

BEFORE THE
LOS ANGELES COUNTY SUPERINTENDENT OF SCHOOLS
LOS ANGELES COUNTY OFFICE OF EDUCATION
STATE OF CALIFORNIA

In The Matter Of The Accusations Against:

OAH No. L2005030067

FLORENCE AVIGNON, et al.,

Respondents.

PROPOSED DECISION

Timothy S. Thomas, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 11, 12 and 27, 2005, at Downey, California.

Aaron V. O'Donnell and Warren S. Kinsler, Attorneys at Law, represented the Los Angeles County Office of Education (hereinafter LACOE).

Richard J. Schwab, Attorney at Law, represented respondent teachers. Respondents Jackie Brendlinger, Kristen Lai and Bon Silva attended the hearing.

By stipulation of the parties, counsel's oral arguments were supplemented by written briefs. LACOE's and respondents' closing briefs were received on April 22, 2005, and marked as Exhibit 30 and Exhibit D, respectively.

The matter was submitted on April 27, 2003.

FACTUAL FINDINGS

1. LACOE employs 1,381 certificated employees, of whom 984 are currently serving as teachers, who deliver educational services to Los Angeles County students who are not served by traditional school districts. The primary areas of services include special education and alternative education services delivered in juvenile halls and camps. Darline P. Robles,

Ph.D., Los Angeles County Superintendent of Schools, determined that it was necessary due to uncertainty with regard to the level of funding that will be available to LACOE for school year 2005-2006 to reduce or discontinue particular kinds of services provided by teachers and other certificated employees. The decision was not related to the competency or dedication of the individuals whose services are proposed to be reduced or eliminated. Pursuant to the recommendation of the Assistant Superintendent, Human Resource Services, the Superintendent issued Resolution No. 26 on February 28, 2005. The Resolution provided that 182.80 full-time equivalent positions (FTE) within LACOE be reduced or eliminated for the 2005/2006 school year, as follows:

I. Educational Programs

A. Division of Special Education

| | |
|---|----------|
| 1. Assistant Principal | 1.00 FTE |
| 2. Counselor | .20 |
| 3. Principal | 2.00 |
| 4. School Psychologist | 3.60 |
| 5. Sr. Program Specialist | 2.00 |
| 6. Teacher Career Education | 1.00 |
| 7. Teacher Emotionally Disturbed | 8.00 |
| 8. Teacher Home and Hospital | 4.00 |
| 9. Teacher Language Speech | 1.00 |
| 10. Teacher Multiple Disabilities | 1.00 |
| 11. Teacher Orthopedically Handicapped. | 4.00 |
| 12. Teacher Trainable Mentally Retarded | 1.00 |

B. Santa Clarita Special Education Local Plan Area (SELPA)

| | |
|-------------------|------|
| 1. SELPA Director | 1.00 |
|-------------------|------|

C. Educational Programs Support/LACOE SELPA

| | |
|---|-------|
| 1. Coordinator | 5.00 |
| 2. Coordinator in Charge | 2.00 |
| 3. Counselor | 7.00 |
| 4. Director III | 1.00 |
| 5. Program Administrator | 3.00 |
| 6. School Psychologist | 1.00 |
| 7. Sr. Program Specialist | 1.00 |
| 8. Sr. Project Director | 1.00 |
| 9. Teacher Peer Assistance and Review | 1.00 |
| 10. Teacher Resource Specialist Program | 18.00 |

D. Division of Alternative Education

| | |
|---------------------------------|------|
| 1. Assistant Principal | 1.00 |
| 2. Principal | 1.00 |
| 3. School Nurse | 1.00 |
| 4. Sr. Program Specialist | 1.00 |
| 5. Teacher-Alternative Schools | 3.00 |
| 6. Teacher Community Day School | 1.00 |

E. Division of Juvenile Court and Community Schools

| | |
|---------------------------|-------|
| 1. Assistant Principal | 6.00 |
| 2. Sr. Program Specialist | 2.00 |
| 3. Teacher | 43.00 |

II. Educational Services

A. Division of Curriculum and Instructional Services

| | |
|---------------------------|------|
| 1. Consultant | 8.00 |
| 2. Coordinator in Charge | 1.00 |
| 3. Project Coordinator | 1.00 |
| 4. Sr. Program Specialist | 6.00 |
| 5. Sr. Project Director | 5.00 |

