

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

In the Matter of the Reduction in Force of:

CERTAIN CERTIFICATED PERSONNEL  
EMPLOYED BY THE WASHINGTON  
UNIFIED SCHOOL DISTRICT,

Respondents.

OAH No. 2010031013

**PROPOSED DECISION**

This matter was heard before Karen J. Brandt, Administrative Law Judge, Office of Administrative Hearings, State of California, in West Sacramento, California, on April 12 and 14, 2010.

Ben Hance, Attorney at Law, represented the Washington Unified School District (District).

Christina Medina, Attorney at Law, represented the respondents, who are listed on Attachment A hereto.

Evidence was received, the record was closed, and the matter was submitted for decision on April 14, 2010.

**FACTUAL FINDINGS**

1. On March 11, 2010, the Board of Education (Board) of the District adopted Resolution No. 910-18, "Relative to the Reduction or Elimination of Particular Kinds of Services" (PKS Resolution). Pursuant to the PKS Resolution, the Board determined that it was necessary and in the best interests of the District to reduce or eliminate certain particular kinds of services (sometimes referred to herein as PKS) and to decrease a corresponding number of certificated District employees not later than the beginning of the 2010-2011 school year. In the PKS Resolution, the Board directed the Superintendent to send appropriate notices to all employees to be affected by virtue of the PKS reductions and eliminations. The Board also directed the Superintendent or his designee to make assignments and reassignments in such a manner that certificated employees are retained to render any service which their seniority and qualifications entitle them to render. The PKS

reductions and eliminations are based solely upon budgetary issues, and are not related to the skills, abilities or work performance of the affected teachers.

2. The PKS Resolution identified the following particular kinds of services for reduction or elimination:

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|--|----------------------|
| 1. K-8 Assistant Principals                        | 6.0 FTE <sup>1</sup> |
| 2. Coordinator, Adult Ed.                          | 0.2 FTE              |
| 3. Certificated Directors                          | 2.0 FTE              |
| 4. Teachers on Special Assignment                  | 5.3 FTE              |
| 5. Nurses  | 1.4 FTE              |
| 6. Secondary Counselors                            | 2.0 FTE              |
| 7. Behavior Specialist                             | 1.0 FTE              |
| 8. Program Specialist                              | 1.0 FTE              |
| 9. Adult Ed. Teacher                               | 1.0 FTE              |
| 10. Elementary Classroom Teaching Services         | 6.0 FTE              |
| 11. Secondary Social Science Teaching Services     | 2.0 FTE              |
| 12. Secondary Physical Education Teaching Services | 2.0 FTE              |
| 13. Librarian                                      | 1.0 FTE              |
| 14. SDC (Moderate/Severe)                          | 1.0 FTE              |
| 15. RSP (Mild/Moderate)                            | 1.0 FTE              |
| 16. RSP-SDC (Mild/Moderate)                        | 1.0 FTE              |
| 17. Yolo High School Art                           | 0.6 FTE              |

TOTAL FTE LAYOFF: 34.5 FTE

3. The PKS Resolution set forth the District's competency criteria as follows:

That in the interest of maintaining a highly qualified certificated staff in order to meet the requirements of No Child Left Behind law and to meet the requirements of law to serve the needs of EL students in each classroom in the District, "competency" for the purposes of Education Code section 44955 shall be determined upon current possession of a preliminary or clear credential for the subject matter, grade level or pupil personnel services position to which the employee will be assigned at the beginning of the 2010-2011 school year; to be certified as highly qualified in the academic subject and further possession of an appropriate EL certification if proposed for assignment to a class including EL students.

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<sup>1</sup> "FTE" stands for full-time equivalent.

The PKS Resolution also included the following additional competency requirement:

That “competency” shall also require possession of a BCLAD in the Language (e.g. Spanish/ Mandarin) for a Teacher who will be assigned to a bilingual class in that language.

