

BEFORE THE
GOVERNING BOARD OF THE
SANTA ANA UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Employment Status of:

OAH No. 2008030331

Teachers of the Santa Ana Unified School
District,

Respondents.

PROPOSED DECISION

Ralph B. Dash, Administrative Law Judge with the Office of Administrative Hearings, heard this matter on May 15, 2008, at Santa Ana, California. The matter was originally scheduled to commence on April 3, 2008, but was continued at the request of the parties.

Eric Bathen, Attorney at Law, represented Santa Ana Unified School District (SAUSD or District).

Ernest F. Ching, Jr., represented Respondents Dominic Crewe (Crewe) and William Quemada (Quemada).

Carlos R. Perez, Attorney at Law, represented all other Respondents.

At the close of the hearing, "Exhibit B" was identified as a document to be produced by Mr. Perez which was to reflect the names of all of the teachers present at the hearing. Exhibit B was received in due course and admitted. Pursuant to stipulation of the parties, the record was left open until June 3, 2008, for the parties to submit certain offers of proof¹ and closing briefs. Crewe² and Quemada were given until May 20, 2008, to submit their offers of proof; the same were timely received, marked as Exhibits C and D, respectively, and were admitted in evidence. The District was given until May 23, 2008 to submit its responding offers of proof; the same were timely received, marked collectively as Exhibit 15, and were admitted in evidence. The remaining Respondents were given until May 23, 2008 to submit

¹ The offers of proof consisted of representations as to the testimony that each of the teachers would have given if called as a witness to testify, and a representation of the testimony the District would have offered in rebuttal.

² Prior to the close of the record, the Accusation was withdrawn as to Crewe.

their offers of proof; the same were timely received, marked collectively as Exhibit E and admitted in evidence.³ The District was given until May 30, 2008 (thereafter extended by stipulation of the parties to June 3, 2008), to submit its responding offer of proof; the same was timely received, marked as Exhibit 16,⁴ and was admitted in evidence. The record was closed on June 3, 2008.

Oral and documentary evidence having been received and the matter having been submitted, the Administrative Law Judge makes the following Finding of Facts.

1. Chad Hammitt, the District's Executive Director of Human Resources, Certificated Personnel, acting in his official capacity, caused all pleadings, notices and other papers to be filed and served upon Respondents pursuant to the provisions of Education Code Sections 44949 and 44955. The parties, by and through their counsel, stipulated that all pre-hearing jurisdictional requirements have been met. Accordingly, no Findings regarding the timeliness of any notices or requests for hearing are made.
2. On February 26, 2008, the District's Governing Board adopted Resolution 07/08-2713, which reads, in pertinent part as follows:

WHEREAS, the Governing Board hereby finds it is in the best interest of the District and the students it serves to reduce and discontinue at the end of the 2007-2008 school year, particular kinds of services specifically identified by the numbers of FTE affected as follows: 271 FTE reduction due to a reduction of categorical programs, 232 FTE reduction due to class size reduction in grades K-3, 20 FTE reduction due to class size reduction in 9th grade, 34 FTE reductions due to enrollment projection declines in grades K-5, and 16 FTE reductions due to enrollment projection declines in grades 6-8 for a total of 573 FTE reductions of particular kinds of services in grades K-12.

NOW, THEREFORE, BE IT RESOLVED: That the particular kinds of services currently being provided by this District be and hereby are reduced to the extent set forth above.

BE IT FURTHER RESOLVED: That the Superintendent, or designee, hereby is authorized and directed to initiate and pursue procedures necessary to not reemploy the equivalent of 573 full-time certificated positions pursuant to Education Code Sections 44949 and 44955 because of said reduction or discontinuance of services.

³ Subsequent to this date, layoff notices were rescinded as to a number of Respondents who had submitted offers of proof; accordingly, this Proposed Decision addresses only those offers of proof from Respondents as to whom layoff notices were not rescinded.

⁴ Accompanying Exhibit 16 were three additional exhibits, marked 12 (list of 151 rescinded notices); 13 (list of 151 rescinded notices, alphabetized); and, 14 (list, in order of seniority, of 221 remaining Respondents.) Each was admitted in evidence.

BE IT FURTHER RESOLVED: That the District shall retain regardless of their seniority certificated employees considered necessary to meet the District's program staffing needs. Such employees shall be retained based upon their qualifications and credentials and include, but are not necessarily limited to, special education teachers, speech and language specialists and math and science teachers. In accordance with Education Code Section 44955(c) the Governing Board shall make assignments and reassessments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render.