B. Division for School Improvement

| | |
|--------------------------|------|
| 1. Consultant | 4.00 |
| 2. Coordinator in Charge | 1.00 |
| 3. Sr. Project Director | 2.00 |

C. Head Start – State Preschool

| | |
|--------------------------|------|
| 1. Assistant Director | 1.00 |
| 2. Consultant | 2.00 |
| 3. Coordinator | 3.00 |
| 4. Coordinator in Charge | 1.00 |
| 5. Head Start Specialist | 6.00 |
| 6. Program Specialist | 2.00 |

D. Parent and Community Services

| | |
|---------------------|------|
| 1. Project Director | 2.00 |
|---------------------|------|

E. Student Support Services

| | |
|-------------------------|------|
| 1. Counselor | 4.00 |
| 2. Sr. Project Director | 1.00 |

III. Human Resource Services

A. Beginning Teacher Support and Assessment

| | |
|-------------------------|------|
| 1. Coordinator | 2.00 |
| 2. Sr. Project Director | 1.00 |

B. Human Resource Services

| | |
|---------------------------|------|
| 1. Sr. Program Specialist | 1.00 |
|---------------------------|------|

| | |
|-------|------------|
| Total | 182.80 FTE |
|-------|------------|

2. The services set forth in Finding 1 are particular kinds of services that may be reduced or discontinued within the meaning of Education Code section 44955. The reduction of services is related to the welfare of LACOE and its pupils, and it has become necessary to decrease the number of employees by 182.80 FTE. LACOE identified 86 teaching positions for elimination.¹

3. LACOE maintains a seniority list that contains employees' seniority dates (first date of paid service), current assignments and locations, advanced degrees, credentials, and authorizations. Credential and authorization data of record as of March 15, 2005, were obtained from the records of LACOE, where certificated teachers must register such documents.

4. LACOE used the seniority list to develop a proposed layoff and "bumping" list of the least senior employees currently assigned in the various services being reduced or eliminated. In determining who would be laid off for each kind of service reduced or eliminated, LACOE conducted a "top down" approach; that is, for each position to be eliminated, the most senior person was identified and a matrix constructed that showed where the person could be placed based on his or her credential and competence. Some were placed in vacant positions that had not been identified for elimination, while

¹ The majority of the 182.80 FTE positions identified for reduction or elimination involve administrators or other non-teachers who are not protected by the Education Code sections applicable to this hearing. However, according to LACOE policy, an administrator with a teaching credential may revert to teaching and "bump" less senior teachers if the administrator achieved tenure as a teacher and is certificated and competent to render the same services as the junior teacher.

others "bumped" less senior teachers in the same or a different position. The teacher bumped then was looked at similarly to determine if he or she could be placed elsewhere, or could bump someone even less senior. When any such employee could not be placed in that fashion, he or she was identified for layoff and given notice by March 15.

5. By resolution adopted by the County Superintendent of Schools on March 4, 2005, LACOE established tie-breaker criteria for determining the relative seniority of certificated employees who first rendered paid service to LACOE on the same date. It provided that the order of termination shall be based on the needs of the programs administered by the County Superintendent and the students participating in those programs. The tie-breaking criteria meet the requirements of Education Code section 44955, subdivision (b), and are not challenged by respondents either in terms of their validity or their specific application to them.

6. In the process of compiling the seniority list used to identify teachers subject to layoff, LACOE modified certain seniority dates in light of *Smith v. Elk Grove Unified School District* (2004) 120 Cal.App.4th 563 (*Elk Grove*). Prior to that decision, LACOE credited employees who were teaching a subject under an emergency or other provisional credential with their time toward seniority and tenure if they also held a regular credential in another subject. The seniority dates of many teachers were adjusted to delete any credit for such service as a result of the decision in *Elk Grove*, but only three respondents were thus affected: Eduarte, Orona and Reyes. While respondents' counsel objected to any "retroactive" application of *Elk Grove*, neither Eduarte, Orona nor Reyes attended the hearing, and no evidence was offered to establish what their seniority dates were prior to the adjustments.