4. The PKS Resolution set forth the following tie-breaking criteria:

That as between employees who first rendered paid service on the same date, the order of termination and reemployment pursuant to Education Code sections 44955 and 44846 shall be based solely on the needs of the District and the students thereof, as determined by applying the point system described herein. This system shall be applied only where the implementation of layoffs or reemployment rights actually impacts two or more employees with the same first date of paid service and is applied only to those employees. In case of each tie, points shall be granted to each affected employee based upon all the following criteria. The points for each employee shall be totaled and the employees ranked from highest to lowest with the lowest being subject to layoff and next lowest being subject to layoff, etc. For reemployment, the employee with the highest total shall be reemployed first and so on. In the case that two or more employees remain tied by point total after totaling points for criteria a-e and the tie must be broken to determine a layoff, then criteria f shall be invoked.<sup>2</sup>

- a. Possession of a currently valid preliminary or clear California teaching credential: *2 points*.
- b. Possession of multiple valid preliminary or clear California teaching credentials: *2 points*.
- c. Possession of one or more language certifications (e.g., LDS, CLAD, SB 1969, SB 395, BCC, BCLAD): *2 points*.
- d. Possession of evidence of core academic subject competence in accordance with NCLB: *1 point*.

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<sup>2</sup> At the hearing, there was testimony that there were typographical errors in the criteria references in the following sentence of the tie-breaking criteria: “In the case that two or more employees remain tied by point total after totaling points for criteria a-e and the tie must be broken to determine a layoff, then criteria *f* shall be invoked”; and that the Board intended the sentence to state: “In the case that two or more employees remain tied by point total after totaling points for criteria a-g and the tie must be broken to determine a layoff, then criteria *h* shall be invoked.” (Italics added.) When applying the tie-breaking criteria, the District totaled the points certificated employees received for criteria a-g and then broke any ties by conducting the lottery described in criteria h.

- e. Possession of an undergraduate major or minor in: math, science, special education: *2 points*.
- f. Possession of one or more post graduate degree(s): *1 point for each degree*.
- g. Overall rating of “meets expectations” in the most recent evaluation: *1 point*.
- h. In any case where a tie results after calculating points for all the criteria, a random drawing by lot will be conducted for each tie by the Assistant Superintendent of Human Resources in the presence of an authorized representative of the Washington Teachers Association.

5. In the PKS Resolution, the Board refused to allow for “partial bumping” as follows:

That it has been determined not to be in the interest of the District or the instructional program for students, to allow partial bumping, *e.g.*, a more senior part-time employee may not bump into a position of a less senior employee which is a greater FTE than the more senior employee currently holds or implement a bump which would result in splitting a full-time classroom teaching position into two positions.

6. The PKS Resolution provides that the Board “has considered all positively assured attrition, including deaths, resignations, retirements and other permanent vacancies, for 2010-2011 which has occurred to date in determining the needed services to be reduced or eliminated.”

7. On March 11, 2010, as set forth in the PKS Resolution, the Superintendent of the District orally recommended to the Board that certain identified certificated employees be given written notice that their services would not be required for the 2010-2011 school year as provided in Education Code sections 44949 and 44955.<sup>3</sup>

8. Attached hereto as Attachment A is a list of all respondents. All respondents are certificated employees of the District. The District provided all notices to respondents as required by sections 44949 and 44955. The notices conformed to all applicable legal and administrative requirements and were served upon respondents in a timely and proper manner. Respondents filed or had filed on their behalf timely notices of defense.

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<sup>3</sup> All further statutory references are to the Education Code unless otherwise indicated.

9. At the hearing, the District agreed to rescind the preliminary layoff notice served on respondent Christy Savage.

Cristina Brabant

10. Respondent Cristina Brabant is currently a third-grade teacher at Bridgeway Island Elementary School (Bridgeway Island). She holds a Multiple Subject credential and an English Language Learner Authorization. The District's seniority list indicates that Ms. Brabant's seniority date, i.e., her first day of paid service as a probationary employee, is August 24, 2009. At the hearing, Ms. Brabant asserted that her seniority date should be August 2008, not August 2009.

11. Ms. Brabant was a student teacher at Bridgeway Island. In or about August 2008, Koral Raya, an employee in the District's Human Resources office, offered Ms. Brabant a long-term substitute assignment, substituting for Nicole Palmer, a third-grade teacher at Bridgeway Island. Ms. Raya told Ms. Brabant that she believed that Ms. Brabant's long-term substitute assignment would last until about December 20, 2008.

