skipped. Some of the more senior employees did have bumping rights

and were permitted to bump a skipped junior employee. Since the junior employee being bumped had not been given a preliminary notice of layoff, both the skipped junior employee and the more senior employee who successfully bumped the more junior employee were retained.

33. Throughout these proceedings, respondents complained that the District “overnoticed” this matter, giving preliminary notices of layoff to far more certificated employees than were reflected by the reduction or elimination of the PKS set forth in Resolution No. 42. This claim was based upon respondents’ contention that the layoff process was defective and unnecessarily complex, and that such layoffs require an approximately a one to one correspondence between the FTEs of the PKS being reduced or eliminated, and the number of certificated employees receiving preliminary notices.

34. These contentions, if followed, could lead to unanticipated consequences materially adverse to the larger group of respondents. If approximate one to one correspondence is required, the District could find itself in a considerable financial bind with respect to matters such as giving employees more senior to those being skipped full rights to exercise a bump upon an employee being skipped, if warranted under the circumstances. The District could have easily found itself significantly under noticed, had there been an unexpectedly large number of successful bumps of those skipped and not noticed, especially if all 37 respondents claimed to have been improperly skipped had been found to have any merit (below). The District could have found itself being required to reemploy numerous certificated employees for the upcoming school year for which it had no funding and no budget. Had this ploy succeeded, respondents who were inadvertently retained would have been retained at the expense of some of their more senior peers who were not, creating an evident conflict between groups of respondents.

35. Further, this sort of eventuality was precisely what the District was planning to protect against by issuing the number of preliminary notices it did, for if the District is required to retain employees for which it has no budget and no funding, the District will end up “in the red” and will wind up under fiscal management by the County Office, all with potential continuing jeopardy to a much larger segment of certificated employees’ jobs when the inevitable next rounds of even more severe cuts are required to rebalance the budget. It is important to recall that the sort of prognostication required of the District must all occur before March 15, and more likely before March 1, and much uncertainty and guesswork is necessarily incumbent in the process of determining how many notices to issue. Respondents’ contentions assume a much higher level of precision than is practically available at the time the District is required to make unchangeable decisions.

36. In addition, respondents’ contentions are both short sighted and contrary to the best interests of the larger group of certificated employees of the District in an effort to bring an untoward benefit to a few. In order to save a few positions at any cost, the jobs of a potentially much larger group of certificated employees are potentially jeopardized. The contentions create a rather evident conflict with the District’s Governing Board’s outspoken goal of avoiding being a captive of fiscal oversight by the County Office of Education fiscal

manager. If the District is required to reemploy persons for which it had no funds in the upcoming school year due to more retentions than expected and fewer preliminary notices of layoffs outstanding to cover those contingencies, deeper and more profound cuts, likely externally imposed, are sure to follow, potentially harming a much larger group of employees.

THE ACTUAL SKIPPING CONFLCITS

37. The conflict with the Skipping Resolution arose with respect to groups of more senior respondents not skipped who are possessed of Multiple Subjects (MS) credentials and/or credentials with supplemental authorizations or District approvals to teach in mathematics or physical sciences. The Associate Superintendent explained in his testimony that the District adopted the Skipping Resolution because the District has identified a need for teachers credentialed and capable of teaching advanced mathematics such as Algebra II, Math Analysis and Calculus, and for Chemistry and Physics, as well as Honors and AP sections of these advanced subjects, at the Senior High School, grades 10-12. In order to maintain the maximum flexibility possible for the District to assign and reassign personnel to staff all mathematics and physical sciences assignments at all grade levels 7-12, the District sought to skip the certificated employees in the District credentialed and competent to teach mathematics or physical sciences at all grade levels in middle and high school.

38. There was no dispute that all the employees identified as subject to being skipped in the Skipping Resolution are credentialed and competent to teach mathematics or physical sciences at all grade levels 7-12. Those more senior employees who are teaching mathematics or physical sciences who were not possessed of the credentials identified in the Skipping Resolution were served preliminary notices of layoff because none of these respondents are certificated or competent to teach mathematics or physical sciences at the senior high school level, grades 10-12, due to lack of an appropriate credential authorizing them to do so. It was not disputed that possession of a MS credential with a supplemental authorization or District approval in mathematics or physical science does not authorize the credential holder to teach mathematics or physical science at the senior high school level of grades 10-12. Even so, if the senior respondent being laid off could demonstrate that he or she was properly credentialed to teach mathematics or physical science across the whole spectrum of grades 7-12, that respondent was permitted to bump a more junior employee who had been skipped, and both were retained.

39. Following all exercises of rights to bump, there was no evidence that any remaining respondent more senior to those employees who had been skipped due to the application of the Skipping Resolution had the appropriate credentials and competencies that would authorize them to teach mathematics or physical science at all grade levels 7-12. Some of these more senior employees receiving notices are teaching lower levels of mathematics and earth and life sciences at the middle schools in the District. In particular, some of these employees are teaching in a “bridge” program in seventh to ninth grade classrooms and are teaching algebra and geometry, and earth and general physical sciences. The focus of the attack on the Skipping Resolution focused on this group of employees

teaching bridge mathematics and/or physical sciences at the middle school level pursuant to a MS credential plus a supplemental authorization. None of these respondents teaching bridge mathematics and/or physical sciences are credentialed to be able to teach mathematics or physical sciences at grades 10-12.

THE 37 SINGLE SUBJECT SKIPS

40. Respondents contend that the District inherently set up a seniority conflict that resulted in 37 respondents who are possessed of Single Subject credentials in mathematics and physical sciences being retained who are teaching at middle schools but who are junior to 37 more senior persons being laid off who are senior and who are able to teach at middle schools due to their credentials. Respondents produced a spread sheet copied in part from the District's Seniority List spread sheet identifying the 37 individuals being allegedly improperly retained. The 37 affected respondents who were impacted by the application of the Skipping Resolution contended the skipping was unlawful, unfair, arbitrary and capricious, and a violation of Education Code section 44955, subdivisions (b) and (d). Nothing of the sort is accurate.