7. On or before March 15, 2005, LACOE served on each employee identified for layoff a written notice that it had been recommended that notice be given to him or her pursuant to Education Code sections 44949 and 44955, to the effect that his or her services would not be required for the next school year. The notices were served by certified mail, return receipt requested. The notices stated that the reason for the recommendation was that the services enumerated in Resolution No. 26, a copy of which was enclosed to each respondent, were to be reduced or discontinued no later than the beginning of the 2005/2006 school year. The notices further represented that "no permanent or probationary certificated employee with less seniority than you is being retained to render services which you are certificated and competent to render."

8. LACOE chose to modify the steps outlined in Education Code section 44944 for the giving of notice and provision for respondents' hearing rights. To all but two of the recipients of notices, the packets sent to

employees subject to layoff were mailed on March 14, 2005, and included a form entitled "Request for Hearing/Notice of Defense." The employees were given 14 days, until March 28, 2005, to return the document and request a hearing. In other words, rather than send Accusations and Notice of Defense forms only to those who returned a Request for Hearing in response to the initial March 14 notice, LACOE included an Accusation in the initial mailing and combined the statutory time limits of section 44944 for requesting a hearing (seven days) and serving a Notice of Defense (five days). Of the 72 teachers receiving notices dated March 14, 30 teachers timely served a Request for Hearing/Notice of Defense.

9. Two employees, Bon Silva and Martin Navaroli, were served with notices of layoff dated and mailed March 15, 2005. Because they had not been included in the March 14 mailing, LACOE chose to follow the two-step process outlined in section 44944, and Silva and Navaroli were given seven days to request a hearing. After Silva timely requested a hearing, an Accusation was served upon him, and he timely filed a notice of defense. Thus, 31 teachers timely requested hearings according to the two methods of service of notices utilized by LACOE and are respondents in this matter.²

10. The 74 recipients of layoff notices consisted of 55 teachers classified as probationary (the Exhibit A list appended to the Accusation³) and 19 teachers who are by individual contracts filling positions of regular teachers on leaves of absence (the B list⁴). No permanent teachers were served with layoff notices. The teachers on the A list consist of probationary 1⁵ and probationary 2 teachers, as well as teachers filling previously vacant positions who are teaching pursuant to emergency, variable term waiver (VTW), pre-intern, or intern permits (sometimes collectively referred to as probationary 0 teachers). LACOE asserts that the B list teachers are temporary teachers (as opposed to permanent, probationary or substitute) and none of them has a right under Education Code sections 44944 or 44949 to be included in the hearing process. The B list teachers were sent notices of non-reelection on March 14, 2005. But LACOE simultaneously served these teachers with "precautionary" notices "that your services will not be required for the ensuing school year" (virtually identical to the notices served on the A list teachers) so as to allow them the opportunity to appear and state their cases for retention should any one of them wish to challenge his or her status as temporary. While five of the B list teachers requested a hearing, none appeared or offered evidence of his or

² The list of 31 respondents is attached to this Proposed Decision as Exhibit 1.

³ The A list of employees who received notices is attached to this Proposed Decision as Exhibit 2.

⁴ The B list of employees who received precautionary notices is attached to this Proposed Decision as Exhibit 3.

⁵ The designation probationary 1 refers to a probationary teacher in his or her first year of teaching in a probationary status. A probationary 2 designation refers to a teacher in his or her second year of teaching in a probationary status.

her individual situation. The evidence therefore established that the 19 B list teachers are temporary teachers and not entitled to the procedural protections of Education Code sections 44955 and 44949.

11. On the first day of hearing, LACOE withdrew the Accusation as against 18 of the teachers who had been notified of their impending layoffs. Nine of the teachers were respondents⁶ and nine were teachers who had not requested a hearing.⁷ All of the teachers who were the beneficiaries of the Accusation withdrawals were probationary teachers from the original A list. The teachers were retained because LACOE determined prior to the hearing that it was able to restore certain positions and due to additional attrition it had identified since March 15, 2005.