12. Ms. Palmer taught the third-grade class at Bridgeway Island for the first three days of the 2008-2009 school year. Ms. Brabant began teaching the third grade class as a long-term substitute on the fourth day of the 2008-2009 school year.

13. On December 23, 2008, Ms. Brabant was informed that Ms. Palmer would not be returning to teach the third grade. The District gave Ms. Brabant an Offer of Employment (Temporary Offer of Employment), which Ms. Brabant signed on December 23, 2008. The Temporary Offer of Employment provided that Ms. Brabant would begin working as a temporary third-grade teacher at Bridgeway Island on January 5, 2009. The Temporary Offer of Employment provided further that Ms. Brabant's temporary employment was based on section 44920, due to the "need for additional certificated employees because a certificated employee has been granted leave for a semester or year, or is experiencing long-term illness."<sup>4</sup>

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<sup>4</sup> Section 44920 provides:

Notwithstanding the provisions of Sections 44917 and 44919, the governing board of a school district may employ as a teacher, for a complete school year, but not less than one semester during a school year unless the date of rendering first paid service begins during the second semester and prior to March 15th, any person holding appropriate certification documents, and may classify such person as a temporary employee. The employment of such persons shall be based upon the need for additional certificated employees during a particular semester or year because a certificated employee has been granted leave for a semester or year, or is experiencing long-term illness, and shall be limited, in number of persons so employed, to that need, as determined by the governing board.

Any person employed for one complete school year as a temporary employee shall, if reemployed for the following school year in a vacant position requiring certification qualifications, be classified by the governing board as a probationary employee and the previous year's employment as a temporary employee shall be deemed

14. In July 2009, the District gave Ms. Brabant another Offer of Employment (Probationary Offer of Employment). The Probationary Offer of Employment provided that Ms. Brabant would begin working as a third-grade teacher at Bridgeway Island on August 24, 2009, as a Probationary 1 employee. When Ms. Brabant received the Probationary Offer of Employment, she asked LuAnn Watkins, the District's Certificated Human Resources Specialist, whether her employment in the 2008-2009 school year would be counted as probationary. Ms. Watkins told Ms. Brabant that, because her Temporary Offer of Employment was not signed for 75 percent of the school year, her employment during the 2008-2009 school year could not be considered as probationary. Ms. Brabant signed the Probationary Offer of Employment on July 17, 2009.

15. The District sent a letter to Ms. Brabant dated November 9, 2009, which showed her first date of paid service (seniority date) as August 24, 2009. The letter asked Ms. Brabant to "note any corrections on this letter and return to the Human Resources office **no later than December 11, 2009.**" (Bolding in original.) Ms. Brabant received this letter and did not return any changes regarding her seniority date to the District's Human Resources office. The District also posted its seniority list at Bridgeway Island. Ms. Brabant saw that posted list but did not seek to make any changes to her seniority date.

16. At the hearing, the District argued that Ms. Brabant could not seek to change her seniority date because she did not respond to the District's November 9, 2009 letter or seek to make changes in the posted seniority list. During her testimony, Ms. Brabant explained that she did not reply to the District's November 9, 2009 letter or seek to change her seniority date on the posted seniority list because she had already spoken to Ms. Watkins about counting the time she spent teaching during 2008-2009 school year as probationary employment. According to Ms. Brabant, because Ms. Watkins made clear that the District did not consider Ms. Brabant's long-term substitute teaching and temporary employment during the 2008-2009 school year to be probationary employment, Ms. Brabant believed that she did not have any further recourse. She did not, therefore, respond to the District's November 9, 2009 letter or seek to make changes in the posted seniority list.

17. Ms. Brabant's testimony was persuasive. By asking for a change in her seniority date in or about July 2009, Ms. Brabant put the District on notice of this issue. Because she had already requested and been denied a change in her seniority date, she was not estopped from seeking such a change during this proceeding by her failure to challenge either the District's November 9, 2009 letter or its posted seniority list.

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one year's employment as a probationary employee for purposes of acquiring permanent status.

For purposes of this section "vacant position" means a position in which the employee is qualified to serve and which is not filled by a permanent or probationary employee. It shall not include a position which would be filled by a permanent or probationary employee except for the fact that such employee is on leave.

