

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. 2008020722

PROPOSED DECISION

Administrative Law Judge Stephen J. Smith, Office of Administrative Hearings, State of California heard this matter in Elk Grove, California on April 14, 15 and 16, 2008.

Xavier De La Torre, Ed.D., Assistant Superintendent for Human Resources and Karen M. Rezendes, Attorney at Law, and Leah Won, Attorney at Law, of Lozano Smith, Attorneys at Law, represented the Elk Grove Unified School District (District).

Margaret Geddes, Attorney at Law, of Beeson, Tayer and Bodine, Attorneys, and A. Eugene Huguenin, Jr., Attorney at Law, represented the certain certificated District employees receiving notice that their services would not be required for the upcoming school year are members.

Respondents Eric Saragoza, Shannon Barchus, Michelle Dallas, Justin Jones, Katherine Smiley, Erin Goldman, Hilary Heckman, Taber Perry, Grace Gelvoria and Tammy Skarset appeared in pro per. These unrepresented respondents received either a preliminary or precautionary notice of layoff. The unrepresented respondents selected Shannon Barchus to serve as spokesperson.

FACTUAL FINDINGS

1. Xavier De La Torre, Ed.D. (Assistant Superintendent) made and filed the Accusation in his official capacity as Assistant Superintendent, Human Resources, Elk Grove Unified School District. 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.

2. Respondents are and at all times relevant to this Decision were certificated employees of the District.

3. On or just before March 4, 2008, in accordance with Education Code sections 44949 and 44955, the Superintendent notified the Governing Board of the District (the Board) in writing of the Superintendent's 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 below. 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 particular kinds of services. The Superintendent notified the Board that respondents had been identified as persons to whom notice should be given that their services would not be required for the ensuing school year. 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.

4. The Board adopted three Resolutions regarding these proceedings. Resolution 56, adopted March 4, 2008, resolved to follow the Superintendent's recommendation to reduce 137.00 full time equivalent ("FTE") particular kinds of services. The Resolution authorized and directed the Superintendent to give notice to an equivalent 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. The Resolution authorized the elimination of the following services now offered in the District:

A.	High School Counselors	3.00 FTE
B.	High School English	17.00 FTE
C.	High School Math	17.00 FTE
D.	High School Life Sciences	6.00 FTE
E.	High School Social Studies	6.00 FTE
F.	High School Business	1.00 FTE
G.	World Language	1.00 FTE
I.	High School Physical Education	2.00 FTE
J.	K-6 Elementary Multiple Subject	56.00 FTE
K.	Instructional Coaches	28.00 FTE

5. The Assistant Superintendent caused each of the respondents to be served with a written Notice of Intention to Dismiss (the preliminary notice) on March 11, 2007. The Assistant Superintendent also caused another group of respondents, separately identified, with a written Precautionary Notice of Intention to Dismiss (precautionary notice), also on March 11, 2008. The written preliminary and precautionary notices advised respondents of the Superintendent's recommendation to the Board that their services would not be required for the upcoming school year. The preliminary notice set forth the reasons for the recommendation, a copy of Resolution 56 with the list of the PKS the Board has determined to reduce or eliminate, a blank copy of a Request for a Hearing, copies of Education Code

sections 44949 and 44955, and a copy of a worksheet showing detail of the location by school sites where the particular kinds of services slated for reduction or elimination will take place. The precautionary notices had the same attachments, except the addition of a list of those District employees receiving a precautionary notice, and omitting the worksheet.

6. Respondents each timely filed written requests for a hearing to determine if there was cause for not reemploying them for the ensuing year.

7. The District timely served Accusations on each respondent following receipt of their Requests for a Hearing. Each respondent timely filed a Notice of Defense to the Accusation. All prehearing jurisdictional requirements were met.

