BEFORE THE
GOVERNING BOARD OF THE
JOHN SWETT UNIFIED SCHOOL DISTRICT

In The Matter Of The Accusation Against: KAREN PRICE CANDICE HUTCHINSON JOANNE CLARK Respondents.	OAH No. N2004030324

PROPOSED DECISION

Karl S. Engeman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 19, 2004, in Crockett, California.

Jason Rabinowitz and Costa Kerestenzis, Attorneys at Law, represented the John Swett Unified School District.

John R. Yeh and Neha M. Samput, Attorneys at Law, represented all of the respondents.[1]

Evidence was received and the record left open for the submission of simultaneous briefs on or before April 19, 2004. District's brief was marked exhibit 6 and respondents' brief was marked exhibit C and each was made a part of the record. The matter was submitted on April 19, 2004.

FACTUAL FINDINGS

1. The John Swett Unified School District ("District") provides elementary, middle schools and high schools in the District.

2. Michael Roth is the Superintendent of the District.

[1] Two other teachers, Dan Auza and Noel Peterson, were served with the preliminary notice and each, through counsel, requested a hearing and filed a notice of defense to the accusations which followed. Neither appeared at hearing to contest the statutory basis for the issuance of the final notice.

3. Respondents are probationary or permanent certificated employees of the District.

4. On March 3, 2004, the Governing Board of the District adopted Resolution No. (03-04) 21. The resolution directed the Superintendent to give notices to respondents that their services would not be required for the ensuing school year. The resolution, as amended, proposed the elimination or reduction of 6.4 full time equivalent (FTE) positions. The specific particular kinds of services (PKS) were:

Self-contained 6th Grade classes	1.0 FTE
High School French - 1 section	0.2 FTE
High School Art - 1 section	0.2 FTE
High School Social Studies – 1 section	0.2 FTE
High School Science – 1 section	0.2 FTE
High School Keyboarding – 2 sections	0.4 FTE
High School Counselor	1.0 FTE
High School Drama – 1 section	0.2 FTE
Self-contained K through 5th grade classes	3.0 FTE
Total reductions	6.4 FTE

5. On March 4, 2004, the Superintendent gave written notice to the Governing Board of his recommendation that notice be given to respondents that their services would not be required for school year 2004-2005 and stating the reasons therefor.

6. On or about March 12, 2004, respondents were served in the manner prescribed by law with written notice that it had been recommended that notice be given them that their services would not be required for the ensuing school year, 2004-2005, and stating the reasons therefor. Respondents filed a timely request for a hearing and a timely notice of defense to the accusation which followed.[2]

7. Respondents Joanne Clark (Clark) and Candice Hutchinson (Hutchinson) began employment as teachers for the District under emergency permits. Clark's first day of employment for the District was August 29, 2000. She obtained her Health Science credential on January 28, 2004, and the District has assigned that date as her first date of paid probationary service for seniority purposes. Hutchinson's first day of employment for the District was August 27, 2003. She obtained her Multiple Subject credential on October 2, 2003, and District has assigned that date as her first date of paid probationary service for seniority purposes.[3] The evidence did not establish whether a new contract was entered into between either respondent and the District at the time that District learned of the acquisition of the respective credentials and designated the teachers as probationary.

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[2] The parties stipulated that the District met all jurisdictional requirements including proper service of required notices.

[3] Each respondent also holds a Cross-Cultural Language Acquisition Development (CLAD) certificate.

8. Respondent Karen Price (Price) is a counselor at John Swett High School. She was given notice by reason of the Board's resolution to eliminate one FTE high school counseling position. She is the only high school counselor and the least senior District counselor. The high school counselor's duties include helping students with college applications including financial aid requests, personal and social counseling, scheduling of all students in the grades 9 to 12 high school, state mandated testing, and administration of standard college entrance examinations including the PSAT and the SAT. The District does not have a concrete plan for the provision of these services but they intend to provide them by other means. Among ideas that the District is considered are inviting local community colleges and universities to visit the high school campus to help with applications for admission and financial aid, continuing to use a teacher who is particularly competent in scholarship applications, assigning administration personnel to handle class scheduling responsibilities now done by the counselor, and having other teachers handle some personal counseling and test administration responsibilities. The District will retain a .6 FTE more senior counselor to work with District special education students whose Individual Educational Plans require counseling. None of the other District employees who may assume Ms. Price's duties has a counseling credential.

9. Prior to the issuance of the preliminary notice to respondents (and the Board's resolution), District learned that a number of certificated employees will not return for school year 2004/2005. These include D'drea Black, a counselor, and Rochelle Onizuka, an elementary school teacher, who both resigned before March 15, 2004. They also include Inez Sorbe, a middle school teacher, and Michelle McCurry, an elementary school teacher, each of whom has submitted a resignation effective June, 2004. District, when determining which particular kinds of services to reduce or eliminate, considered the resignations of the listed counselor and teachers, as well as four others. In essence, they determined the reductions and eliminations of PKS on the basis of the "net" positions after such resignations were considered. They did not begin with the counseling positions and courses being taught this year and follow a two part process by which they first identified total eliminations and reductions for next year and "resolved" to do so, and then subtracted the positively assured attrition to determine the net effect of such changes. For example, instead of beginning with a resolution to eliminate two counseling positions and then subtracting the vacancy caused by Black's resignation to provide a basis for noticing one FTE counselor, District simply began with a resolution to eliminate one counseling position and gave notice to Price, the most junior remaining counselor.