41. The contention is based upon incomplete information (the spreadsheet identifying the 37 persons allegedly improperly skipped omits considerable pertinent information, such as those person's credentials and competencies) and assumes the contended conclusion to be true in order to make the contention. The contention requires assuming true that the District lacks discretion to retain junior employees with larger breadth of credentials over more senior employees with more limited credentials to serve in specifically targeted and narrowly drawn areas the District has identified as special needs areas. As pointed out here, the assumption is inaccurate. Assuming as correct this incorrect conclusion regarding the District's lawful discretion leads then to respondent's intermediate assertion that the District is retaining 37 more junior employees with larger breadth of credentials to teach in middle school classrooms where the more senior employees are indeed credentialed to teach.

42. The contention is also flawed in that it requires one to assume as true a fact not proved or proveable; that these 37 junior teachers with larger breadth of credentials being skipped will all be staffing middle schools classrooms that respondents could teach in, as opposed to staffing senior high school calculus, physics, chemistry or algebra II classrooms where the more senior respondents are indisputably not credentialed to teach. The point of the Skipping Resolution is to provide the District the maximum ability to staff across the broadest spectrum of mathematics and physical sciences offerings as District resources shrink; the junior employees can do this, respondents cannot. No one knows what the District's assignments will look like for the upcoming school year yet, and with a huge number of employees taking early retirement, enrollment upheavals and this action, it is a fair bet staffing will look a good deal different in the upcoming school year than in this one. Respondent's contention assumes assignments in middle schools classrooms, particularly "bridge" will be exactly as they were in this most recent school year. That is anything but a safe assumption.

43. The District is not required at this stage of the proceedings to commit itself to any particular allocation of personnel to assignments for the upcoming school year. The seniority requirements for such staffing do not disappear with the completion of this action and the District is still bound by those mandates. But one of those seniority rules has an exception for specifically and narrowly defined District needs, set forth in section 44955, which permits the District to do precisely what it did here with the 37 respondents who do not have breadth of credentials that would have enabled them to teach the targeted subjects in any 7-12 classroom in the District that would have resulted in them being skipped.

44. The Skipping Resolution was carefully and narrowly drafted, sought to prioritize special District needs in a fashion that provides the District with the broadest possible flexibility in staffing classes that are indisputably mandated by law, and focused upon retaining a group of persons possessed of special additional training and experience reflected in their credentials that permit them to teach both the lower levels of mathematics and physical sciences taught by the complaining respondents, as well as the much more advanced offerings at the high school level respondents are indisputably not credentialed to teach.

45. In addition, the District offered all of these more senior respondents being displaced by the application of the Skipping Resolution the opportunity to bump any junior skipped employee, if that more senior respondent could demonstrate he or she had the credentials and competencies that would permit the more senior respondent to staff a mathematics or physical science class, regardless of grade level. The District also credited these respondents with points for their additional authorizations for the purposes of breaking ties.

46. Finally, the contentions suggest the District is obtaining some sort of benefit from ridding itself of more senior teachers with less breadth of credentials than those junior persons being skipped. It was plainly evident that this process is painful for the District, and some very adept, skillful and rather competent persons are subject to preliminary notices of layoff, which is costing the District some very skilled employees. For example, Ms. Wilson and Ms. Reynolds, both “bridge” teachers, one in physical science and one in mathematics, are both subject to layoff, having been subjected to lay off when junior employees with broader credentials were skipped pursuant to the Skipping Resolution. Both testified and presented themselves as very pleasant, dedicated and committed persons, innovative in their delivery of services at difficult grade levels in the middle schools. It is impossible to believe that the District is obtaining any benefit in having to lay off employees like these.

47. In the Skipping Resolution, the District lawfully exercised its discretion to retain a more junior group of employees who were credentialed to staff a mathematics or physical science class at any grade level 7-12, over an equal sized group of more senior employees who are significantly more limited in the classes they can staff, and are unable to

fill an assignment at a senior high school.¹ There is nothing arbitrary, capricious, unfair or unlawful about drawing such a distinction, and section 44955 specifically provides school district governing boards such discretion and authority, provided a correlation, such as was successfully demonstrated here, is made between the District's needs and the more junior group of employees being skipped and retained. The Skipping Resolution is a reasonable, lawful, prudent and carefully drawn exercise of the District's discretion, and there is no legal flaw with it, either in concept or as actually implemented.

TIE BREAKING

48. On March 2, 2010, the Governing Board adopted Resolution No. 43, to determine criteria to be applied to break ties between groups of certificated employees who have identical first days of paid service to the District (seniority dates). Pursuant to provisions of Education Code section 44955, the Board determined, as reflected in Resolution No. 43, certain District needs that should be prioritized between groups of employees with identical seniority dates. The Governing Board determined, for the 2010-2011 school year only, that the needs of the District and its students would be best met by establishing a point system to be applied to give priority to individual employees with identical seniority dates who have attained education, training, degrees, credentials and authorizations that were prioritized by the Governing Board. In Resolution No. 43, a point scoring system was set up for use in ordering seniority within groups of employees with identical seniority dates, and, in the event that two or more employees with identical seniority dates remain tied after the application of the point system, seniority would be determined by lottery. The point scoring system was as follows:

- A. Multiple and Single Subject Credentials: Rating +1 per credential;
- B. Supplemental and Subject Matter Authorizations that authorize the employee to teach a subject matter different from that authorized on the underlying credential: Rating: +1 per authorization.
- C. Earned degrees beyond the BA/BS level: Rating +1 per credential; and
- D. Earned English Language Authorization: Rating +1 per authorization

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.

¹ *Alexander v. Delano Unified School District* (1983) 139 Cal.App.3d 567, 571-2; *Alexander v. Board of Trustees* (1983) 139 Cal.App.3d 567; *Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399.