8. During the evidentiary hearing, the District moved to withdraw the preliminary notices of layoff served on employees as follows:

1. Ann Filios;
2. Saody Tep;
3. Jennifer Fassett;
4. Rebecca Forcum,
5. Teresa Hansen;
6. Tara Higishino;
7. Joel Johnson;
8. Jessica Payne;
9. Lisa Radonjic,
10. Nicole Roschak;
11. Terri Hock;
12. Jennifer Wega;
13. Monica Dal-Ben;
14. Grace Galvoria;
15. Dylan Moria;
16. Kerri Flock;
17. Jason Coppola;
18. Michael Simmons;
19. David Kjargaard;
20. Cristin Gianetti;
21. Laureen Fox;
22. Sharon Zankier;
23. Sheryl Draper;
24. Joel Goldwaith,
25. Cristine Tabernia;
26. Graham Stewart;
27. Shirley Arroyo;
28. Michelle Newell; and
29. Lisa Crummey

After the taking of evidence was closed, the District moved to rescind the notices of the following additional certificated employees who had received a preliminary notice:

1. Michele Abriani; and
2. Taber Perry.

9. In addition, the District moved to correct seniority dates and/or status of the following certificated employees:

1. Lisa Crummy: seniority date corrected to 08/20/07;
2. Kristen Emlet: seniority date corrected to 11/26/07; status to probationary;

The motions were granted without opposition. Those certificated employees identified above were dismissed following the District's decision to withdraw the preliminary notices issued to them.

TIE BREAKING

10. On March 11, 2008, the Governing Board adopted its Resolution No. 58, to determine criteria to be applied in case of ties. Pursuant to provisions of Education Code section 44955, the Board determined, as reflected in the Resolution, the District needs, should it become necessary to determine the order of termination for employees who first rendered paid probationary service to the District on the same day. The Board determined, for the 2008-2009 school year only, that the needs of the District and its students would be best met by establishing a rating system to be applied in determining the order of termination of certificated employees:

- A. Multiple and Single Subject Credentials: Rating +1 per credential
- B. Earned degrees beyond the BA/BS level: Rating +1 per credential

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.

11. No additional guidance was provided regarding how to conduct such a lottery. No direction was provided regarding how to group employees potentially affected by the application of the tie-breaker rating system and criteria. By necessary implication, the Board delegated discretion to the Superintendent and his delegates to implement the rating and tie breaking criteria in any fashion consistent with the adopted criteria, as long as the implementation was fair and impartial.

12. As it happened, application of the tie breaker criteria and rating system became critical in determining which District employees' preliminary notices should be sustained. The Assistant Superintendent and his assistants summoned the representatives of the Elk Grove School Employees' Association (Association) to watch the process. All but a

tiny number of respondents subject to this action are members of the Association. The President of the Association and an associate met with the Assistant Superintendent and watched as the criteria and ratings were applied to individual employees. The President and his associate became involved in the process and were praised by the Assistant Superintendent for helping to correct numerous mistakes. Despite some efforts to imply otherwise, it is not assumed here that by voluntarily participating with the Assistant Superintendent in the application of the tie breaking criteria that the Association representatives endorsed the manner in which the Assistant Superintendent chose to apply the Board's criteria. Nevertheless, the Association's role, through its elected representatives, was substantially more than merely passive observation.

13. As a precursor to the meeting where the tie breaker criteria and rating system was applied, the Assistant Superintendent directed a District wide effort to update and validate the District's Certificated Seniority List (Seniority List). With more than 3200 certificated employees, this was no small feat, complicated by the fact that the District has been growing enrollment for the past 10 consecutive years. Little attention was paid to making certain the Seniority List was accurate and up to date.

14. When it became evident in late January 2008 that suspension of Proposition 98 and the threatened \$4.5 billion in cuts to school funding were imminent and would directly impact the District, the Assistant Superintendent ordered the District wide solicitation of updated information from all certificated employees. The canvass was accomplished by the Assistant Superintendent giving each site administrator in the District an employee information form and directions to copy the form, provide a copy to each employee and instruct each to verify the employee's credentials and seniority date with the District Office.

15. The Assistant Superintendent was deluged with responses to the solicitation in the following weeks, piled in a stack he described as a foot thick. Responses were also received by e-mail and other means of communication. At the time of the evidentiary hearing, responses were still being submitted. Although the form has a deadline date, the District is considering every submission, regardless of when it was filed.