3. A District may reduce services within the meaning of Education Code section 44955, "either by determining that a certain type of service to students shall not, thereafter, be performed at all by anyone, or it may 'reduce services' by determining that proffered services shall be reduced in extent because fewer employees are made available to deal with the pupils involved." (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.) The Board's decision to reduce or discontinue these particular kinds of services was not arbitrary or capricious, but constituted a proper exercise of discretion.

4. The reduction or discontinuation of these particular kinds of services related to the welfare of the District and its pupils. The reduction or discontinuation of particular kinds of services was necessary to decrease the number of certificated employees of the District as determined by the Board.

5. The Board 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. On March 7, 2008, the District served 573 notices of layoff in inverse order of seniority in accordance with an approved seniority list. Since that time, a total of 352 notices have been rescinded. The District is now proceeding to layoff 221 Respondents, all of whom are listed on Exhibit 14, a copy of which is attached hereto and by this reference made a part hereof.

6. No certificated employee junior to any Respondent was retained to perform any services which any Respondent was certificated and competent to render.

7. Between those employees who first rendered paid service to the district on the same date, the Board determined their order of termination solely on the basis of the needs of the district and the students. The specific criteria used to determine the order of termination were fairly applied to rank those employees hired on the same date.

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8. Offers of proof were made with respect to the following teachers:

a. **Jane Shawber**

If called to testify, Shawber would assert that her seniority date is incorrect because she first started working for the District on July 1, 2002. She specifically recalls being on campus on that date. In support of her position, Shawber would introduce a letter from Associate Superintendent Winston Best dated August 28, 2002. In the letter, Associate Superintendent Best confirms that Shawber's appointment as a probationary staff member in the District for 2002-2003 school year was effective July 1, 2002. Consistent with this letter, Shawber requests that her seniority be corrected to July 1, 2002.

District Response:

If Rosie Rosales,⁵ who testified at the hearing, was re-called, she would testify as follows:

Jane Shawber was offered a probationary contract for the 2002-03 school year. The fiscal year began July 1, 2002. Ms. Shawber was hired to teach First Grade – Cycle "C" at Madison Elementary School. The first paid duty day for Cycle "C" was July 8, 2002.

Finding:

It is found that Ms. Shawber's first date of paid service with the SAUSD is July 8, 2002, and that is her correct seniority date.

b. **Edith Madruga-Houghton**

If called to testify, Madruga-Houghton would assert that her seniority date of August 8, 2002 is inaccurate. She would assert that she started working for the District on August 1, 2002 and that this date should be reflected on the seniority list as her first date of paid service.

District's Response:

If Rosie Rosales was re-called, she would testify as follows:

Edith Madruga-Houghton was offered a probationary contract for the 2002-03 school year. The fiscal year began July 1, 2002. Ms. Madruga-Houghton was hired to teach Third Grade – "Modified Cycle "D" at Lowell Elementary School. The first paid duty day for "Modified Cycle "D" was August 8, 2002.

⁵ Ms. Rosales' title with the District is "Administrative Secretary, Confidential." She prepared the Master Seniority List (Exhibit 8).

Finding:

It is found that Ms. Madruga-Houghton's first date of paid service with the SAUSD is July 8, 2002, and that is her correct seniority date.

c. Dan Ramirez

If called to testify, Mr. Ramirez would note that the reference in the District's master seniority list to his credential is incorrect. On the list, he is identified as a District intern when, in fact, he currently possesses a professional clear multiple subject teaching credential. In support of his testimony, Mr. Ramirez would introduce a copy of his credential with the California Commission on Teacher Credentialing.

District's Response:

If Marlene Hernandez,⁶ who testified at the hearing, was re-called, she would testify as follows: Both credentials are already listed on the master seniority list. The Clear Multiple Subject is documented on the list. All intern credentials were also listed on the seniority list.

Finding:

It is found that Mr. Ramirez's place on the master seniority list is correct and accurately reflects his credentialed status.

d. Cynthia Ramsay

If called, Ms. Ramsay would testify as follows: Ms. Ramsay began with the District in 1982, and became permanent in 1984 with a clear life credential. She began child care leave in September 1991. After her third child was born, Ms. Ramsay returned to the District in 2002. Ms. Ramsay believes the District should count her first nine years of service towards her seniority. She believes it is unfair for the District to promulgate a seniority list where "non-credentialed, temporary or emergency time is considered equal to credentialed full-time service."