GENERAL CHALLENGES TO TIE BREAKING CRITERIA THE BOARD VALUED

49. Numerous respondents sought to challenge the Tie-Breaking Criteria during the hearing. These respondents were of the opinion that the Tie-Breaking Criteria established by the Governing Board in Resolution No. 43 for earning points to break ties failed to consider skills, services, and experiences these respondents felt were either ignored or undervalued, or both. These respondents contend that changes to the Tie-Breaking Criteria should be ordered as part of these proceedings in order to have these additional factors recognized and weighted appropriately.

50. The establishment of the Tie-Breaking Criteria set forth in Resolution No. 43 was the result of a deliberative process following presentation and hearings before the Governing Board, and a decision made by the Board after consideration and deliberation. The result of this deliberative process is the expression of the Governing Board's priorities for the District for the upcoming school year only, reflected in the selection and weighting of the criteria. The selection of some and not other criteria, and the relative weighting of such criteria are matters entirely within the discretion of the Board. There is no jurisdiction here to bring challenges to the Tie Breaking Criteria reflected in Resolution No. 43 in these proceedings. Such challenges, and any changes deemed necessary, or not, remain matters within the exclusive province of the Board and may not be raised or disturbed here.

INFORMATION REGARDING CREDENTIALS, CERTIFICATIONS, AUTHORIZATIONS, DEGREES AND SENIORITY DATES SOUGHT BY DISTRICT

51. The instant matter represents the District's third annual consecutive layoff proceeding, following many years of being essentially exempt due to rapid growth in the District. Many respondents who were served preliminary notices of layoff and were made part of these proceedings have been through one or more of these previous two layoff procedures. It is incomprehensible that any of the respondents were not aware of the proceedings in the past two years, even if not directly subject to them.

52. When it became evident in November 2009 that the Governor threatened severe additional cuts to school funding, and that such cuts were imminent and would directly impact the District, the Assistant Superintendent ordered the District wide solicitation of updated information from all certificated employees regarding each employee's credentials and certifications. The all-employee canvass was accomplished by the Assistant Superintendent by sending out three e-mail messages entitled "Annual Verification, 2009-2010 Certificated Seniority List." The emails were sent to each certificated employee in the District.

53. The first such “Annual Verification, 2009-2010 Certificated Seniority List” email was sent to all certificated employees on November 20, 2009. The email requested each employee to provide updated information regarding the following:

- Legal Name;
- Seniority Date (first day of paid probationary service in the District);
- Degrees;
- Credentials;
- Certificates;
- Licensures;
- Subject(s) currently assigned.

54. The email advised each employee to confirm whether the information for the employee that was then on file with the District was correct by instructing each employee to use the following steps to verify that your information is correct: (emphasis in the original)

- Open Public Folders;
- Select All Public Folders;
- Select District Forms;
- Select Human Resources;
- Open email from Brandon Krueger with the subject 2009-2010 Certificated Seniority List; and
- Open the attached document entitled Certificated Seniority List 11-03-09.

55. The email continued with instructions to help each employee find his or her records on file with the District, and advised that once the information was accessed, and if the information was accurate and complete, the employee need do nothing else. If the information in the District official records for the employee was incorrect or inaccurate in any fashion, an attachment for submitting corrections to the District’s HR Department was provided (Request for Correction), along with instructions regarding how to complete and submit the Request for Corrections. Information to obtain help and to get questions answered was also provided. The District requested all Requests for Correction be on file with the District no later than December 4, 2009.

56. A follow-up email entitled “Reminder-Annual Verification, 2009-2010 Certificated Seniority List” was sent to all District certificated employees on December 7, 2009. The email was identical in most respects to the November 20 request for information, with two exceptions. In the list of types of information on file with the District for which the District sought confirmation of accuracy or completeness, “Degrees” was omitted. The date for submission of the Requests for Correction from District employees was also different, as it was extended to December 10, 2009.

57. A third email was sent to all District certificated employees from the HR Department on January 21, 2010. This email was entitled “2009-2010 Certificated Seniority List-UPDATE.” The types of information sought and the method for requesting changes or corrections of any incorrect, missing or incomplete information in any employee’s District Personnel record was the same as that set out in the December 7, 2009 email. For the third time, District certificated employees were directed to an electronic copy of the District certificated Seniority List provided as an attachment to the email and requested to review it for completeness and accuracy with respect to the data carried on official District Personnel records for the employee. Employees were provided until January 29, 2010, to provide Requests for Correction.

58. Many employees took advantage of this thrice repeated District canvass for updated and/or corrected information that should be reflected on the District certificated Seniority List. The District was very forgiving about the stated deadlines for the submission of the Requests for Corrections, and in fact was continuing to make corrections to records up to and throughout the evidentiary hearing through the front desk of the HR Department and in the hearing itself.

59. There was one exception, however. The District was required to select a cut-off date for the submission for Requests for Correction to records in order to produce a reasonably firm certificated Seniority List in order to determine seniority for the purpose of determining who of the District’s certificated employees should receive preliminary notices of layoff. Thus, corrections submitted after February 1, 2010, were not reflected in the final Seniority List used to determine who received preliminary notices of layoff. Nevertheless, the District did not cut off the correction process, and continued to make corrections as it was presented with evidence that corrections were warranted.

60. The District HR personnel and counsel, as the hearing drew close and commenced, investigated and attempted to verify, or is in the process of, investigating and verifying, the assertions made by each employee on each Request for Corrections of records. Many corrections to the Seniority List were made using these inputs, when found to be warranted and verified, before the seniority list became final. The updated and augmented Seniority List was the tool the Assistant Superintendent and his staff used in both creating the lists of employees identified for receipt of preliminary notices of layoff, as well as lists of employees with first dates of paid probationary service to the District where ties needed to be broken and application of the tie-breaking criteria was required.

*END OF HEARING STIPULATION REGARDING SUBMISSION OF EVIDENCE OF
ADVANCED DEGREES*

61. The District sought a finding in closing statements that the District’s system of notifying its employees that updates should be made to the District’s records to make certain the Seniority List was accurate was sufficient and adequate notice. Respondents sought a finding that the notice was insufficient and pointed out repeatedly that only the first of the three email notices mentioned that respondents should provide information about “Degrees.”