16. The District has investigated and attempted to verify, or is in the process of, investigating and verifying, the assertions made by each employee on each response. Hundreds of addenda and corrections to the Seniority List were made using these inputs, when found to be warranted and verified. This updated and augmented Seniority List was the tool the Assistant Superintendent and his staff used in creating the lists of employees identified where ties needed to be broken and application of the tie breaking criteria.

17. 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 numbered poker chips from a hat in alphabetical order for each employee still tied in the particular group. Some such groups had more than 10

persons. The number drawn for each employee represented the employee's relative seniority within the group of ties, for example, three ties in the Physical Education grouping were assigned numbers based upon a drawing between those three, with the lowest number drawn receiving the highest relative seniority.

18. The Assistant Superintendent did not group all District employees with the same first date of paid probationary service together in one general group for the application of the lottery. 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.

19. Respondents contend the Assistant Superintendent's application of the tie breaking process was unfair, constituted an inappropriate exercise of discretion, violated the criteria set by the Board for tie breaking, and violated the law. Respondents failed to mention what law the Assistant Superintendent's actions violated, other than claiming that failure to group all respondents together in one large group caused the Seniority List to become inherently unreliable due to "the associative law of mathematics." Counsel failed to elaborate on that claim.

20. Unrepresented respondents also contended the District failed, in enacting the tie breaking criteria, to credit factors the District has highly emphasized with its certificated employees; for example, the District failed to give credit in the tie breaking for possession of CLAD or BCLAD certification, or possession of certification as a Highly Qualified Instructor under the No Child Left Behind Act.

21. None of the contentions have merit. The Assistant Superintendent's methodology for the assembly and application of the lottery was not proved to be unfair, arbitrary, capricious or other than even handed. The methodology was fair, even-handed and transparent. There was no evidence that any individual or group of employees subject to the process gained any advantage over any other due to the methodology. The methodology selected may not have been the most efficient or effective possible under the circumstances, but no one pointed out any better or more even handed method. In fact, the method claimed by respondents that should have been applied may have actually disadvantaged some respondents relative to others within the group subject to the process.

22. The Assistant Superintendent's methodology actually combined separate steps of a process that would ultimately be required in the tie breaking process, even if respondent's "all in one group" approach was followed. Had all employees with the same points and the same first date of paid probationary service to the District been lumped generally together, as contended by respondents, the subject matter selection process employed would still have been required to determine whether any tied employee would be able to bump another tied employee or one less senior into a potentially available position. It makes no sense for an employee to claim he or she has been disadvantaged due to not being subject to a general lottery, obtaining a better number than another, then not being able to displace that other employee, despite faring poorer in the lottery, because the employee

making the claim with the higher rank does not have the certifications and credentials necessary for the available position or to be able to displace another less senior employee. Such a raw number flowing from a general lottery is meaningless outside the context of the certifications and qualifications necessary to attain displacement rights and fill any given available slot.

23. Respondent's contentions that the Board failed to recognize and give credit for qualifications otherwise highly valued by the District also fails. The selection or rejection of any such criteria is entirely in the discretion of the Board. It may be that in the future that the Board will want to include possession of CLAD or BCLAD, cleared credentials, highly qualified certification, or a host of other valued additional qualifications, when determining how to rank employees against one another who have the same first day of paid service to the District as probationary employees. But the fact that the Board elected to not include these criteria in this year's tie breaking creates no factual of legal deficit. The selection and application of the tie breaking criteria was not arbitrary and took into consideration the needs of the District. The Assistant Superintendent testified that the Board considered adding some of the other criteria suggested by respondents, but elected not to do so due to a desire to keep the process as simple and conflict free as possible. The weight of the evidence revealed that that the selection and application of the tie breaking criteria was an appropriate exercise of the Board's and the District's discretion.