LEGAL CONCLUSIONS

1. All notice and jurisdictional requirements set forth in Education Code[4] sections 44949 and 44955 were met.

[4] All statutory references are to the Education Code unless otherwise indicated.

2. Respondents raise three legal contentions. First, respondents Clark and Hutchinson contend that their seniority dates should be the first date on which each was employed by the District under an emergency credential. Second, respondents contend that the method District used to determine the particular kinds of services to be eliminated or reduced did not properly account for positively assured attrition. Third, respondent Price contends that the District's plans to provide counseling services by others demonstrates that such services are not being reduced or eliminated. For the reasons set out below, these contentions are rejected.

Clark and Hutchinson Seniority Dates

3. There are three appellate decisions which are somewhat helpful in resolving the first legal issue raised by respondents, although none of the three directly dealt with the precise issue in this case. *Summerfield v. Windsor Unified School Dist.* (2002) 95 Cal. App.4th 1026 involved the question whether teaching under an emergency credential should be counted in computing an employee's progress toward permanent status. The court interpreted section 44911 to include emergency credentials within the definition of "provisional credentials." The pertinent part of section 44911 states:

> Service by a person under a provisional credential shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee of a school district.

In a footnote, the court observed, "Although a District employee initially, mistakenly, classified Summerfield as a probationary employee while she continued to work under an emergency permit, it is well settled that the two – year probationary period for teachers is mandatory and may not be shortened by the advice or actions of a school district. (citations omitted). *Summerfield* at page 1035.

4. *California Teachers' Ass'n v. Governing Bd. of Golden Valley Unified School Dist.* (2002) 98 Cal. App.4th 369 involved the dismissal of a teacher for cause during the school year. The teacher was teaching under an emergency credential. The court, relying primarily upon Education Code section 44915, held that the teacher should have been classified as a probationary teacher and accorded the due process rights to which probationary teachers are entitled. Section 44915 states:

> 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.

The *Golden Valley* court reasoned that since those who teach under emergency credentials are neither permanent nor substitute employees, they must be classified as

probationary employees. *Golden Valley* at page 378. The court acknowledged the holding in *Summerfield* and the footnote cited above, but characterized the statement as dicta.

5. The most recent in the triad of cases is *Fine v. Los Angeles Unified School Dist.* (2004) 116 Cal. App.4th 1070. This case involved a teacher who began her fourth year of teaching under an emergency credential pursuant to a contract which identified her as a provisional teacher. She received her credential in February of the next calendar year and presented it to the school district. The district offered her a new contract identifying her as a probationary employee, effective on a specified date in March. The credential the teacher received stated that it was "valid" from August 27th of the preceding calendar year. The question before the court was whether Fine's probationary period began on August 27th or in February of the next calendar year. The answer determined whether, when Fine was given notice in March two years later that she would not be reemployed, she was a probationary or permanent employee. The court determined that she was a probationary employee declining to give retroactive application to the acquisition of her credential in the middle of the school year. The court discussed both the holdings in *Summerfield* and *Golden Valley*, noting that under Golden Valley, "teacher serving under an emergency permit [is] entitled to the benefits of probationary classification (specifically the statutory protections governing dismissal of probationary employees) except for the benefit of counting that service toward attaining permanent service." (Parenthesis original).

6. Thus, two published appellate court cases have held that teaching under an emergency credential does not "count" toward the time required to attain permanent status. The third, in what some might consider as questionable logic,[5] held that such teachers are nonetheless entitled to the due process rights afforded probationary teachers. It is true that the *Golden Valley* decision rests on the interpretation of a generic statute dealing with the classification of teachers and, in that sense, runs contrary to the holdings in both *Summerfield* and *Fine*. In other words, <u>if</u> such teachers are entitled to be probationary status, that necessarily implies that time spent as such should qualify in the acquisition of permanent status. After all, that is the purpose of probationary periods in civil service positions. The *Golden Valley* court in fact suggested that but for the language in 44911 expressly prohibiting credit for such service, it would be counted toward the acquisition of permanent status. As noted above, unfortunately none of the cases dealt with a lay-off situation but the two which come the closest are those which deal with the time at which probation begins for tenure purposes. Therefore, based on the holding (and dicta) in *Summerfield*, buttressed by the very recent holding in *Fine*, it is determined that for lay off purposes, ordinarily the first paid date of probationary service (senority date), should coincide with the date on which the teacher is properly classified by the District as probationary for tenure acquisition purposes. Here, while the evidence did not establish whether the District actually entered into a new contract with respondents Clark and Hutchinson, District acknowledged by stipulation that

[5] The conclusion that a statute enacted decades before emergency credentials existed should be interpreted to imply legislative intent to classify such teachers working under such credentials as probationary seems a logical stretch. In fact, as the *Golden Valley* court acknowledged, the legislature did specifically exclude such service for tenure acquisition purposes. Its failure to address similar limitations on the rights of such teachers in the context of a mid year dismissal (or a layoff proceeding) is more likely simply an oversight.

they became probationary teachers on the dates that they acquired their respective credentials.