62. Several respondents testified about the canvassing email notices soliciting respondents to update their records. Some were candid enough to state they paid the notices little heed, and found themselves scrambling after the preliminary notices went out to get their degree information on file with the District. Others conducted themselves inappropriately and unprofessionally. Such testimony and demeanor by a few respondents tended to diminish the impression of professionalism exhibited by most of the respondents, who, for the most part presented themselves professional, thoughtful and having appropriately prepared themselves to defend their jobs. None of these respondents in this small group were willing to accept personal responsibility for making certain that the District's records of credentials, education and qualifications information on file corresponded with their expectations of what the records should reflect, and each blamed the District for failure to remind them of what was their own responsibility.

63. It is not the District's responsibility to see to it that any employee's documentation for earning an advanced degree, successfully completing post graduate units, obtaining an additional credential or authorization, or any other additional enhancement to their qualifications is updated or accurate. This responsibility is solely and exclusively that of the certificated employee, and no one else. If the employee incorrectly assumes the District's records are updated and later finds the records are not, but has made no effort to check his or her own documentation on file for accuracy, it is disingenuous to try to blame the District for that failure. The District's responsibility is to make certain that any documentation the employee submits is accurately reflected in the District's records, and nothing more. Respondent's contentions seek to shift a good deal if not all of their own responsibility to provide accurate and updated information to the District and away from themselves, where it exclusively belongs.

64. The District was not legally required to send the respondents any email or other notifications that respondents should update their information. The District sent the email notices solely as a courtesy and a convenience for the benefit of its employees, knowing that having everyone's information accurately updated in advance might obviate the chaotic updating and correction of records that can and did occur, when those who have made little or no effort to keep their records updated suddenly realize their lack of diligence might cost them their job. The District is under no legal obligation to remind its employees to update their records, and respondents pointed out no legal authority that requires the District to give such notice, reasonable or otherwise. This responsibility is entirely that of the employee. Thus, contending that the District's emails failed to give "reasonable" notice to the employees to update their information assumes that the District is under a duty to give such notice.

65. It also appears that some of this small group of respondents' confusion stemmed from their failure to familiarize themselves with the difference between having evidence of completion of the post-graduate units necessary to prove that the employee is entitled to an enhancement on the District pay scale for completing the equivalent of a Master's degree, and the submission of actual evidence of the award of the degree. There is a significant difference, and it appears that many of the respondents who complained that

they thought the District had already received evidence that they had been awarded a Master's degree thought submission of an unofficial transcript showing the completion of the units was satisfactory proof that they had been granted the degree.

RELIANCE UPON CBEDS REPORTS

66. Most of the respondents complaining about the District's failure to recognize and credit them tie-breaking points for having Master's degrees claimed they based their beliefs about the state of the District records for them because they claimed that District records for them reflected in District disseminated CBEDS reports provided to each certificated employee at the end of each school year showed they had Master's degrees. These respondents claimed that they were entitled to rely upon these CBEDS reports as accurately showing that the District records showed credit for the degree. No CBEDS report for any respondent upon which any respondent allegedly relied was offered in evidence.

67. The small group of respondents making this particular claim about Master's degrees not reflected in the District tie breaking score sheet were profoundly unpersuasive. Each failed to accept personal responsibility for the timely filing of their own documents with the District and confirming the accuracy of their own records on file. None paid much heed when the District email reminders were disseminated. There was no showing that the assumptions these respondents made about the state of their credentials and records on file with the District was either reasonable or rational. These respondents' efforts to slough their own responsibilities off on the District, and then fault the District for failing to notify them when their records were not as they thought was rather unprofessional.

A TWO EDGED SWORD-BE CAREFUL WHAT YOU WISH FOR

68. This particular challenge to Master's degree crediting for tie-breaking is short sighted and a dangerous two edged sword. In order to prevail, the challenge seeks to create a duty that does not and should not exist, and then faults the District for failure to comply. A necessary corollary to this claim is a possible change to a District policy that respondents appear to blame for creating the confusion, that of the District's policy of being quick and generous with granting enhancements on the salary scale for obtaining the units necessary for an advanced degree before the degree is actually awarded. The District has generously provided quick pay enhancements for employees on receipt of unofficial documentation evidence of completion of the units necessary for the degree, such as an unofficial transcript showing completion of units but that does not show the award of the degree. The District has determined as a matter of policy not to force their employees to provide official documentation of completion of the units and actual award of the degree before the pay enhancement is provided. This is a considerable benefit and incentive to the employee to attain post-graduate education. The District has determined to provide its advanced degree seeking employees with the benefit in advance of receipt of official documentation of completion, because there is always a lag time, sometimes considerable, between completion of the units for the degree and actual official award of the degree.

69. These respondents now complain that District records on a CBEDS report that reflect a change in pay scale for completion of post-graduate units but not attainment of the actual degree binds the District to treat them as if they have the degree for the purpose of breaking ties. These respondents each revealed in their testimonies that they knew they had not yet been officially awarded their degrees, and that they only had unofficial documentation of units completed on file with the District as of March 15, 2010, and that the unofficial documentation did not show the award of the degrees. The District has sought adequate proof of official award of the degree before granting a tie breaking point that is indisputably to be awarded only for the actual attainment of the degree, which necessarily means the degree has to have been officially awarded by the degree granting institution. Yet these respondents have complained that untimely submission of an unofficial transcript showing only completion of units, but no evidence of even unofficial award of the degree, should entitle them to a point for the award of the degree, because the District accepted the unofficial transcript as satisfactory to grant the pay scale increase, which was then reflected on their CBEDS reports.

70. The “be careful what you wish for” consequence of this contention comes into play if this claim that the District has a duty to give notice to these respondents that their degree information on file with the District is not what these respondents thought is found to have merit, the District could insist that no benefit or enhancement is available for any respondent completing continuing or post-graduate units or attaining degrees, absent official documentation of every group of units and every degree in advance of providing the employee any enhancement. This strict outcome is precisely what this rather short-sighted contention invites.