12. In the process of sending out the March 15 notices to respondents and others subject to layoff, LACOE inadvertently failed to serve one teacher who, by its own analysis of the seniority and bumping rights of its employees, should have been served. That teacher, Troy Doyle, has a seniority date of September 13, 2004. He is a probationary 1 employee who teaches in the juvenile court and community schools (JCCS), and holds a multiple subject teaching credential and second language certificate (SDAIE). As a result of the mistake in not serving Mr. Doyle with a March 15 notice, by law he may not be laid off.⁸ The mistake was not discovered until April 7, 2005, but LACOE claims that the omission did not result in any employee receiving a layoff notice who should not have. In other words, no employee received a layoff notice that was intended for Doyle. Because the mistake was not discovered until after March 15, 2005, LACOE proceeded with the layoff of one employee less than it had intended.

13. Two teachers who once left LACOE and returned within 39 months were given new seniority dates upon their return pursuant to law.⁹ Roy Hensley, who teaches at a juvenile court school, has a seniority date of September 14, 2004, and holds elementary, secondary, administrative services, driver education and SDAIE certificates. Claretta Diaz, whose teaching assignment is in community day care, has a seniority date of November 8, 2004, and holds a clear multiple subject teaching credential. Both Hensley and Diaz were issued layoff notices. Diaz requested a hearing, Hensley did not. The Accusations as to both were withdrawn on the first day of the hearing.

14. The parties agree that the following respondents have seniority dates earlier than Doyle, Hensley and Diaz, and that each of these respondents

⁶ A list of the nine respondents is attached as Exhibit 4.

⁷ A list of the nine non-respondents is attached as Exhibit 5.

⁸ Education Code section 44955, subdivision (c).

⁹ See Education Code sections 44848 and 44931, and *San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627, 641.

is certificated and competent to provide the services now being rendered by Doyle, Hensley or Diaz: Brendlinger, Cali, Cruces, Hastings, James, Lai, Oliphant, Resor, Reyes, Silva, Tatevossian, and Warner. Additionally, the following teachers who received layoff notices but did not request a hearing likewise have seniority dates more senior than Doyle, Hensley and Diaz, and are likewise certificated and competent to render the services now being rendered by Doyle, Hensley or Diaz: Bailey, Chavira, Garcia, Miller, Navaroli, Ruiz, Scean, Stang and Winitsky.

15. LACOE has or intends to send notices of non-reelection to all teachers now serving under emergency, VTW, pre-intern and intern permits. This fact was known to LACOE prior to March 15, 2005, and was taken into account in identifying the positions for elimination that were included in Resolution No. 26.

16. Respondent Jackie L. Brendlinger testified in her own behalf. Her date of initial hire was June 11, 1990, and she worked for LACOE as an instructional assistant. Brendlinger was assigned to teach in a juvenile court school beginning in September of 2003 in a vacant position as a substitute teacher. She taught under a long-term permit, as she had not yet earned her credential. Thereafter, the California Commission on Teacher Credentialing (CTC) issued a clear multiple subject teaching credential to Brendlinger, effective September 19, 2003, the date Brendlinger believes should also be her seniority date. She testified that she filed the credential with LACOE "immediately." Instead, LACOE established December 19, 2003, as her seniority date on the basis that her status was not changed from substitute teacher to probationary 1 until the date she was first paid as a probationary 1 teacher, which was the later date. On February 10, 2004, Brendlinger signed a Probationary Employee Contract, which indicated the effective date of her status as a probationary 1 teacher to be December 19, 2003. Finally, on February 20, 2004, LACOE sent a letter to Brendlinger advising her that her seniority date had been established as December 19, 2003. LACOE has no record that respondent replied or objected to the date at that time, although Brendlinger testified that she does not recall receipt of the letter.

17. Respondent Bon Silva testified in his own behalf. He agreed that his seniority date of September 20, 2003, as reported by LACOE, is correct. Silva, a probationary 2 teacher, holds a preliminary multiple subject credential that should be cleared by the end of May, 2005. He teaches in a juvenile court school and has received good evaluations. Silva testified that he would gladly accept the position currently held by Doyle, Hensley or Diaz.