18. Section 44918, subdivision (a), provides:

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.

19. Beginning on the fourth day of the 2008-2009 school year, while Ms. Brabant was classified as a long-term substitute and temporary teacher, she performed all the duties normally required of a third-grade teacher. She worked more than 75 percent of the regular school days that the District's schools were in session during that school year. When she became a probationary employee on August 24, 2009, for the 2009-2010 school year, she continued to work as a third-grade teacher in the same classroom in which she taught during the 2008-2009 school year. Given these facts, pursuant to section 44918, subdivision (a), Ms. Brabant's seniority date must be corrected to reflect that she served a complete school year as a probationary employee during the 2008-2009 school year.

20. When Ms. Brabant's classification for the 2008-2009 school year is changed to probationary, a review of the seniority list shows that the District is retaining a certificated employee with less seniority to render a service that Ms. Brabant is certificated and competent to render. Consequently, Ms. Brabant's preliminary layoff notice must be rescinded.

Joanna Walkowski

21. Respondent Joanna Walkowski is currently a second-grade teacher at Bridgeway Island. She holds a Multiple Subject credential and a Crosscultural, Language, and Academic Development (CLAD) certificate. According to the District's seniority list, Ms. Walkowski is a permanent employee with a seniority date of August 24, 2009.

22. Within 39 months prior to August 24, 2009, Ms. Walkowski was a teacher employed by the District. She resigned from her District employment. On August 24, 2009, she returned to the District as a teacher. Because of her prior certificated employment, in accordance with sections 44848 and 44931, the District classified her as a permanent employee, but designated her seniority date as August 24, 2009.<sup>5</sup>

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<sup>5</sup> Section 44848 provides:

When any certificated employee shall have resigned or been dismissed for cause and shall thereafter have been reemployed by the board, his date of employment shall be deemed to be the date on which he first accepted reemployment (if reemployed before

23. A review of the District’s seniority list shows that a probationary certificated employee with an earlier seniority date than Ms. Walkowski’s is being retained to render a service that Ms. Walkowski is certificated and competent to perform. Mr. Beno testified that, when designating Ms. Walkowski for layoff instead of the probationary employee, the District took into consideration Ms. Walkowski’s seniority date and not her permanent status.

24. Section 44955, subdivision (b), in relevant part, provides:

Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section 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.

Ms. Walkowski argued that, due to her permanent status, the plain language of this provision prohibits the District from laying her off if it retains a probationary employee to render a service that she is certificated and competent to perform.

25. The District recognized that it was retaining a probationary employee while it was laying off Ms. Walkowski, but argued that the quoted provision of section 44955 must be read to protect the interests of senior teachers over more junior teachers. According to the District, accepting Ms. Walkowski’s reading of the quoted provision would lead to the “perverse result” that both Ms. Walkowski and the probationary employee could invoke the statutory language to argue that neither could be laid off while the other was retained.

26. The District’s argument about the “perverse results” that might arise from a literal reading of the quoted provision of section 44955 is best addressed to the Legislature. The plain language of section 44955 provides that, no matter the relative seniority dates, the District may not layoff a permanent employee while it retains a probationary employee to render a service that the permanent employee is credentialed and certificated to perform.

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July 1, 1947) or rendered paid service (if reemployed after June 30, 1947) after his reemployment.

When an employee’s services are terminated for lack of enrollment or discontinuance of service or are otherwise interrupted in a manner declared by law not to constitute a break in service, his original order of employment shall stand.

Section 44931 provides:

Whenever any certificated employee of any school district who, at the time of his or her resignation, was classified as permanent, is reemployed within 39 months after his or her last day of paid service, the governing board of the district shall, disregarding the break in service, classify him or her as, and restore to him or her all of the rights, benefits and burdens of, a permanent employee, except as otherwise provided in this code. However, time spent in active military service, as defined in Section 44800, subsequent to the last day of paid service shall not count as part of the aforesaid 39-month period.

Because the District has done just that with regard to Ms. Walkowski, the District must rescind her preliminary layoff notice.