STIPULATION REGARDING LATE FILED EVIDENCE OF MASTER’S DEGREES

71. Nevertheless, in the interest of continuing to accommodate its employees, the District entered into a stipulation with respondents in closing regarding untimely filed evidence of advanced degrees. The stipulation is as follows:

72. Those who hold Master’s degrees granted before March 15, 2010 and have official transcripts or official documents showing conferral of the Master’s degree on those documents, then with respect to the award of tie-breaking points for having an additional degree, if the additional point for having the Master’s degree moves the employee up to the next higher band of employees, the employee receiving the extra point will be moved up to the next band and will be placed at the bottom of that next higher band. No additional tie breaking will occur between the employees already in the next higher band and any employee moved into the next higher band due to the award of the extra point.

73. The Assistant Superintendent elected to group employees subject to the tie breaking process by subject matter taught and the employee’s eligibility to teach in that subject matter area due to having the appropriate credentials. If, after crediting each with the points authorized by the Resolution one or more employees were still tied, the Superintendent and his staff drew numbers from an envelope for each employee still tied in

the particular group. Groups of employees with the same first dates of paid probationary service to the District were thus ranked within their same dates, and were given seniority with respect to one another within their tie groupings. No employee became subject to the lottery until the criteria specified by the Board had been applied, all possible eligible points had been credited and the employees were still tied. These tie broken seniority dates were agreed in advance to be effective for this year only, as the application of the Tie-Breaking Criteria reflects the Board's ranking of District priorities for this single school year only.

74. Although there were a number of individual issues and complaints regarding the actual application of the Tie-Breaking Criteria and the resulting rankings within same date groups, there was no issue regarding how the groups were selected or how the process of breaking the ties was accomplished. The Assistant Superintendent's methodology for the assembly and application of the Tie-Breaking Criteria and the resulting lottery, if still required, was not arbitrary, capricious or other than even handed. The methodology and its application was fair and transparent.

BUMPING

75. As briefly alluded to above, bumping is the process where an employee who has received a preliminary notice of layoff looks at the Seniority List and attempts to find an individual with less seniority who is being retained for the upcoming school year who has the same or weaker credentials, authorizations and competencies in the same subject matter areas such that the more senior teacher receiving notice might be able to displace the junior teacher. Whenever notices of layoff deviate from just going up the Seniority List consecutively from least senior forward in time and date, resulting in junior employees being retained in the process, bumping can become an issue. There was no issue raised specific to bumping.

FINANCIAL AND BUDGET REASONS FOR THE ACTION

76. The District is facing multi-faceted financial pressure that has placed the District into a fiscal condition that could lead to an operating deficit for the upcoming school year. The District is faced with the prospect of having the Sacramento County Office of Education appoint a fiscal monitor to oversee its finances and expenditures if it does not bring its budget into balance. The District exhausted its "rainy day" cash reserve in order to save jobs for certificated employees during the previous two years. The District is now faced with hard cuts and little room for maneuvering. The District was warned by the Governor's budget projections in January 2010 to expect a significant across-the-board cut in school funding due to a commensurate severe decline in receipt of revenue by the State. In the previous school year, federal stimulus money helped alleviate some of the cuts. This year no such inflow of federal funds is expected.

77. Regardless of the ultimate mechanism, the District expects a substantial reduction in funding in the upcoming school year. The Board has concluded it is not in the best interests of the District and the welfare of its students to operate at a deficit and have to

run its finances through the County Office of Education and have its fiscal decisions subject to the review and approval of the County OE fiscal manager. The Board and the Superintendent have considered myriad methods to deal with the anticipated reductions in expected funding. Unfortunately, the law requires service of preliminary notices of layoff by a specific date, and at that time, reducing or eliminating certain non-mandated classes and programs offered in the District's educational portfolio was the only remaining option for the District to bring its budget into balance. The Associate Superintendent expressed his desire to save as many classes, programs and teacher's jobs as fiscally possible and prudent, and the District's on-going search for funding and options that will continue long after these proceedings are concluded.

ATTRITION

78. The Associate Superintendent, on behalf of the District, 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. In fact, more than 100 employees had their preliminary notices of layoff rescinded because the District was able to implement its Plan for early retirement and enough persons accepted the offer to retire.

STATE AND FEDERAL MANDATES

79. There was no evidence that the District proposes to eliminate any services that are State or federally mandated.

INDIVIDUAL RESPONDENTS AND THEIR CLAIMS

80. This represents the District's third consecutive annual layoff procedure. Most of the respondents have been through this process at least once before, and were fortunate enough to be hired back when the District received better than expected funding. Some of the respondents have been through all three years' layoff processes.

81. There were 89 individual respondents who testified. As stated above, most of the respondents who testified presented themselves professionally and credibly, appropriately prepared considering the nature of the proceedings, and consistent with reasonable expectations of professional educators with advanced degrees, credentials and certifications who are charged with the responsibility to educate the youth of the community.

82. The respondents fell into general groups regarding their individual issues that they felt needed to be raised during these proceedings.

83. A few respondents had no claim of any sort, and some of these had no idea they had no claim because they were completely unprepared to present a coherent, supported claim. These respondents had not bothered to check any District records before they came forward to assert a claim that was ultimately directly rebutted by the District records on file for them that were indisputably correct. These respondents wasted time and money.

84. Others made claims that were strikingly untimely, two of which sought correction in District records for the employees of data that was more than ten years old and which the employees had never made any previous effort to correct.

85. Several made excellent attacks on the seniority system by making mutually exclusive alternative claims that, on the one hand, a senior employee who has never before taught the subject they are teaching should not be able to displace (bump) them because that senior employee had no experience teaching that course, even though there was no dispute the senior employee had credentials and competence that would enable the senior employee to teach the assignment. These claimed that it was unfair not to give them some credit for the previous experience teaching the assignment against the naked seniority claim being used to displace them; and yet, at the same time, these same respondents made claims to the right to bump a different employee junior to themselves to teach a subject they had never taught before, simply because they were senior to that employee. What was troubling about the testimony of the few respondents making such conflicting alternative claims was the fact that none of them appeared to see the conflict between trying to claim the advantages of the seniority system, using it as a weapon to displace a junior employee, even where they had no previous experience in the subject matter to be assumed, and at the same time decrying the use of seniority to displace them from an assignment the bumping in employee had never before taught. These contentions certainly pointed out a flaw in the seniority system, as seniority alone often fails to place value upon a teacher's experience in a particular subject matter, and at times overweighs the mere possession of credentials and authorizations over actual experience.