18. Respondent Kristen Lai testified in her own behalf. She agreed that her seniority date of September 2, 2003, as reported by LACOE, is correct. Lai, a probationary 1 teacher, holds a single subject credential in

music, is working on a masters degree in education at California State University, Los Angeles, and intends to obtain a Ph.D. as well. She testified that she will earn a clear multiple subject credential sometime in 2005. Lai would gladly accept an assignment to teach in any one of the positions currently held by Doyle, Hensley or Diaz.

LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists pursuant to Education Code sections 44949 and 44955, by reason of Factual Findings 1 through 5.

2. Respondents raised the following issues in support of a claim that some or all of them should be retained by LACOE.

(a) Did the one-step process utilized by LACOE, combining the request for a hearing and Notice of Defense deadlines into one deadline, violate Education Code section 44949 so as to invalidate all of the notices sent in that fashion?

(b) Must certain respondents be retained because they are senior to and certificated and competent to render the same services being rendered by teacher Doyle?

(c) Must certain respondents be retained because they have seniority dates earlier than permanent teachers Hensley and Diaz, and are certificated and competent to render the same services?

(d) Did teachers who did not request a hearing and/or did not file a Notice of Defense and did not appear at the hearing waive their rights under Education Code sections 44949 and 44955 to challenge their layoffs in light of the retention of teachers Doyle, Hensley and Diaz? If so, what is the effect of LACOE's decision to withdraw the Accusation as to nine teachers who had not requested a hearing?

(e) Does the decision to not re-elect all temporary teachers for the next school year constitute additional assured attrition that must be taken into account in identifying teachers to be laid off?

(f) Did *Elk Grove* require LACOE to adjust the seniority dates of certain respondents so that they became more susceptible to layoff under Education Code section 44949?

(g) Does *California Teachers Association v. Governing Board of the Golden Valley Unified School District* (2002) 98 Cal.App.4th 369

(*Golden Valley*), apply to this matter such that LACOE failed to assign seniority dates to emergency permit-holders or interns to the prejudice of any respondent?

3. Did the one-step process utilized by LACOE, combining the request for a hearing and Notice of Defense deadlines into one deadline, violate Education Code section 44949 so as to invalidate all of the notices sent in that fashion? No.

It is true that LACOE did not strictly follow the procedures outlined in Education Code section 44949, which uses typically mandatory language ("shall") to require that school districts first serve all teachers subject to layoff with notice that his or her services will not be required for the ensuing school year by March 15. The teacher served with notice is allowed no less than seven days to request a hearing. The school district must then serve all teachers who requested a hearing with an Accusation that advises the teachers of a further deadline to file a Notice of Defense to the Accusation within five days of service of the Accusation. Thus, a teacher must comply with two deadlines, totaling 12 days, in order to be granted hearing rights as administered pursuant to Government Code section 11500, et seq.

Instead, LACOE served all but two respondents with notices of the impending layoff and Accusations simultaneously, provided forms combining a request for hearing and a Notice of Defense, and allowed the teacher 14 days to return the combined form. On its face, the procedure utilized by LACOE does not offend due process considerations, and no advantage to the teacher in being offered two separate deadlines to meet is obvious. Respondents offered no authority to support its claim that the process chosen by LACOE should invalidate all notices served pursuant to the process other than its obvious variance from the procedures dictated by section 44949.

In their closing brief, respondents nevertheless claim prejudice by virtue of the procedure utilized, as follows: "1. Confusion as to dates when responses had to be filed by the respondents. 2. What documents were required to be filed by the Respondents. 3. A majority of the Respondents were denied their rights to request the County Superintendent to rescind the Notices of Lay-Off; and 4. There was confusion as to who was actually a part of these hearings and who were merely 'precautionary' and what that was intended to mean." But no one testified to being confused. Indeed, the procedure adopted appears less confusing than the one provided by the code in that only one deadline of longer duration is presented. And the notices are sufficiently clear to overcome the claim of confusion.