Lyubov Gentry

27. Respondent Lyubov (Luba) Gentry is an Adult Education teacher employed by the District. She holds a full-time Adult Education credential in the designated subjects of English, Industrial Technologies, Math, and Physical Science. The District's seniority list indicates that Ms. Gentry's seniority date is April 2, 2007. At the hearing, Ms. Gentry challenged both her seniority date and whether the District had properly taken into consideration all attrition.

28. Ms. Gentry testified that she began teaching Adult Education English as a Second Language (ESL) and Citizenship classes in the District in August 2006. Although Ms. Gentry was told when she began teaching that she was substituting for another teacher, she was not informed of the name of that teacher. She worked 40 hours a week for the entire 2006-2007 school year performing the regular duties of an Adult Education teacher. According to Mr. Beno, from August 2006 until April 2007, Ms. Gentry was paid as an hourly employee. On April 20, 2007, Ms. Gentry signed an Offer of Employment (April 2007 Offer of Employment), which designated her as a temporary certificated employee. The April 2007 Offer of Employment stated that Ms. Gentry's services would terminate on June 15, 2007, and that her employment was based upon section 44909, in that she was employed to "perform services in a categorically funded project (or to replace a regular teacher who is performing services in a categorically funded project), which is not required by federal or state statute."

29. On July 2, 2007, Ms. Gentry signed an Offer of Employment (July 2007 Offer of Employment). Pursuant to the July 2007 Offer of Employment, Ms. Gentry was hired as a temporary certificated employee under section 44909 for the 2007-2008 school year to teach the same Adult Education classes she taught in the 2006-2007 school year.

30. At its meeting on February 14, 2008, the Board approved the recommendation of the Human Resources office to reclassify certain certificated employees from temporary to probationary status. One of the employees whose status was changed was Ms. Gentry. The agenda item describes Ms. Gentry's position as "Adult Ed ESL Teacher 1.0 FTE *General Fund*." (Italics in original.) The agenda item describes the action taken by the Board as "Reclassify from Temporary to Probationary-1 due to Kavanaugh issue and being hired on incorrectly as Temp for 2007-2008 school year." The effective date set forth in the agenda item is "2/14/08."

31. At the hearing, Mr. Beno testified that he understood that the effective date of February 14, 2008, on the Board's agenda item meant that the Board was making Ms. Gentry

a probationary employee as of February 14, 2008.<sup>6</sup> The evidence did not support Mr. Beno's understanding.

32. The plain language of the Board's agenda item indicates that Ms. Gentry was being reclassified as a probationary employee for the entire 2007-2008 school year. In addition, on March 3, 2008, Ms. Raya sent Ms. Gentry an email that confirmed that the Board had approved Ms. Gentry's change in status to probationary for the entire 2007-2008 school year.

33. On May 20, 2008, Ms. Gentry signed a Request for Notice (Sec. 44842) and Offer of Employment, indicating that she was a probationary employee and notifying the District that she intended to remain in the District's employ for the 2008-2009 school year.

34. On November 9, 2009, the District sent Ms. Gentry a letter that stated that the District was in the process of updating and verifying hire dates, credentials and certifications on file, and current assignments. The November 9, 2009 letter indicated that Ms. Gentry's seniority date was April 2, 2007. It also listed Ms. Gentry's credentials. The letter asked that Ms. Gentry note any corrections on the letter and return it to the Human Resources office not later than December 11, 2009.

35. Ms. Gentry made a number of corrections to the credentials shown on the November 9, 2009 letter and returned the letter with the corrections to the Human Resources office. Ms. Gentry did not make any corrections to the April 2, 2007 seniority date shown on the November 9, 2009 letter. At the hearing, Ms. Gentry testified that, when she reviewed the November 9, 2009 letter, she did not "pay attention to" the seniority date included in the letter.

36. Ms. Gentry testified that she spoke to Mr. Beno about whether her substitute teaching would count toward her seniority when she signed the July 2007 Offer of Employment for the 2007-2008 school year. Mr. Beno informed her that because she did not have a contract when she was paid on an hourly basis, her time spent as an hourly employee would not be counted toward her seniority. In June 2009, she emailed Ms. Raya about her placement on the salary schedule. In November 2009 she filed a "paper" with the Board challenging her placement on the salary schedule, which the District denied in December 2009. Ms. Gentry testified that, although the issues that she raised in 2009 specifically related to her placement on the salary schedule, "common sense" would dictate that those issues also included the issue of her seniority date.