Consideration of Positively Assured Attrition

7. Section 44955 reads, in pertinent part:

(b) Whenever in any school year the average daily attendance in all of the schools of a district for the first six months in which school is in session shall have declined below the corresponding period of either of the previous two school years, whenever the governing board determines that attendance in a district will decline in the following year as a result of the termination of an inter district tuition agreement as defined in Section 46304, whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, or whenever the amendment of state law requires the modification of curriculum, 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. 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. (Emphasis added)

8. District was not required to take into account positively assured attrition at the time that the Governing Board resolved to eliminate and/or reduce PKS. Such consideration is limited to lay off cases based on a reduction in ADA in which case the "corresponding percentage of employees in the district" who may be given notice should be reduced by attrition known to the District before March 15th. *Lewin v. Board of Trustees* (1976) 62 Cal. App.3d 977, at 980-983.

9. In *San Jose* v. *Allen* (1983) 144 Cal. App.3d 627, the court was called upon to decide whether positively assured attrition had to be considered in a PKS layoff. Holding that attrition need not be considered, the court reasoned:

> A board's decision as to reduction or discontinuation of a particular kind of service is not tied in with any statistical computation, such as reduction in the number of students. The number of terminations made necessary by PKS reductions depends totally upon the district's decision as to how many services to reduce. Put another way, the language of section 44955 that the governing board of a school district "may terminate the services of not more than a corresponding percentage of the certificated employees of said district" is only applicable to ADA terminations based upon an actual reduction in attendance. Where the governing board determines to discontinue or reduce a particular kind of service, there is no way to calculate a "corresponding percentage,"

hence it is within the discretion of the board to determine the amount by which it will reduce a particular service.

. . . in PKS cases the determination of the amount by which a service is to be reduced is the determination of the number of positions to be eliminated.

. . . In making a final decision on PKS reductions, the extent to which the services are reduced inherently determines the number of positions to remain. If a service is to be eliminated, for example, it is obvious that it is unnecessary to consider attrition in any way. *San Jose Teachers Association v. Allen*, supra, at pp. 635-636.

10. In this case, the District knew, before the Governing Board resolved to reduce or eliminate PKS, that certain teachers would not return in the ensuing school year. These departures were considered when the level of services to be reduced was considered and resolved. The evidence did not establish any positively assured attrition following the March 3, 2004, resolution which might have obviated the need for a layoff notice to any respondent. In summary, the process followed by the District did not violate section 44955.

Counseling Services Reduction

11. This issue has been the subject of a number of appellate cases, one of the most recent of which was *Gallup v. Board of Trustees of the Alta Loma School District* (1996) 41 Cal. App.4th 1571. The *Gallup* court traced the history of judicial review of PKS reductions and reiterated the principle that PKS reductions may legitimately involve the anticipated performance or provision of the service in a different manner. The differences may involve district personnel or contract providers. Respondent Price relies primarily on *Santa Clara Fed'n of Teachers v. Santa Clara Unified School Dist.* (1981) 116 Cal. App.3d 831, at 843-845 in support of her contention that counseling services are not being reduced by the District. *Santa Clara* involved the reduction of health services necessitating the lay off of nurses. The record reflected that the district intended to use other employees to provide first aid assistance, health instruction and the handling of child abuse. The appellate court affirmed the trial court's findings that there was nothing in the record to establish that there would be a difference in the method or manner of providing the health services.[6] In this case, while the District has not definitively decided which services will be continued and in what manner, the tentative plan does reflect a different manner of providing counseling services. Under the tentative plan, class scheduling will become an administrative function. Teachers, without counseling credentials, will administer standard tests and some may provide personal "counseling" to students with whom they have established a level of trust. At least one teacher will assist college bound students with financial aid applications. The District will solicit area universities and community colleges for help in college admission and financial aid applications. In summary, the District will not continue the particular kind

[6] The judgment was reversed and the matter was remanded to the trial court on other grounds.

of service or position performed by respondent Price. For the most part, administrative personnel, teachers who are not trained counselors, and outside volunteers will assume some of respondent Price's current tasks although it may be reasonably inferred that at least some of her services will no longer be provided.

Legal Cause for Notice

12. Cause exists under sections 44949 and 44955 to provide notice to respondents Karen Price (1.0 FTE), Candice Hutchinson (.6 FTE)[7], and Joanne Clark (1.0 FTE) that their services will not be required in the ensuing school year. Such cause relates solely to the welfare of the District and the pupils thereof.

ORDER

Notice shall be given to the identified respondents that their services will not be required for the 2004-2005 School Year because of the reduction and discontinuance of particular kinds of services.

Dated: May 4, 2004

KARL S. ENGEMAN
Administrative Law Judge
Office of Administrative Hearings

[7] Hutchinson will "bump" into .4 FTE of Clark's position at the District's continuation school.