FINANCIAL AND BUDGET REASONS FOR THE ACTION

24. Respondents contend the layoff should fail because "the District has failed to show any link between revenue loss and 137 FTE reduced or for 56 respondents." Respondents also contend the layoff should fail to those receiving precautionary notices because the District has failed to show any loss of categorical funding for the upcoming school year. Both contentions wholly lack merit and are contrary to long settled law.¹

25. As noted above, 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. Districts were all warned by the Governor's budget projections in January 2008 to expect one or both of the suspension of Proposition 98 (mandatory school funding as a percentage of the total budget) and/or ten per cent across the board cuts. The District's fiscal condition has markedly shifted almost overnight from rapid growth to anticipated contraction. Suspension of Proposition 98 would certainly place the District into an operating deficit, as would the threatened ten percent across the board cuts. 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 Superintendent. The Board and the Superintendent have considered myriad

¹ *San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627, 632, citing *Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831, 841.

methods to deal with the anticipated reductions in expected funding. One of these responses is a contraction in the range of non-mandated the services the District will be able to offer in the upcoming school year. Respondents were repeatedly reminded during the Assistant Superintendent's testimony that reducing or eliminating certain classes and programs offered in the District's educational portfolio was only one of a multitude of belt-tightening measures the District has undertaken, with most being focused upon trying to save as many classes, programs and teacher's jobs as fiscally possible and prudent.

26. The District does not know at present whether it will be terminating any categorically funded program in the upcoming school year. Continuation of any and all categorically funded programs is entirely dependent upon the continuity of outside sources of funding, for which there is no guarantee. In such uncertain financial circumstances as are facing the District and many of its outside funding sources for such programs, it is simply impossible to predict with any reasonable degree of certainty whether any of those funding sources will continue to fund categorical programs in the upcoming school year. No one knows what the funding situation will be for categorical funding in the upcoming year. Sources of extra-District funding for earmarked programs widely vary, both in nature and solvency. It is unlikely all categorically funded programs will terminate in the upcoming school year. It is equally unlikely all the categorically funded programs the District offered this school year will again be offered in the upcoming school year.

27. The District is not required factually or legally to prove the links between the proposed reductions and anticipated revenue declines respondents contend are mandatory.² The District is legally required to operate with a balanced budget. Since the exact amount of revenue and categorical funding that will be actually provided to the District for the upcoming school year cannot be known with any precision at the time preliminary notices are legally required to be given, the legislature and the courts have never required Districts to link proposed reductions to anticipated revenue shortfalls other than in a very general fashion at the present stage of the layoff process, which the District did here quite satisfactorily.³

ATTRITION

28. The 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, one employee, Michele Abriani, had her preliminary notice rescinded because the District discovered another position made available by attrition after the commencement of the evidentiary hearing.

² *Id.*

³ Since the March 15 notice is only the initial step in the termination process it is not required that it specify the precise number of teachers to be terminated or the specific positions to be eliminated. The preliminary notice is sufficient if it specifies the statutory grounds set forth in section 44955. The specific positions to be eliminated need not be identified. *San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627, 632, citing *Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831, 841.

STATE AND FEDERAL MANDATES

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

TEMPORARY AND CATEGORICAL PROGRAM EMPLOYEES

30. The District employs certificated personnel as temporary employees pursuant to two types of temporary contracts. The first is for those filling in for permanent or probationary employees on leave, short or long term, pursuant to section 44920. The other is for those filling categorically funded positions, or filling in for permanent or probationary employees who are staffing a categorically funded position, pursuant to section 44909. The District carefully contracted with each of these employees according to the requirements of sections 44909 and 44920. Each employee working under a temporary contract received a notice before commencing work that they were temporary employees, that they would not acquire status or seniority, and were given such notice in writing. There was no evidence that any temporary employee working in the District under a temporary employment contract did not receive these notices or was not aware of the limitations to status and seniority the position entailed.

31. Some of the District's temporary employees were hybrids, teaching under both sections 44909 and 44920, due to both filling in for another employee teaching in a categorically funded program or by back-filling for another employee in such status, who was also on a short or long term leave of absence.