37. Ms. Gentry's testimony was persuasive. By discussing her seniority date with Mr. Beno in July 2007, and seeking changes to her placement on the salary schedule in 2009, Ms. Gentry brought issues relating to her seniority date to the attention of the District. Her failure to correct her seniority date on the November 9, 2009 letter did not estop her from contesting her seniority date during this proceeding.

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<sup>6</sup> During his testimony, Mr. Beno did not explain why the District's seniority list stated that Ms. Gentry's seniority date (i.e., first day of paid service as a probationary employee) was April 2, 2007.

38. As set forth in Finding 18, pursuant to section 44918, subdivision (a), an “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.”

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.

Section 44949.25, in relevant part, provides:

When a teacher of classes for adults serves sufficient probationary time as provided in Sections 44929.20 to 44929.23, inclusive, and Section 44908 to be eligible for election to permanent classification in that district, his or her tenure shall be for the service equivalent to the average number of hours per week that he or she has served during his or her probationary years. In no case shall the employee be classified as permanent for more than one full-time assignment. The service for which the person has acquired tenure may be reduced in conformity with Sections 44955 and 44956.

39. Ms. Gentry began working for the District as an Adult Education teacher in August 2006. For the entire 2006-2007 school year, she worked 40 hours per week. In February 2008, the Board made her a probationary employee for the entire 2007-2008 school year. From the evidence presented at hearing, she worked full-time during the 2007-2008 and 2008-2009 school years. She is currently working full-time in the 2009-2010 school year. Given this information, pursuant to sections 44918, subdivision (a), 44908, and 44949.25, Ms. Gentry must be deemed to have served a complete school year as a probationary employee in the 2006-2007 school year. Her seniority date must therefore be corrected to the first day of school in August 2006, and she must be reclassified as a permanent employee.

40. The District argued that, even if Ms. Gentry is deemed to have been employed as a probationary employee in August 2006, this change in her seniority date would not

affect her layoff, because the PKS Resolution calls for the layoff of a 1.0 FTE Adult Education teacher and Ms. Gentry is the most junior Adult Education teacher in the District.

41. Ms. Gentry disputed the District's argument. According to Ms. Gentry, the Board must take into consideration as attrition the full-time Adult Education position vacated by Catherine Bratton at the end of the 2008-2009 school year. As set forth below, Ms. Gentry's argument is not persuasive.

42. Mr. Beno testified that Ms. Bratton worked for the District as a full-time Adult Education teacher. In or about February 2009, she gave notice that she was resigning. Mr. Beno believed that Ms. Bratton may have stopped teaching as an Adult Education teacher before the end of the 2008-2009 school year due to the lack of sufficient student enrollment. In any event, Ms. Bratton's resignation was effective no later than the end of the 2008-2009 school year. The District decided that, due to insufficient student enrollment, it would not fill Ms. Bratton's vacant position in the 2009-2010 school year. The Board did not take any action to eliminate that vacant position. According to Mr. Beno, the Board was not required to take any action to eliminate that vacant position because it "disappeared" on its own at the end of the 2008-2009 school year.

43. Ms. Gentry argued that the position vacated by Ms. Bratton remained in existence, albeit unfilled, during the 2009-2010 school year, and that it could not "disappear" without Board action to eliminate it. According to Ms. Gentry, if the Board wanted to eliminate both Ms. Bratton's vacant position and Ms. Gentry's current position and layoff Ms. Gentry, it had to identify two Adult Education positions for elimination in the PKS resolution. Ms. Gentry argued that, because the Board did not take action to eliminate Ms. Bratton's vacant position, that position still remains in existence and must be considered as available to Ms. Gentry through attrition, as set forth in the PKS Resolution (Finding 6).

44. Section 44955, subdivision (b), in relevant part, provides:

... whenever 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. (Bolding added.)