86. Common to all of the claims of the individual respondents were three features. First, each individual respondent who raised a factually or legally viable claim received relief from the District's team of three counsel and three administrators overseeing the presentation of the District's case and evaluating each individual claim as it was presented by the respondents during the evidentiary hearing. Each individual claim that was assessed and found to have merit by the District team before the close of the evidentiary hearing resulted unhesitatingly in a rescission of that respondent's respective preliminary notices of layoff.

87. The second common feature was that, for those respondents who did not present a viable claim for correction or relief, those respondents did not receive relief from the District, because none of them raised a factually or legally viable claim.

88. Third, and most important, almost none of the individual respondents who testified raised a claim that, had it been found to be meritorious, would have resulted in a change in who should or should not have received a preliminary notice of layoff or whether any PKS slated for reduction or elimination for the upcoming school year should not be permitted. Jurisdiction for these proceedings is quite limited, and, without the District's consent to extend the process, there is no jurisdiction in this forum to review claims of incorrect seniority dates or incorrect application of the Tie-Breaking Criteria, or any of the other issues the individual respondents raised, unless it can be shown that if the respondent prevails on the claim, his or her preliminary notice should be rescinded, and/or one of more

of the PKS FTEs slated for elimination or reduction is factually or legally inappropriate. Almost none of the respondent's claims, if recognized, would have had this jurisdictionally required impact. Many of these claims were not only untimely raised, but constituted issues properly the subject of a different process, such as a grievance to correct the alleged error pursuant to the District's internal or Memorandum of Understanding (MOU) processes between the District and its employees.

89. Although these proceedings have a material indirect impact in certain regards upon rehire rights, there is no jurisdiction in these proceedings to decide rehire rights or the order of rehire for any individual or group of certificated employees. The fact that any individual respondent's claim might affect the employee's rehire rights is thus insufficient, in and of itself, to invoke the jurisdiction of these proceedings. Most of the individual respondent's claims, if recognized, would have impacted only the individual's rehire rights.

90. Nevertheless, the District has elected to give the individual respondents a forum, even though it had no legal obligation to do so, and allowed all 89 individuals to state their claims, even only a very few had viable claims for which jurisdiction in these proceedings is appropriate. Where the individual respondent's claim was deemed to have factual or legal merit, the claim was recognized and relief was granted, as set forth above. For the remainder of the claims, recognizing any claim in this forum that could not have resulted in a rescission if satisfactorily proved, was entirely within the District's discretion. As the District did not object to these claims being advanced that were remaining after the District recognized those it deemed to have merit were eliminated, those remaining claims are accordingly assessed here.

RESPONDENTS WHO SEEK A CHANGE IN SENIORITY DATE

THOSE SEEKING TO TACK PREVIOUS LONG TERM SUBSTITUTE SERVICE

91. Certain respondents sought to tack previous experience teaching in the District as long term substitutes on to their existing service in order to push their seniority dates back in time, to the date they claimed they first rendered paid service as a long term substitute. A few of these respondents produced documentation that persuaded the District that they met the legal test for adding their long term substitute service to their existing service. The District accordingly made changes to those respondents' seniority dates as was warranted by the documentation presented, and preliminary notices to some were rescinded.

92. None of the other respondents making a claim to an earlier seniority date than that already carried in the District's records produced satisfactory evidence that they met the legal and factual requirements to have their previous long term substitute experience tacked to their recognized District service. There were a variety of reasons the evidence supporting these remaining claims failed, such as the long term substituting had breaks in service in it and thus did not result in a consecutive 75 per-cent of the school year served, or were a cobbling together of several short terms of substitute service at different sites that did not combine to meet the threshold, or, finally and most common, the long term substitution

experience did not meet the 75 per-cent consecutive service in the school year test because it was less than that in the year claimed. Accordingly, the remaining respondents' claims to change their seniority dates to begin when they started their long term substituting fail for lack of evidentiary support.

44914 v. 44918

93. The District contends the provisions of Education Code section 44914 provide the District discretion to grant or deny credit for previous long term substitute service in the District for seniority purposes toward permanent status when the certificated employee continues on as a probationary employee in the District. The District points to the discretionary language of the statute, use of the language, "... the governing board may count the year of employment as a substitute or as a substitute and probationary employee as one year of the probationary period which he is required by law to serve as a condition to being classified as a permanent employee of the district," the fact that the statute deals with substitute service for the purpose of computing time for classification as a permanent employee and the fact that it was enacted in 1976 as reasons section 44914 governs and provides the District discretion in determining whether it may grant or refuse to allow employees to tack previous service as a substitute in the District in computing seniority.

94. Respondents contend section 44918 mandates that the long term substitute who serves in the District for more than 75 per-cent of a previous year and continues on as a probationary employee must be given credit toward seniority for the substitute service. Respondents correctly point out that the language of section 44918 is mandatory and agree section 44914's language is discretionary. Respondents also agree that section 44918 was enacted later in time than section 44914.

95. It is not necessary to resolve these contentions here, as no respondent whose seniority date was not corrected during the proceedings produced satisfactory evidence to advance a viable claim for a change in date. None of the remaining respondents presented satisfactory evidence that they served 75 per-cent of the days of the school year for which they were making claim.

"TIME SHEET" TEACHERS SEEKING TO TACK PREVIOUS TEMPORARY SERVICE

96. Several respondents, including Ms. Soto, sought earlier seniority dates by attempting to tack earlier service under temporary teaching contracts, where they were paid hourly for service and were paid by submitting time sheets. None of these claims had legal or factual merit. None of the respondents making this claim produced satisfactory evidence in support of their claims.