32. A few District employees were hired on contingent temporary contracts (contingent temporary). These employees were offered employment contingent upon the presence of sustaining enrollment. The contingent temporary employee's status in such circumstances was temporary at hiring, contingent upon sufficient enrollment arriving in the classes assigned to the employee to support the position. If the enrollment arrived, such employees were reclassified to probationary and their seniority date was back dated to the first day they rendered paid service to the District under the temporary contract. If the sustaining enrollment did not materialize, the contingent temporary employee's contract was terminated, and every effort was made to find another position for the employee in the District, dependent upon the employee's credentials and competencies. At times this reassignment was successful, and at others the contingent temporary employee was terminated. There was no evidence that any such contingent temporary employee in the District accepted such a temporary contract position without full knowledge of their status or the effects of the contingency, or the potential for termination if sustaining enrollment failed to materialize and the employee did not have credentials and competencies to permit reassignment to another open position in the District.

33. All District temporary contract employees are tracked on a list that reflects the temporary employee's "hire date." The Assistant Superintendent made it clear that the "hire

date" is not a seniority date, and does not necessarily reflect an employee's "first day of paid service to the District as a probationary employee."

34. At no time did the number of temporary employees in the District exceed the number of permanent or probationary employees on leaves of absence and those staffing categorically funded positions. In fact, the Assistant Superintendent's direction to all Human Resources staff throughout his three and a half year tenure in the District has consistently been to make certain that these numbers "never get close."

35. Respondents contend that the District has adopted a practice, as reflected in the Assistant Superintendent's testimony, that all District employees hired initially as substitutes or on temporary contracts, are given "back-dated" seniority dates. Respondents contend the District has treated these employees' first day of service in any capacity as the employees' first day of paid service as a probationary employee, when the employee later becomes probationary. Respondents contend that since the District has done so with its employees in the past, it has adopted this back-dating as a practice and is now obligated to follow it with respect to all the other temporary employees who have become probationary or permanent, but did not receive extra seniority credit for such substitute or temporary contract service.

36. The contention is factually and legally lacking in merit and misconstrues the facts adduced during the evidentiary hearing. The Assistant Superintendent made it quite clear in his testimony that the District lacks legal authority to back-date seniority dates as respondents suggest, and credibly denied that any such practice exists or existed in the past, except in the case of the contingent temporary employee described above. Under these very limited circumstances, the Education Code gives the District discretion to credit or deny credit for the period of service under the temporary portion of the contingent temporary contract. In this narrow instance, the District does have the practice of trying wherever possible to reward the employee by exercising its discretion in favor of the employee. In all other instances, employees working pursuant to temporary contracts acquire no status or seniority for the temporary contract service. Otherwise, the District is bound by law and lacks the legal capacity to back date any employee's first day of paid service to the District, despite a variety of claims of other extenuating circumstances.

37. Education Code section 44909 provides that employment of certificated employees in categorically funded programs which are not required by federal or state statutes are classified as temporary and do not acquire any status or tenure during such service, including the right to a sections 44949/44955 evidentiary hearing to challenge the termination. Section 44909 provides: "Such persons may be employed for periods which are less than a full school year and may be terminated at the expiration of the contract or specially funded project *without regard to other requirements of this code respecting the termination of probationary or permanent employees other than Section 44918.*" [Emphasis added.]

38. The *Bakersfield Elementary Teachers Association*⁴ decision added opacity to this issue. The *Bakersfield* court, in dicta⁵, when considering the rights of 19 employees hired under Education Code section 44909 to teach in categorically funded programs, or fill in for permanent or probationary employees who had taken such assignments, who had been classified as temporary, indulged itself in some legislating by its own additional requirement to section 44909's provisions, by concluding that these employees are not entitled to these due process layoff protections *unless* the categorical program or its funding had expired.⁶ The court found the District's classification of such employees as temporary was erroneous, because although such employees are "treated like" temporary employees in certain respects (i.e., not crediting service toward permanent classification) they are presumptively probationary employees and entitled to notice and a hearing in the event of layoff under Education Code sections 44949 and 44955.⁷ In apparent reliance upon the language of Education Code section 44909, the Fifth District Court of Appeal explained:

Thus, certificated teachers assigned to a categorically funded program may be laid off without the procedural formalities due a permanent and probationary employee *only* if the program has expired. (*Hart Federation of Teachers, supra*, 73 Cal.App.3d at pp. 215-216; *Zalac, supra*, 98 Cal.App.4th at p. 852.) Here, so far as the record discloses, none of the programs to which the 19 laid-off employees were assigned had expired.⁸