District's Response:

If Rosie Rosales was re-called, she would testify as follows: Cynthia Ramsay's initial contract was probationary status for the 1982-83 school year. Ms. Ramsay resigned as a permanent employee on February 9, 1991. Ms. Ramsay was not reemployed as a permanent employee within 39 months of her resignation. On August 2, 2002, with a break-in-service

⁶ Ms. Hernandez has been a District employee for 25 years and has served as the "Lead Credential Tech" for the past 15 years.

and a recommendation for re-hire, Ms. Ramsay was reemployed on a probationary contract. The first duty day for the 2002-03 school year for Ms. Ramsay's First Grade assignment at Franklin Elementary Cycle "D" was August 2, 2002.

Finding:

The layoff notice was properly given to Linda Ramsay. She voluntarily resigned from the District in 1991 after having taught for nine years. As a permanent teacher with the District at the time of her resignation, she was reinstated as a permanent teacher when re-hired by the District in 2002. In essence, Ms. Ramsay retained all of her rights as a permanent teacher, except as to her seniority date.

Education Code section 44931 provides, in pertinent part:

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.

Ms. Ramsay was not rehired within 39 months of her resignation. Even if she had been rehired within that time frame, she still would not have retained her original seniority date. Rather, her seniority date would be as of the date of her re-hire. In *San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627, the court held, at page 641,

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. (Emphasis added.)

With respect to the issue of "non-credentialed, temporary or emergency time [being] considered equal to credentialed full-time service," the discussions in Findings 8f, 8j and 8n below are incorporated herein. Accordingly, it is found that Ms. Ramsay's correct seniority date is August 2, 2002.

e. Linda Jacobs

If called, Ms. Jacobs would testify that she should have been skipped by the District because she possesses a supplemental authorization in Geo Science and Biology.

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District's Response:

If Marlene Hernandez was re-called, she would testify as follows: The Commission on Teacher Credentialing website verifies the following valid credentials for Ms. Jacobs:

Life Standard Elementary Teaching Credential – Authorized Field – History;
Administrative Services Credential – Expires April 1, 20012; Certification of Staff Completion.

Finding:

Ms. Jacobs failed to submit any confirming evidence that she holds the claimed credential. Accordingly, it is found that the District was correct in not skipping her.

f. **Andrea Cortez:**

If called, Ms. Cortez would testify that she has worked for the District since July 30, 2001. She would also testify that she was laid off after the 2003-2004 school year, and returned to the classroom "three weeks late" in the 2004-2005 school year because her classroom could not yet open due to insufficient enrollment. She has been informed by the District that it considers this three week hiatus to constitute a break in her service. Ms. Cortez would assert that, pursuant to Education Code 44848, her alleged break in service at the beginning of the 2004-2005 school year should not be counted against her because the code section provides as follows: "When an employee's services are terminated for lack of enrollment or discontinuance of service or are otherwise interrupted in a manner declared by law not to constitute a break in service, his original order of employment shall stand."

District's Response:

If Rosie Rosales was re-called, she would testify as follows: Andrea Cortez's initial contract was under Emergency 44911 status for the 2001-02 school year. Ms. Cortez had Board approved reappointments for the 2002-03 and 2003-04 school years. Ms. Cortez was not affected by layoff in the 2003-04 school year and was not identified as a probationary or permanent employee. However, due to Mr. Cortez's Provisional credential, she was noticed, released and terminated at the end of her 2003-04 contract. On July 26, 2004, with a break-in-service and a recommendation for re-hire, Ms. Cortez was reemployed on a Probationary contract. Her assignment was a 6th grade elementary teacher, Cycle "B" at Madison Elementary. The first duty day for Cycle "B" in the 2004-05 school year was July 7, 2004.