97. However, two respondents making such claims warrant being singled out for special recognition. These two respondents testified in a fashion that revealed they tried to conceal the true nature of their previous service in the District that they were contending should be recognized for additional seniority credit. One only reluctantly conceded upon

cross-examination that her previous service she hoped to tack was pursuant to a temporary contract. The other refused to concede the true facts until confronted with a copy of the contract, and then she refused to acknowledge that her first day of service was later than she claimed, even though the contract impeached her claim. The fact that these two respondents decided to advance their claims in this fashion was disappointing.

THOSE SEEKING EARLIER SENIORITY DATES FOR ATTENDING PRE-CONTRACT IN-SERVICES

OPEN COURT

98. A significant number of respondents sought changes and advances in their seniority dates for attendance at Open Court in service training that occurred before the first day of paid service under their contracts for the given year they attended the training. In each instance, the respondents attended the week long training that indeed did take place before the school term started. Each of these respondents served as elementary or middle school teachers teaching at Title 1 schools in the District. There was no doubt the training was useful and valuable to the respondents and to the District. There was no evidence that training was mandatory, even though many respondents believed it to be so. A few more forthcoming respondents more accurately described the parameters of the training; that it was “highly recommended and encouraged,” although not mandatory, making it clear that disapproval of one’s principal was at stake if one exercised the choice not to attend, but that attendance was still discretionary with the teacher.

99. The respondents claiming credit on their seniority dates for attendance at Open Court trainings fell into two rough groups, those who were aware they were not paid a stipend or cash for attending, and those who were not sure. Many respondents who attended Open Court trainings believed they were required to go as part of their job requirements, and most believed that such training attendance was part of their teaching contracts for that school year. Some were aware that they received educational credit for the training in the form of units completed credit that would help them advance on the District’s salary scale, and others thought they had been paid for the time.

100. Each respondent who attended Open Court training, regardless of the year, was given hour for hour educational units credits on the District salary scale. For some it resulted in a pay increase, for others it did not, because they had not yet accumulated enough credit hours to advance to the next step. There was no evidence any respondent was compensated for Open Court training with cash or by a payment under their teaching contract for that year. Therefore, as the service was not paid service to the District, but was rather in the form and nature of additional higher/continuing education credits, similar to participating in post-graduate classes toward an advanced degree. Therefore, attendance at the Open Court trainings does not constitute paid service for the purpose of advancing their seniority dates.

OTHER PRE-CONTRACT IN-SERVICE TRAINING DATE CLAIMS

101. A few other respondents sought to advance their seniority dates for claims that they attended in-service trainings before their contracts started that were not recognized by their seniority dates. One or two of these claims were discovered during the proceedings by the District team to have merit, and corrections were made to those respondents' District records immediately. At least one such correction resulted in an immediate rescission of that respondent's preliminary notice of layoff.²

102. None of the remaining claims had any merit. The remaining respondents had either attended training that was not mandatory and was not part of their contract, or failed to prove their seniority date did not accurately include their attendance at all training required by their contracts.

COUNSELORS SEEKING EARLIER SENIORITY DATES FOR PER-CONTRACT IN SERVICE DURING LONGER CONTRACT YEAR.

103. The few respondent counselors who testified appeared to make a special effort to testify unpersuasively. Two made claims that their seniority dates should be advanced due to attending in service training and due to the fact that counselors serve under a longer contract year than other certificated personnel. One of these respondents claimed adjustments were due him for service in 2001, and another one for in service completed in 1995. Neither brought any documentation to substantiate their claims. Neither had any explanation for why they waited for the better part of a decade or more to bring these claims, and neither appeared to exhibit any comprehension why bringing such grossly stale claims might be a problem. Neither was able to coherently articulate any factual or legal basis for why the claimed adjustments should be made.

104. The counselor staffing the Tobacco Use Education Coordinator position made an exceptionally self-absorbed claim that she is absolutely indispensable to the District and cannot be laid off, regardless of her seniority, because no one in the District has ever staffed the Tobacco Use Education program before and no one but her is capable of staffing it. She failed to identify any sort of degree or credential she has that no one else does that is required to staff the program. Other than the fact that she has staffed the position for the very few years the position has been in existence, she presented no evidence of any special education or qualifications that render her uniquely suited among all the District's certificated counselor employees to staff the post, or why none of these many other well educated and qualified certificated employees in the District were incapable of learning the post from the ground up, as she did.

² E.g. Respondent Ms. Kerwin

RESPONDENTS WHO SEEK CREDIT FOR PREVIOUS SERVICE FOLLOWING RESIGNATIONS

105. Three respondents made claims their seniority dates should be adjusted backwards in time in order to add previous service with the District that was broken when each of them resigned. Each was reemployed following significant breaks in service. One of these claims was quite compelling, reflecting a resignation that was driven by the respondent's husband's deployment to Iraq and her need to take another teaching position in Southern California in order to support her family. She returned to the District and to living in Elk Grove when he returned.

106. Unfortunately, the law³ is well settled that when a certificated employee resigns and has a break in service, there is no lawful way to add the previous service and retain the first seniority date upon reemployment. The law simply bars providing the remedy these respondents seek.

MISCELLANEOUS INDIVIDUAL CLAIMS REQUIRING MENTION

MR. SATO AND MS. WELCH

107. Counsel for the District requested a Finding regarding Mr. Sato's claim. Mr. Sato's claim was all but incomprehensible. His affect was so flat and his responses so slow and sedate, it was all but impossible to understand him, despite repeated requests for repetition. He evidently claimed that he should be retained to teach computers and/or business at the middle school level because one employee also teaching computers and two teaching business at the middle school level were rescinded earlier in the proceedings. When asked what the credentials and competencies of the employees who were rescinded had, he had no idea. There was no evidence to support Mr. Sato's claim.

108. Ms. Welch complained that her supplement in Agricultural Specialization had not been considered in issuing her a preliminary notice of layoff. Ms. Welch's Agricultural Specialization supplement does not authorize her to teach anything other than her clear Agriculture credential authorizes. She failed to point out how the Agricultural Specialization credential, if it was not considered, would have provided her any status or ability to bump or be skipped. Ms. Welch should immediately check with the District's HR Department to confirm if the supplement is on file with the District, and to provide the District the necessary documentation for it to be officially reflected in District records, if it not.