The more pertinent question, however, is whether LACOE is authorized to alter the procedure set forth in section 44949. LACOE could not convincingly argue that it could establish a deadline later than March 15 to serve its notices of layoff, or that it could shorten the deadlines for teachers to request a hearing or file a Notice of Defense, or that it could establish its own adjudicatory system that did not adhere to the hearing process of the Administrative Procedure Act. Such innovations would clearly violate the statute, defeat legislative intent and introduce due process concerns. But is LACOE otherwise free to alter the statutory scheme, and if not, what is the consequence to doing so vis-à-vis these respondents? The answer follows from a determination of whether the two-step requirements of section 44949 is mandatory or directory, and an analysis of "whether the failure to comply with a particular procedural step will or will not have the effect of invalidating the governmental action to which the procedural requirement relates." (*Morris v. County of Marin* (1977) 18 Cal.3d 901, 908.)

In order to determine whether a particular statutory provision ... is mandatory or directory, the court, as in all cases of statutory construction and interpretation, must ascertain the legislative intent. In the absence of express language, the intent must be gathered from the terms of the statute construed as a whole, from the nature and character of the act to be done, and from the consequences which would follow the doing or failure to do the particular act at the required time. [Citation.] When the object is to subserve some public purpose, the provision may be held directory or mandatory as will best accomplish that purpose [citation], and the courts will look to see whether the provision is of the essence of the thing to be accomplished.

(*Pulsifer v. County of Alameda* (1946) 29 Cal.2d 258, 262.) Here, the legislature intended that a school district follow the two-step process laid out in section 44949 to ensure that teachers subject to layoff will receive timely and adequate notice of that fact, and to ensure that they have fair opportunity to appear at a hearing and state their individual and collective cases for retention. Nothing about LACOE's one-step process appears to thwart that purpose, and while a public agency ignores or alters a legislatively-imposed procedural requirement at its own peril, here "the essence of the thing to be accomplished," timely and adequate notice and a fair opportunity to exercise a right to a hearing, was satisfied. The statute's requirement that LACOE do in two steps what it chose to do in one is directory only.

4. Must certain respondents be retained because they are senior to and certificated and competent to render the same services being rendered by teacher Doyle? No.

For two reasons clearly enunciated in the Education Code, the mistake in not serving teacher Doyle with a layoff notice does not require that all teachers senior to him be retained. First, the controlling language of Education Code section 44955 is:

[T]he 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 employee is certificated and competent to render.

(Emphasis added.) As no permanent employee is being laid off (see Finding 10), LACOE correctly argues that it has complied with the section. Section 44955 also requires, however, that “employees shall be terminated in the inverse of the order in which they were employed” (Ed. Code § 44955, subd. (c)). Respondents argue that Doyle’s retention violates the requirement and compels the retention of all senior teachers who are certificated and competent to render the services being rendered by Doyle.

Education Code section 44949, subdivision (c)(3), provides, “[n]onsubstantive procedural errors committed by the school district or governing board of the school district shall not constitute cause for dismissing the charges unless the errors are prejudicial errors.” Since no teacher received a layoff notice because LACOE failed to serve Doyle, and all respondents would have been laid off in any event, no prejudice is shown. (See Factual Finding 12.)

5. Must certain respondents be retained because they have seniority dates earlier than teachers Hensley and Diaz, and are certificated and competent to render the same services? Yes.

Teachers Hensley and Diaz, who had established tenure with LACOE prior to their resignations, resigned at points in time less than 39 months prior to being reemployed on September 14, 2004, and November 8, 2004, respectively. Education Code section 44848 required that LACOE fix their seniority dates upon their return to employment as the dates of paid service upon reemployment. LACOE takes the position that these teachers are nonetheless “permanent” employees within the meaning of section 44955, subdivision (b), and may not be laid off so long as any probationary employee is being retained in a position for which the “permanent” employee is certificated and competent to render. LACOE relies on Education Code section 44931 to justify classifying Hensley and Diaz as “permanent” despite their break in service and the requirement that new seniority dates be assigned them pursuant to section 44848. 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.*

(Emphasis added.) Each party cites *San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627, in the context of this issue. While *San Jose* does confirm the need to restore the returning teachers to permanent status, the precedent supports respondents' argument that for purposes of seniority calculations vis-à-vis other teachers, Hensley and Diaz have lost the protection section 44955 otherwise gives permanent teachers:

We hold that section 44931 provides that the break in service shall be "disregarded" as to individual rights, burdens and benefits, *but not as to seniority rights which affect other employees.* The "except as otherwise provided in this code" provision in section 44931 must be read as deferring to section 44848.