Finding:

As to Andrea Cortez, the District's calculation of seniority date is in error. Ms. Cortez's service under her emergency credential is counted, for seniority purposes (and not for purpose of tenure), as though she were a probationary employee. In the recent case of *Bakersfield Elementary Teachers Association v. Bakersfield City School District* (2006) 145

Cal. App. 4th 1260 (*Bakersfield*), the court held that certificated employees who were not classified as temporary employees under the Education Code, and who were not properly classified under the Education Code as permanent or substitute employees, had to be classified as probationary employees under Education Code section 44915, and had to be accorded the rights of probationary employees as provided in the Code.⁷ And in the case of *California Teacher's Association v. Governing Board of Golden Valley Unified School District* (2002) 98 Cal.App.4th 369, 375-376 the court concluded that section 44915 applies to teachers serving under an emergency permit as well as fully credentialed teachers and "teachers serving under an emergency permit who satisfy the requirements of section 44915 are entitled to the statutory protections governing the dismissal of a probationary employee." (98 Cal.App.4th at p. 383.) Furthermore, Ms. Cortez did not suffer a "break in service" that would trigger a new seniority date on rehire. Education Code section 4484d provides:

When any certificated employee shall have resigned or been dismissed for cause and shall thereafter have been reemployed by the board, his date of employment shall be deemed to be the date on which he first accepted reemployment (if reemployed before July 1, 1947) or rendered paid service (if reemployed after June 30, 1947) after his reemployment.

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

The undisputed evidence is that the "late rehire" was due to low enrollment and through no fault of Ms. Cortez. Accordingly, it is found that Ms. Cortez's correct seniority date, as set forth in Finding 8f, is July 1, 2001, and Ms. Cortez enjoys all of the rights and privileges of a probationary teacher with that seniority date. Accordingly, the Notice of Layoff is deemed rescinded and the Accusation is dismissed as to her.

g. Donovan Bean

If called, Mr. Bean would take issue with his current seniority date. He is listed in the District's master seniority list as having a seniority date of July 1, 2005. Mr. Bean would testify that he had previously worked within the District as an intern since August of 2004.

District's Response:

If Rosie Rosales was re-called, she would testify as follows: Donovan Bean's initial contract was under Probationary status for the 2005-06 school year. Mr. Bean was not a SAUSD intern, did not have an Intern Contract and there is no record of an Intern credential issued by CCTC.

⁷ Including the right to accrue seniority under Education Code section 44845, and the rights to notice and a hearing in the event of a workforce reduction under Education Code sections 44949 and 44955.

Finding:

Mr. Bean submitted no evidence to support his contention that he worked for the District as an intern since 2004. Accordingly, it is found that his correct seniority date is July 1, 2005.

h. Jorge Castro

If called to testify, Mr. Castro would state that he was currently working within the District as a 5th Grade (Dual Immersion) teacher. Dual Immersion, according to Mr. Castro, is a powerful program designed to produce bilingual/biliterate students. Mr. Castro would testify that he has 10 years of experience as a teacher. He would also state that the program is important to the community. He is concerned that the District has identified three teachers at his site, Jefferson Elementary, for layoff. In Mr. Castro's opinion, these teachers are integral to the Dual Immersion program. Moreover, he would testify that students in this program consistently outperform the general population in State and District test scores. Based on high test scores, the powerful and effective Dual Immersion program and its proven results, Mr. Castro would request that his lay off notice be rescinded.

District's Response:

If Chad Hammitt was re-called, he would testify as follows: The position held by Mr. Castro requires a Multiple Subject teaching credential with a BCLAD Authorization. Positions that require Multiple Subject teaching credentials are not an area of need nor hard to fill. If Mr. Castro is laid off, there would be other teachers in the seniority list with the appropriate credentials who are NCLB⁸ "highly qualified" and could fill this position.

Finding:

Based on the offer of proof by Mr. Hammitt, and the discussion in Finding 8n below, it is found that Mr. Castro is properly subject to layoff.

i. Bertha Benavides

If called to testify, Ms. Benavides would affirm that she first started to work with the District in March 1998 through the present, and that her only break in service occurred when she was served with a lay off notice in the Spring of 2004. Consequently, she was awarded a seniority by the District of October 14, 2004. She returned to work within the statutory period and contends that any break in service as a result of the lay off should not be counted against her. See Education Code Section 44957 (c) ("As to any such employee who is reappointed, the period of his absence shall be treated as a leave of absence and shall not be considered as a break in the continuity of his service, he shall retain the classification and

⁸ NCLB (No Child Left Behind) is the current version of the Elementary and Secondary Education Act (ESEA). It is the federal law that funds basic public school programs such as Title 1.

order of employment he had when his services were terminated . . .); Education Code Section 44956(a)(4) (same).)"