39. The *Zalac*⁹ court did not decide the status of Ms. Zalac based upon the expiration of the categorical funding for the position she occupied. The *Zalac* court found that upon the expiration of the categorical program Ms. Zalac had been teaching in for two years, when the District reemployed her in her third year of teaching, and then tried to lay her off after that third year, she should have been classified as probationary and could not be laid off without notice and a hearing. Her termination at the end of her third year of teaching in the District had nothing to do with the end of a categorically funded program or teaching as a temporary teacher, because she had not been teaching in a categorically funded program or under a temporary contract for more than a year and was a regular certificated employee of the District at the time the District tried to lay her off. *Zalac* then inexplicably cites *Hart*, in what appears to be dicta, even though the citation to *Hart* is entirely unrelated to Ms. Zalac

⁴ *Bakersfield Elementary Teacher's Association v. Bakersfield City School District* (2006) 145 Cal.App.4th 1260, 1285-1287.

⁵ The issue before the court in *Bakersfield* was whether the District could lawfully treat its employees who did not have completed credentials as temporary. The key holding in the decision is that certification (credentialing) and status (seniority and classification) are legally unrelated and credentialing, or lack thereof, cannot be used as a factor to determine an employee's status and seniority. The comment about 44909 categorically funded positions was not essential to the holding and is a gratuitous afterthought fortunately not required to be given any deference here, especially due to the problem it unwittingly creates as set forth in footnote 6 below.

⁶ *Id.* at p. 1287. Although giving a blush to the *Santa Barbara* and *Paulus* decisions (below) which specifically held Districts are not required to engage in the one to one matching of employee with position or funding that would be required if this alleged new rule were implemented, the *Bakersfield* court goes on to ignore these holdings and the obvious conflict it creates.

⁷ *Id.*

⁸ *Id.*

⁹ *Zalac v. Governing Board of Ferndale Unified School District* (2002) 98 Cal.App.4th 8438, 849.

or her status. The *Bakersfield* court picked up on this dicta in *Zalac* in its own dicta, leading to the “rule” respondents advocate here. The *Bakersfield* court thus miscited *Zalac* for the proposition quoted above. This dicta upon dicta is not binding or persuasive in this matter.

40. The all out warfare against Districts classifying teachers as temporaries, under the banner of probationary status being the presumptive classification for all certificated employees, ignores the Legislature’s creation of temporary classifications pursuant to sections 44909 and 44920. Temporary classification is specifically statutorily permitted to allow Districts flexibility in staffing short term vacancies and meeting District needs without having to provide status toward tenure and benefits.¹⁰ Whether employees may be classified as temporary, if the requirements of sections 44909 or 44920 are observed, as opposed to being required to be classified as presumptively probationary, is a matter for the Legislature, not judicial fiat. There is one caveat, however, that Districts may not abuse the temporary contract tool to solve staffing problems in Districts in derogation of certificated employee rights. This abuse is curbed by the rule the District has relied on in hiring all its temporary teachers, that Districts may not employ more temporary teachers than there are permanent or probationary employees on leave plus the number of categorically funded positions.¹¹ Both these decisions make clear that there need be no one to one correspondence between any particular temporary employee in a District and any particular leave of absence position or categorically funded position, as long as the aggregate total of such positions did not exceed the total number of temporary employees in the District. The District proved it complied with all the requirements of sections 44909 and 44920 and *Santa Barbara* and *Paulus* in dealing with its temporary employees.

PRECAUTIONARY NOTICES

41. The District not only served the identified probationary and permanent respondents subject to this action with preliminary notices of lay off, but also served employees teaching under Education Code section 44909 and 44920 temporary contracts with “precautionary” notices of lay off. There was no showing that the giving of precautionary notices of layoff to employees who arguably have no right to this hearing was legally or factually inappropriate. These precautionary notices are the product of District (not just this one) reactions to conflicting and confusing Court of Appeal rulings in several recent cases, primarily, but not exclusively out of the Fifth District Court of Appeal.¹² These rulings have made the status of employees teaching under temporary contracts pursuant to sections 44909 or 44920 in any District very unclear, regardless of how closely the District adheres to the statutory requirements for entering into temporary contracts with teachers and under the circumstances permitted by sections 44909 and 44920. Even close and faithful adherence to these statutory requirements, as is the case in this District, is no guarantee against claims of temporary employees to presumptive probationary status and the right to an

¹⁰ *Id.*, p. 851.