45. This provision in section 44955, by its plain language, provides that a school district must conduct a layoff when the school district's determination to eliminate particular kinds of services results in the need to decrease the number of certificated employees. The provision does not, however, require a school district to engage in a layoff or otherwise take any action to eliminate a particular kind of service if the elimination of that service does not result in the need to reduce any certificated employees. The provision's plain language also

states that a school district's review of whether it needs to eliminate services and certificated employees must be made on a yearly basis.

46. When the plain language of the quoted provision of section 44955 is applied in this case, it does not give rise to the result Ms. Gentry seeks. Due to Ms. Bratton's resignation, the District did not need to layoff any certificated employees to eliminate Ms. Bratton's vacant position. Because it did not need to layoff any certificated employees, the District could deem Ms. Bratton's vacant position to have been eliminated at the end of the 2008-2009 school year without taking any action to comply with the requirements of section 44955. Because the District could deem Ms. Bratton's position to be eliminated at the end of the 2008-2009 school year without taking any further action, the District did not have to consider that position as attrition in this case. Even though Ms. Gentry's seniority date must be changed to the first day of the 2006-2007 school year and she must be deemed to be a permanent District employee, the District established that it properly identified Ms. Gentry's Adult Education position for elimination and Ms. Gentry for layoff.

Corrine Kelly

47. Respondent Corrine (Cori) Kelly is currently employed as a .6 FTE Art teacher at Yolo Continuation High School. She has a single subject credential in Art. Her seniority date is August 23, 2000. At the hearing, she asserted that she should be allowed to "bump" into elective Art classes currently being taught by sixth through eighth grade teachers in the District.<sup>7</sup>

48. Susan Brothers is the District's Assistant Superintendent, Educational Services. Ms. Brothers testified that students in grades six through eight have six class periods during the school day. During four of these periods, students take core academic courses (English, Math, Science, and Social Science). During the other two periods, students take either Physical Education, academic support courses, or electives. The elective courses meet every other day and include a variety of different subjects, including Art. Students may take an elective for nine to 18 weeks. But a student may be pulled out from an elective course and assigned to an academic support course depending on the student's academic performance. The certificated employees who teach the core academic courses also teach the elective courses, including Art. Two certificated employees currently teaching Art electives are more junior to Ms. Kelly and do not possess an Art credential. These certificated

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<sup>7</sup> During the hearing, Ms. Kelly put on evidence relating to two other issues: (1) whether the Board is improperly eliminating Art at Yolo Continuation High School; and (2) whether she should be allowed to "bump" into the Video Production course currently taught by Martin Newborn, a more junior certificated employee. During closing argument, Ms. Kelly did not raise these two issues as matters for determination in this proceeding. In any event, the evidence did not establish that the District was improperly eliminating Art at Yolo Continuation High School. The District established that it will be offering sufficient classes at Yolo Continuation High next year to ensure that students will be able to meet the state's graduation requirements. Ms. Kelly also did not establish that she should be allowed to "bump" into the Video Production class currently taught by Martin Newborn. Next year, that class will be offered as a Regional Occupational Program (ROP). Ms. Kelly does not possess the credential required to teach that ROP class.

employees possess the single subject credentials they need to teach the core academic courses they are currently teaching.

49. Ms. Kelly argued that she should be allowed to “bump” into the elective Art classes currently being taught in the sixth through eighth grades by more junior certificated employees. Ms. Kelly’s argument is not persuasive.

50. The PKS Resolution specifically prohibits “partial bumping.” (Finding 5.) Because Ms. Kelly does not possess the credentials to teach the core academic courses currently being taught by the sixth through eighth grade teachers she seeks to bump, Ms. Kelly’s request to bump into the Art electives currently being taught by these teachers would result in “partial bumping,” i.e., a bump that would split a full-time classroom teaching position into two positions. The District’s refusal to permit partial bumping is reasonable and a proper exercise of its discretion. (*Hildebrandt v. St. Helena Unified School District* (2009) 172 Cal.App.4th 334.) The evidence presented by Ms. Kelly does not warrant a different result. The District properly determined that Ms. Kelly should not be allowed to bump into the elective Art classes currently being taught in the sixth through eighth grades by more junior certificated employees.