District's Response:

If Rosie Rosales was re-called, she would testify as follows: Bertha Benavides's initial contract was under Emergency 44911 status for the 1997-98 school year. Ms. Benavides's first duty day was March 30, 1998. Ms. Benavides had Board approved reappointments with Emergency 44911 contracts from 1998-99 through the 2002-03 school year. Ms. Benavides was not affected by layoff in the 2002-03 nor 2003-04 school year and was not identified as a probationary or permanent employee. However, due to Ms. Benavides' Provisional credential not renewed with the CCTC, she was identified as an Emergency 44911 employee who was noticed, released and terminated on September 1, 2003. Ms. Benavides served as a substitute teacher beginning September 2, 2003 through October 2004 while she completed her credential requirements. After her break in service, Ms. Benavides was reemployed on a Probationary contract October 14, 2004. The first duty day for the 2004-05 school year was October 14, 2004.

Finding:

As to Bertha Benavides, the District made the same mistake in computation of seniority dates as it did with Ms. Cortez, and the discussions in Findings 8f and 8j are applicable here. In addition, Ms. Benavides' service as a "substitute" teacher, over an uninterrupted period of more than 12 months, must also be include in the computation of her seniority date. Education Code section 44918, subdivision (a) provides:

Any employee classified as a substitute or temporary employee, who serves during one school year for at least 75 percent of the number of days the regular schools of the district were maintained in that school year and has performed the duties normally required of a certificated employee of the school district, shall be deemed to have served a complete school year as a probationary employee if employed as a probationary employee for the following school year.

Ms. Benavides did not suffer a break in service at any time. Ms. Benavides was hired as a substitute teacher the day after she was released from duty under her emergency credential. Ms. Benavides served for more than 75% of the school year as a substitute, and was then hired on probationary status. Ms. Benavides' service under the emergency credential counts towards seniority for purposes of layoff. (See the discussion in Finding 8j.) Her first date of paid service was in March 1998. Accordingly, the Notice of Layoff is deemed rescinded and the Accusation is dismissed as to her.

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j. Seth Liebman

If called as a witness, Mr. Liebman would testify in accordance with the statement attached as Exhibit O to the offer of proof. Marina Alfaro, Isela Gonzalez, Edith Madruga-Houghton and S. Elizabeth Leyva “endorsed” the statement. In essence, the statement of these teachers is that they believe the Master Seniority List (Exhibit 8) was erroneously prepared because it ranks teachers’ seniority based on their first date of paid service, regardless of the type of credential the teacher held on that date. They contend, for example, that teachers with full credentials, who had moved from one district to another, had lower seniority dates than teachers in that district who had been working under emergency credentials. These teachers never would have left the security of their relatively high seniority had they known that emergency credentialed teachers in their new district would be given higher seniority. The teachers contend that “Bakersfield” (*Bakersfield Elementary Teachers Association v. Bakersfield City School District* (2006) 145 Cal.App.4th 1260) should be “challenged” because it created a new way of determining seniority, a way that is unfair and wrong.

District’s Response:

The District’s response is contained in its legal argument which is discussed in the below Finding.

Finding:

The recent case of *California Teachers Association v. Vallejo City Unified School District* (2007) 149 Cal.App.4th 135 explained in very clear terms how the holdings in *Bakersfield* and *Golden Valley*, *supra*, interact with each other and with the Education Code. The court stated, commencing at page 149:

[T]he Fifth District Court of Appeal recently reaffirmed the Golden Valley holding. In Bakersfield, *supra*, 145 Cal.App.4th at pp. 1269–1270, a school district effecting a layoff sent “release” notices to approximately 154 employees who were considered temporary because they held something less than a full teaching credential. Like the District here, the school district made their employees’ classification dependent upon their level of certification and, further, required all employees without full credentials to sign contracts acknowledging their temporary status. (Id. at p. 1277.) The appellate court explained this view of classification is incorrect; rather, “[a]s a general rule ... , classification and certification operate independently of one another. ... [A] person who has been determined to be qualified to teach is not a temporary employee simply because he or she is not yet fully accredited, but rather because he or she occupies a position the law defines as temporary.” (*Ibid.*)