¹¹ *Santa Barbara Federation of Teachers v. Santa Barbara High School District* (1977) 76 Cal.App.3d 227-228, *Paulus v. Board of Trustees* (1976) 64 Cal.App.3d 59, 62-63.

¹² *California Teacher's Association v. Governing Board of Golden Valley Unified School District* (2002) 98 Cal.App.4th 369, 375-6, *Bakersfield*, at 1286-7.

evidentiary hearing at the termination of their temporary contracts, as is the case here. Thus, in an abundance of caution and in response to uncertainty created by these decisions, the District felt compelled to serve its temporary employees with "precautionary notices," and proceeded forward with plans to include them in a hearing and contemplating their possible participation, not really knowing whether these employees are entitled to an evidentiary hearing or not.

42. Respondents contend that each employee listed as teaching in a categorically funded position, as well as employees filling in for tenured teachers moved to categorically funded positions, are entitled to participate in the layoff process, to be given a seniority date as presumptively probationary employees of the District and to be afforded rehire rights. The District believes these teachers have been correctly classified as temporary employees, subject to release under Education Code section 44954, and that these employees have acquired no status or attendant rights in this process.

43. The District served 83 respondents in this category with precautionary layoff notices, and rescinded one just before the evidentiary hearing.

44. The District moved at the outset of the case for a ruling seeking a determination from the undersigned that the employees receiving precautionary notices were indeed section 44909 and/or 44920 temporary teachers (some teachers served in both capacities), and a ruling that these employees were not entitled to an evidentiary hearing. Ruling on the motion was deferred for a variety of reasons, mostly related to the expeditious use of time for the parties to resolve as many issues as possible among themselves, which proved to be time very well spent. Due to very professional and efficient work on both sides, a great number of the pending issues regarding the layoff and the status and rights of many employees were resolved without further litigation, as the stipulations above reflect. The practical effect of the deferral was that as many of the temporary employees who received precautionary notices as elected to do so were present throughout the entire evidentiary portion of the hearing. No one who sought to be heard, whether noticed with a preliminary or precautionary, was denied the opportunity to be heard.

45. After the close of the evidence, the Administrative Law Judge denied the motion to exclude the employees receiving precautionary notices, and declined to rule one way or the other that these employees had no right to a hearing as a matter of law. The Administrative Law Judge ruled that it was the District's decision whether to afford these employees an evidentiary hearing or deny them same, and not the province of the ALJ to make that determination as a matter of law. The ALJ ruled that the District is legally required to determine the status of each District employee, and, on that basis, determine whether to give them notice and an opportunity to be heard upon the termination of their employment. If the District elects to give employees a precautionary notice, it must determine whether to give any such employee a hearing, or rescind the notice and leave the employee to seek his or her remedies, if any are available, elsewhere. In this instance, the matter was mooted by the fact that all persons receiving either a preliminary or precautionary

notice were afforded a right to be heard and participate in the evidentiary hearing process, and by the fact that the District ultimately rescinded all the precautionary notices.

INDIVIDUAL RESPONDENTS

46. Individual respondents Digisare, Weidner, Schroeder, Smith, Bridges, Jones, Hemsworth each made individual presentations. Each respondent articulately pointed out individual circumstances that, although persuasive and compelling of recognition, nevertheless raise no viable issues regarding the efficacy of their first dates of paid service, status, seniority, or the Board's selection of criteria for tie-breaking.