(*San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627, 641. Emphasis added.) Respondents are, necessarily, "other employees" affected by the breaks in service of Hensley and Diaz.

LACOE contends that the altered seniority dates for teachers who resign but return within 39 months mean only that should a layoff under sections 44949 and 44955 reach into the ranks of permanent teachers, the returning teachers would be vulnerable to layoff to the extent their newly assigned seniority dates compared unfavorably to the seniority dates of other permanent teachers. This narrow construction of section 44931 is not supported by any evidence of legislative intent or other appellate language.

LACOE must retain the services of the two most senior respondents who are certificated and competent to render the services that Hensley and Diaz were retained to render. In rejecting the domino theory as a means of addressing respondents' grievance associated with the retention of Hensley and Diaz, the reasoning applied in *Alexander v. Board of Trustees of the Delano Joint Union High School District* (1983) 139 Cal.App.3d 567, 576, is adopted to effect the retention of only those two teachers actually prejudiced thereby.

6. Did teachers who did not request a hearing and/or did not file a Notice of Defense and did not appear at the hearing waive their rights under Education Code sections 44949 and 44955 to challenge their layoffs in light of the retention of teachers Doyle, Hensley and Diaz? Yes. What is the effect, if any, of LACOE's decision to withdraw the Accusation as to nine teachers who had not requested a hearing?

Education Code section 44949 provides, "The employee [served with a notice of layoff] may request a hearing to determine if there is cause for not reemploying him or her for the ensuing year ... If an employee fails to request a hearing ... his or her failure to do so shall constitute his or her waiver of his or her right to a hearing." LACOE sent each teacher identified for layoff a copy of section 44949, included a form to request a hearing, and advised that a failure to request a hearing constituted a waiver of the right to a hearing.

Respondents cite Education Code section 44924 for the proposition that a teacher cannot waive his or her rights under the Education Code. However, section 44924, which directs that a teacher's purported waiver of his or her rights under the Education Code *in the context of a contract or agreement*, is inapplicable here. The waiver that operates against the teachers' interests in this matter is a product of the Education Code itself, and section 44924 cannot logically be construed to make a nullity of a waiver provided for in section 44949.

LACOE's action in withdrawing the Accusation as to nine teachers who did not request a hearing does not operate to vitiate the mandatory obligation of teachers to request a hearing and file an Notice of Defense should they wish to present evidence concerning their individual seniority dates, special education or qualifications or any other matter that may impact the order of layoff. Put more simply, the Administrative Law Judge cannot operate in a vacuum. He or she can only affect the rights of those who appear before him or her.

7. Does the decision to not re-elect all temporary teachers for the next school year constitute additional assured attrition that must be taken into account in identifying teachers to be laid off? No.

By virtue of Factual Finding 15, LACOE took into account the fact that all temporary teachers would receive notices of non-reelection for the next school year. Therefore, even if such non-reelections were to be considered "attrition," they were accounted for as "positively assured attrition." (See *Moreland Teachers Association v. Kurze* (1980) 109 Cal.App.3d 648, 654.)

8. Did the *Elk Grove* decision require LACOE to adjust the seniority dates of certain respondents so that they became more susceptible to layoff under Education Code section 44949? It is unnecessary under the facts of this matter to decide this issue.

In *Smith v. Governing Board of Elk Grove Unified School District* (2004) 120 Cal.App.4th 5, the court concluded that an emergency credential is a "provisional credential" within the meaning of Education Code section 44911 and that service under such a credential may not be counted toward permanent status even if the teacher also held a valid, regular credential in another subject. Prior to this year, LACOE had given teachers credit toward tenure under such a circumstance and assigned their first date of paid service under the provisional credential as their seniority date in layoff proceedings. Even though *Elk Grove* was not concerned with economic layoffs, LACOE interpreted the decision as requiring the seniority date adjustment for purposes of both tenure and layoff proceedings.

By reason of Factual Finding 6, respondents Eduarte, Orona and Reyes were impacted by LACOE's change in procedure, in that their seniority dates were revised pursuant to its interpretation of *Elk Grove*. However, none of the effected teachers appeared and no evidence was adduced to establish that any pre-adjusted seniority date would have given any one of them seniority over any teacher who is being retained.