Just as the District does in this appeal, the school district in Bakersfield conflated the concepts of teacher credentialing with classification, reasoning

that since teachers working under a provisional credential do not earn credit toward permanent status (§ 44911), whereas probationary employees generally do earn such credit (§ 44929.21, subd. (b)), a person working under a provisional credential must by definition be something less than probationary. (See *Bakersfield*, *supra*, 145 Cal.App.4th at p. 1295, fn. 22 [summarizing this line of reasoning].) However, *Golden Valley* and *Bakersfield* make it clear that a provisionally credentialed teacher may possess some of the rights of probationary employees, such as protections against midyear dismissals and layoffs, although she does not possess others, such as progress toward tenure. (*Bakersfield*, *supra*, 145 Cal.App.4th at p. 1295, fn. 22; *Golden Valley*, *supra*, 98 Cal.App.4th at pp. 383–384.) The Education Code mandates that teachers be classified as probationary employees if they are not permanent and do not fall within one of the narrowly defined classes of temporary employees. (§ 44915.) School districts have no discretion to deviate from the Code's classification scheme. (*Bakersfield*, *supra*, 145 Cal.App.4th at p. 1299; see *Eureka Teacher's Assn. v. Board of Education* (1988) 202 Cal. App. 3d 469, 473–474 [247 Cal. Rptr. 790] [district cannot impose a classification contrary to statutory scheme].) The fact that provisionally credentialed teachers do not accrue credit toward tenure (§ 44911) is merely an exception to the general rule that after two years a probationary employee attains permanent status (§ 44929.21, subd. (b).) Nothing in the Education Code suggests the lesser status of their credentials removes such teachers from the rule—i.e., probationary classification—entirely.

Thus, it is clear that service under a provisional (emergency) credential, must be credited for purposes of seniority, even if that service is not credited towards tenure. With respect to Mr. Liebman and those teachers who joined in his statement, while the holding in *Bakersfield* might have caused unintended consequences, or otherwise disturbed the reasonable expectations of the teachers, it must be followed in these proceedings.

Bakersfield certainly can be challenged by way of a writ to the Superior Court from the final decision in this matter, and then in the Court of Appeal, if necessary, if Mr. Liebman so desires. As of this point in time, there is no legal basis to exclude Mr. Liebman, or those teachers who joined in his statement, from these layoff proceedings.

k. Dawn Mohammadi:

Ms. Mohammadi prepared a very long and involved offer of proof, which actually can be summarized very briefly. If called upon to testify, Ms. Mohammadi would state that she was first employed by the District on about September 28, 1998 under an emergency credential in a third grade teaching assignment. She would further testify that she never once stopped teaching in a District classroom from that time until the date of the hearing. Ms. Mohammadi was employed for a period of time under a pre-intern credential. She was also employed for several months under a “30 day Substitute credential,” but was treated as a full-time teacher in that she continued to receive performance evaluations and was observed in class; her name continued to be listed on the teacher’s mailbox inside the teacher’s lounge.

Thirty-day substitute teachers are not thus treated. In about November 2003, when her pre-intern credential expired, Ms. Mohammadi continued to teach, in the same classroom, under a 30-day substitute credential; she continued to teach in that classroom for the remainder of the year for the remainder of the year. For four months during that year (November 2004 to February 2004), she worked under the "30 day" credential. She then obtained another pre-intern credential and continued teaching. She never stopped teaching at any time. Ms. Mohammadi obtained a clear multiple subject credential on February 4, 2004.

District's Response:

If Marlene Hernandez was re-called, she would testify as follows: Dawn Mohamaddi held a Pre-Intern Certificate October 1, 2000. Pre-Intern Certificates are initiated by the teacher. This program works with the teacher to prepare them for the CSET test. This program also provides funding for the teacher to participate in the program. Validation of the teacher working with a participating school district is necessary. Her credentials as stated in the seniority list are correct.

Finding:

The District does not dispute any of Ms. Mohammadi's offer of proof. A pre-intern certificate is valid for one year only, although it may be renewed for up to an additional two years under certain terms and conditions. The holdings noted in the above findings compel the determination that the District incorrectly assigned Ms. Mohammadi a seniority date of February 4, 2004, the date she first obtained her clear credential. Since case law has established that there are only four categories of teachers, to wit: permanent, probationary, substitute and temporary, pre-interns must be considered as probationary employees, by default. For purposes of seniority, and not for purposes of tenure, Ms. Mohammdi's first date of paid service was September 28, 1998 when she was hired under an emergency credential. In addition, she was not a true "substitute teacher" within the meaning of the Education Code, at any time. To categorize Ms. Mohammadi's service under the 30 day substitute credential as a being a true "substitute" would exalt form over substance, since at all times she was treated by the school administration as a regular classroom teacher. Accordingly, it is found that Ms. Mohammadi's correct seniority date is September 28, 1998 and the Notice of Layoff is deemed rescinded and the Accusation is dismissed as to her.