MS. DILL

109. Ms. Dill claims she is entitled to have a seniority date of January 4, 2005, the date she took over for a retiring teacher in a kindergarten class. Ms. Dill misrepresented the underlying facts in support of her claim. She contended she had an interim permit when she

³ Education Code section 44931.

took over the class on January 5 and taught under the authority of the interim permit as a temporary teacher, thus entitling her to the earlier seniority date. The true facts were that Ms. Dill was hired under a 30 day substitute permit on January 4, 2005. She applied for but had not been awarded the interim permit. Ms. Dill refused to retreat from her claim even when presented with documentation from the Commission on Teacher Credentialing (CTC) that reflects the interim permit was awarded by the CTC on April 7, 2005, which is the date the District carries in its records for her first day of paid service. Ms. Dill's claim lacked credibility and has no merit.

MS. LESTER'S BIRTHDAY BASED KAVANAUGH CLAIM

110. Ms. Lester claims she should have her seniority date be August 14, 2003, because she started work for the District on that date. Her seniority date is August 19, 2003. She claimed to have signed her contract on August 20, 2003, and that she recalls the date because it was her birthday and getting her contract signed on her birthday was a very memorable event. Ms. Lester's testimony was not credible and was peppered with inconsistencies and misrepresentations. What she did say that was credible was that these events occurred a long time ago and her memory was weak regarding the details because the events were seven years ago. She finally acknowledged, after much questioning and a good deal of evasiveness, that she did not actually work for the District on or before the day she signed her contract, and that she may have attended some training before that date for which she was separately paid with a stipend. This claim is grossly untimely and lacks merit.

MR. STEWART AND MR. RUSSELL

111. Mr. Stewart claimed that since he was bumped by persons who were rescinded, he should be rescinded as well. He reasoned that since the person bumping him was rescinded, there is now no one to bump him. It is not clear that anyone understood this rationale. It has no merit.

112. Mr. Russell made an interesting argument against the seniority system along with a contention similar to that of Mr. Stewart. He testified moving a more senior person who has never before taught the subjects into the position he has been staffing at Valley High School for the past two years, "is not a judicially economical way of spending County funds to have to train somebody else to teach this." He was unable to identify anyone junior to himself who is being retained to teach a subject he is credentialed and competent to teach. Although he raises a good point, his claim has no merit.

THE PRESCHOOL TEACHERS WITH MULTIPLE SUBJECTS CREDENTIALS

113. Two preschool teacher respondents with Multiple Subjects (MS) credentials claim they should be retained. The first of these respondents failed to identify any junior person who was being retained to perform a service she was credentialed and competent to perform. The second claimed flatly that she was entitled to be made permanent immediately. She offered no reason why other than the fact that she has been working for the District since

September 3, 1996. She was completely unprepared to support her claim, and presented no documentary evidence to support her claim. These claims have no merit.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied. The District has the burden of proving by a preponderance of the evidence that the proposed reduction or elimination of particular kinds of services and the preliminary notice of layoff served on respondent is factually and legally appropriate.

2. The services the District seeks to eliminate in this matter, as set forth in its Resolution and enumerated in the Factual Findings, are “particular kinds of services” that may be reduced or discontinued within the meaning of Education Code section 44955. The Board’s decision to reduce or discontinue these particular kinds of services was not arbitrary or capricious, but constituted a proper exercise of the Board’s discretion. Legal cause therefore exists pursuant to Education Code sections 44949 and 44955 for the Elk Grove Unified School District to reduce or discontinue the 516.1 FTE remaining of particular kinds of services.

3. The District is facing a significant projected deficit related to the loss of State reimbursement funding. The reduction in particular kinds of services proposed is necessary to avert the District operating in a deficit in the upcoming school year. The reduction or discontinuation of these identified particular kinds of services relates solely to the welfare of the District and its pupils.

4. Education Code section 44955 requires layoffs to take place in inverse order of seniority, with some notable exceptions. “Thus, the statute provides that seniority determines the order of dismissals, and that as between employees with the same first date of paid service, the order of termination is determined on the basis of the needs of the district and its students. Senior employees are given bumping rights in that they will not be terminated if there are junior employees retained who are rendering services which the senior employee is certificated and competent to render. Conversely, as in this case, a district may move upward from the bottom of the seniority list, skipping over and retaining junior employees who are certificated and competent to render services which more senior employees are not.”⁴ There was no evidence that any certificated employee of the District is being retained to provide a service any of the respondents are certificated and competent to render. As set forth in the Factual Findings, all employees the District elected to skip pursuant to the Skipping Resolution were appropriately skipped, and those more senior employees adversely affected by the skips failed to prove the skips were unlawful or inappropriate, individually or collectively.

⁴ *Alexander v. Board of Trustees of the Delano Unified School District* (1983) 139 Cal. App. 3d 567, 571-2; *Moreland Teacher’s Association v. Kurze* (1980) 109 Cal.App.3d 648, 655.

5. Legal cause exists pursuant to Education Code sections 44949 and 44955 to give the remaining respondents, after the 12 rounds of rescissions, final notice that their services will not be required for school year 2010/2011. Legal cause exists to sustain the Accusations. The Board may give respondents final notices that their services will not be required by the District in the upcoming school year, in inverse order of seniority.

ORDER

1. The Elk Grove Unified School District action to reduce or eliminate 516.1 FTE of particular kinds of services for the 2010/2011 school year is AFFIRMED.

2. The Accusations with respect to respondent certificated employees of the Elk Grove Unified School District who received preliminary notices of layoff and were not rescinded, as set forth in the Factual Findings, are SUSTAINED.

3. Final notice may be given to respondents by the District that their services will not be required for the upcoming school year. Notice shall be given in inverse order of seniority.

DATED: May 7, 2010



STEPHEN J. SMITH
Administrative Law Judge
Office of Administrative Hearings