9. Does *Golden Valley* apply to this matter such that LACOE failed to assign seniority dates to emergency permit-holders or interns to the prejudice of any respondent? No.

Respondents argue that *California Teachers Association v. Governing Board of the Golden Valley Unified School District* (2002) 98 Cal.App.4th 369, required LACOE to treat all provisionally credentialed teachers¹⁰ as probationary teachers, assign them seniority dates based upon their first date of paid service and provide them with notice and rights under Education Code sections 44949 and 44955. Had LACOE proceeded in this fashion, it is asserted by respondents, more of the provisionally credentialed teachers would have been served with layoff notices and because many were not served, the entire process is flawed and cannot be sustained.

LACOE counters that *Golden Valley* merely stands for the proposition that a provisional credential holder who had not been classified as a temporary employee must be classified as probationary and could be dismissed mid-year only for cause, pursuant to notice. LACOE argues also that the "top down" approach utilized to identify teachers subject to layoff was

¹⁰ I.e., holders of emergency, VTW and intern permits.

not flawed in that the most junior teachers in the positions to be eliminated were identified and noticed.

The teacher in *Golden Valley* was employed pursuant to a written contract. She taught under an emergency permit, and her status was contingent upon fulfilling the requirements to obtain a valid credential. When she did not fulfill those requirements, she was terminated without the benefit of notice by March 15. The court invalidated the termination, holding that Education Code section 44915¹¹ allows a teacher serving under an emergency permit to be classified as a probationary employee and entitled to the protection of statutory notice governing the mid-year dismissal of a probationary employee. A persuasive argument that underscores the difference between the concepts of tenure and seniority may be made that teachers holding emergency permits or another provisional credential should also receive the protections afforded probationary teachers in layoff hearings. Seniority is the principal tenet behind the layoff procedures. (Education Code section 44955.) Seniority is used to distinguish teachers within a classification, including probationary teachers. (*Cousins v. Weaverville Elementary School District* (1994) 24 Cal.App.4th 1846, 1855.) Section 44955 does not distinguish the type of credential held by a probationary employee, except, perhaps, as part of a tie-breaking formula. The other argument states that there is no compelling reason to suppose that the legislature intended to require the holder of a provisional credential to obtain a regular credential before he or she could begin to accrue seniority toward tenure (Education Code section 44911), but also intended that a provisional credential holder could effectively "bump" a fully credentialed teacher pursuant to an economic layoff under Education Code section 44949.

But the issue as applied here is a red herring: LACOE did in fact categorize provisionally credentialed teachers as probationary teachers (probationary 0) in its seniority analysis. Indeed, the respondents include four employees who are teaching under provisional credentials, and several more were served with layoff notices who did not request a hearing. No showing has been made by respondents that any of them are qualified by certificate and competence to render the services currently being rendered by a junior provisionally credentialed employee who is being retained. Moreover, the evidence is that no provisionally credentialed teacher is to be retained. If the provisionally retained individual was not identified for "bumping" and layoff through the seniority matrix process, then the individual will be non-reelected in any event.

¹¹ Education Code section 44915 reads: "Governing boards of school districts shall classify as probationary employees, those persons employed in positions requiring certification qualifications for the school year, who have not been classified as permanent employees or as substitute employees."

10. Cause exists under Education Code section 44955, because of the reduction or discontinuation of particular kinds of services, to give notice to all but the two most senior respondents who are certificated and competent to render the services being rendered by teachers Hensley and Diaz that their services will not be required for the 2005-2006 school year. The cause relates solely to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949.

ORDER

1. Except as otherwise required by this Order, notice shall be given to respondents that their services will not be required for the 2005-2006 school year because of the reduction or discontinuation of particular kinds of services. Notice shall be given in inverse order of seniority.

2. LACOE shall identify in a manner consistent with the law and this Decision the two most senior respondents who are certificated and competent to render the services being rendered by teachers Hensley and Diaz. As to the respondents thus identified, the Accusation is dismissed.

DATED: May 4, 2005

TIMOTHY S. THOMAS
Administrative Law Judge
Office of Administrative Hearings