Alyssa Lewin

51. Respondent Alyssa Lewin is currently a second grade teacher at Bridgeway Island. Her seniority date is August 24, 2009. She has a Multiple Subject credential and a CLAD. Ms. Lewin also possesses a master’s degree and National Board Certification.

52. The District applied the tie-breaking criteria set forth in the PKS Resolution (Finding 4) to determine the seniority order of certificated employees with an August 24, 2009 seniority date.<sup>8</sup> The District did not give Ms. Lewin any points for her National Board Certification.

53. At the hearing, Ms. Lewin argued that the District should have given her two points for her National Board Certification under section b. of the tie-breaking criteria, which provides: “Possession of multiple valid preliminary or clear California teaching credentials: 2 points.” Ms. Lewin described the work she had to perform to attain her National Board Certification. She asserted that, given this work, she should be given credit for her National Board Certification.

54. In section b. of the tie-breaking criteria (Finding 4), the Board listed the particular credentials for which certificated employees would receive points. The list does not include a National Board Certification. Ms. Lewin did not establish that the Board engaged in arbitrary or capricious action or violated its discretion by choosing to give points only for California credentials. Because a National Board Certification is not one of the

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<sup>8</sup> The District issued preliminary layoff notices to all the certificated employees involved in the tie-breaker.

credentials specifically listed in the tie-breaking criteria, Ms. Lewin cannot be given any points for it.

55. There was no evidence that the District proposes to eliminate any services that are mandated by state or federal laws or regulations.

56. Any other assertions put forth by respondents at the hearing and not addressed above are found to be without merit and are rejected.

57. Except as set forth above for Ms. Brabant, no junior employees are being retained to render services that more senior respondents are certificated and competent to perform.

58. The District's reductions and eliminations of particular kinds of services relate solely to the welfare of the District's schools and pupils.

### LEGAL CONCLUSIONS

1. The District complied with all notice and jurisdictional requirements set forth in sections 44949 and 44955.

2. The services identified in the PKS Resolution are particular kinds of services that may be reduced or eliminated under section 44955. The Board's decision to reduce or eliminate the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion. Cause for the reduction or elimination of services relates solely to the welfare of the District's schools and pupils within the meaning of section 44949.

3. As set forth in Finding 19, pursuant to section 44918, subdivision (a), respondent Cristina Brabant's seniority date shall be corrected to reflect that she served a complete school year as a probationary employee during the 2008-2009 school year.

4. As set forth in Findings 9, 20, and 26, the District shall rescind the preliminary layoff notices served upon respondents Christy Savage, Cristina Brabant, and Joanna Walkowski.

5. As set forth in Finding 39, Lyubov Gentry's seniority date shall be corrected to the first day of school in August 2006, and she shall be reclassified as a permanent employee.

6. Except as set forth in Legal Conclusion 4, cause exists to reduce certificated employees of the District due to the reduction or elimination of particular kinds of services. Except as set forth in Legal Conclusion 4, the District properly identified the certificated employees to be laid off as directed by the Board.

7. Except as set forth in Legal Conclusion 4, no junior certificated employee is scheduled to be retained to perform services that a more senior respondent is certificated and competent to render.

8. Other than for Ms. Savage, Ms. Brabant, and Ms. Walkowski, cause exists to give notice to respondents that their services will be reduced or will not be required for the 2010-2011 school year because of the reduction or elimination of particular kinds of services.

#### RECOMMENDATION

1. As set forth in Legal Conclusion 3, respondent Cristina Brabant's seniority date shall be corrected to reflect that she served a complete school year as a probationary employee during the 2008-2009 school year.

2. As set forth in Legal Conclusion 4, the District shall rescind the preliminary layoff notices served upon respondents Christy Savage, Cristina Brabant, and Joanna Walkowski.

3. As set forth in Legal Conclusion 5, Lyubov Gentry's seniority date shall be corrected to the first day of school in August 2006, and she shall be reclassified as a permanent employee.

4. Except as provided in Recommendation 2, notice may be given to respondents that their services will be reduced or will not be required for the 2010-2011 school year. Notice shall be given in inverse order of seniority.

DATED: April 21, 2010

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KAREN J. BRANDT  
Administrative Law Judge  
Office of Administrative Hearings