47. Ms. Abriani successfully proved her first day of paid service to the District should be backed up one day, to August 20, 2007, which moves her ahead of a significant number of other District employees, many subject to layoff, who had their first day of paid service on August 21, 2007. There was evidence that Ms. Abriani was ordered, as were a number of other new teachers, to attend an orientation the day before her contract began. Respondents claimed other teachers also attended the orientation, and they attempted to identify these persons by looking for all employees at the same school site as Ms. Abriani with the same August 21 first day of paid service. Respondents contend all these employees should have their first day of paid service rolled back to August 20, as was Ms. Abriani's, for the same reasons. The contention fails. There was no evidence that any of these employees actually attended on August 20. On the other hand, Ms. Abriani did so convincingly, credibly testifying, with corroboration, that she was physically present, worked the day and was paid for her service on August 20.

48. Ms. Hemsworth made what appeared to be a similar claim, but it actually was not. She was paid a stipend for short term service in the summer before her first service under her contract. She and other mathematics teachers new to the District were required to meet for two days in the summer to develop the curriculum, and were paid a stipend for the two days. There was no other service between the two day period and the commencement of her contract. Under these circumstances, she is not entitled to have the first of the two days in the summer treated as her first day of paid service to the District.

49. Mr. Williams' contention is that he was incorrectly placed on the English group list for application of the tie breaking criteria, and not on the Physical Education list. It was not disputed that Mr. Williams has a single subject credential in Physical Education and no credentials in English. His assignment has been .33 FTE of OCS, which can be taught by any credentialed person without specification, and .67 of Physical Education at Sheldon High School. Mr. Williams is a probationary 1 teacher. It was not disputed that placing Mr. Williams in the English group and not in the Physical Education group was an error. There was also no dispute that he can be bumped by any one of a myriad of more senior employees facing layoff for the .33 FTE of OCS, which requires no specific credential. It was not proved that he should be displaced for the remaining .67 FTE of Physical Education. It was not proved that Mr. Williams is senior to any certificated employee being retained to teach Physical Education in the upcoming school year. However,

the error is one that can be easily rectified by reapplying the criteria with Mr. Williams in the proper Physical Education group, to determine whether he can displace anyone junior to him that is being retained to teach Physical Education in the upcoming school year. If the error cannot be corrected before May 15, 2008, Mr. Williams must be retained for .67 FTE.

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.¹³

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 81.00 FTE remaining of particular kinds of services after the withdrawal of the 56 FTE of Elementary Teaching, as set forth in the District's Resolution and identified in the Factual Findings.

3. The District is facing a significant projected deficit related to the loss of funding and expected declines in enrollment. 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."¹⁴ There was no evidence that any certificated employee of the District is

¹³ Education Code section 44944.

¹⁴ *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.

being retained to provide a service any of the respondents are certificated and competent to render. Special Education teachers are being skipped, but none of the respondents is certificated to teach Special Education classes.

5. Legal cause exists pursuant to Education Code sections 44949 and 44955 to give the remaining respondents final notice that their services will not be required for school year 2008/2009, with the possible exception of Mr. Williams, for .67 FTE, as set forth below. 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

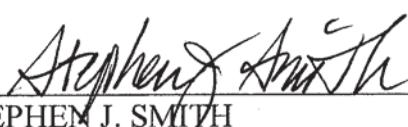
1. The Elk Grove Unified School District action to reduce or eliminate 81.00 FTE of particular kinds of services for the 2008/2009 school year is AFFIRMED.

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. The District shall apply the tie breaking criteria to Mr. Williams relative to other Physical Education employees in the tie breaker grouping for .67 FTE of Physical Education. The District shall determine whether, with the corrected application of his credential grouping, he is able to bump any employee junior to him otherwise being retained to teach English in the upcoming school year. If so, Mr. Williams must be retained for .67 FTE of Physical Education. If not, his preliminary notice and Accusation are sustained and he is laid off for his full 1.0 FTE. Even if he is retained for the .67 FTE of Physical Education, he is still laid off for the .33 FTE of OCS, and final notice shall be given to him for this portion of his position. If the determination cannot be made before the May 15 deadline for issuing final notices of layoff, Mr. Williams shall be retained for .67 FTE of Physical Education.

4. 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 07, 2008



STEPHEN J. SMITH
Administrative Law Judge
Office of Administrative Hearings