I. Nereida Prado

If called to testify, Ms. Prado would take issue with the seniority date awarded to her by the District (August 10, 2004). She contends that her first date of paid service occurred in about July 2000. Ms. Prado is aware of the District's position that she had a break in service between the 2003-2004 school year and her acceptance of a support staff assignment on about August 10, 2004. It is the District's position, to her knowledge, that the school cycle for the support staff assignments started on July 12, 2004 and that her start date was after the beginning of the cycle. Ms. Prado would contest this conclusion and argue that staff

assignments do not have a specific start date, and that, as a consequence, her start date of August 10, 2004 in the staff assignment position should not be considered a break in service.

District's Response:

Nereida Prado's initial contract was under Emergency 44911 status for the 2000-01 school year. Ms. Prado had Board approved reappointments with Emergency 44911 contracts for the 2001-02 and 2003-04 school years. Due to Ms. Prado's provisional credential, she was identified as an Emergency 44911 employee who was noticed, released and terminated at the end of her 2003-04 Emergency contract. On August 18, 2004, with a break-in-service and a recommendation for re-hire, Ms. Prado was reemployed as a late start, with a contract of only 159 duty days left in the Support Staff Calendar. The first duty day on the Support Staff 2004-05 school year calendar was July 12, 2004.

Finding:

As to Nereida Prado, the holdings noted in the above Findings compel the determination that the District incorrectly assigned her a seniority date of August 10, 2004. Ms. Prado first began service with the District under an emergency credential in July 2000. The District contends that Ms. Prado suffered a "break in service" because she was a "late hire" in 2004. However, even though Ms. Prado's service in 2004 began one month late, she nevertheless taught for more than 75 per cent of that school year, and has been re-hired every year since then, except for the upcoming 2008-2009 school year. Education Code section 44914 provides as follows:

If an employee of a school district has served as a probationary employee of the district in a position requiring certification qualifications, for one complete school year, and in the year immediately preceding the service as probationary employee has served as a substitute employee, or as a substitute and probationary employee, serving in both capacities during the same school year in the schools of the district, at least 75 percent of the number of days the regular schools of the district were maintained, the governing board of the district may count the year of employment as a substitute or as a substitute and probationary employee as one year of the probationary period which he is required by law to serve as a condition to being classified as a permanent employee of the district.

In Ms. Prado's case, the "preceding school year" would be the year in which she had the late start, and her retention by the District the following year would mean the "late start year" is counted as a full year of service. Accordingly, her correct seniority date is July 2000. The offers of proof did not provide sufficient information for which a more precise date could be determined. Accordingly the Notice of Layoff is deemed rescinded and the Accusation is dismissed as to her.

m. William Quemada

Mr. Quemada's offer of proof is that he is the "Title 1 Coordinator of the No Child Left Behind" at Valley High School and his role is vital to help "close the achievement gap" of socio-economically disadvantaged and special needs students. His responsibilities are to coordinate with the Math and English departments at Valley High School to attend to the deficiencies the students have in these areas. Mr. Quemada argues that his position is federally funded and that the undisputed evidence at trial was that, although the District might suffer a shortfall in state funding, no shortfall in federal funding was expected and therefore he should not be subject to layoff because of state funding problem. He further argues that elimination of his position contravenes the District's own layoff resolution (set forth in Finding 2) to retain special education teachers, speech and language specialists and math and science teachers.

District's Response:

If recalled, Rosie Rosales would testify as follows:⁹ Mr. Quemada's correct position is Student Achievement Project Coordinator. His position is currently paid "out of a Title 1 funding source." Mr. Quemada is not a Title 1 coordinator. He is part of the teachers' bargaining unit for which he receives an additional eight per cent stipend. The only Title 1 coordinator the District employs is Nuria Solis, District Office Administrator, a management employee. Mr. Quemada is not credentialed in the areas of math or science.

Finding

Categorically funded programs are typically funded outside the base revenue limit of the school district and address needs that cannot be, or are not being, addressed with base revenue limit funds. (*Zalac v. Governing Bd. of Ferndale Unified School Dist.* (2002) 98 Cal.App.4th 838, 847.) Education Code section 44909 provides, in pertinent part, as follows:

The governing board of any school district may employ persons possessing an appropriate credential as certificated employees in programs and projects to perform services conducted under contract with public or private agencies, or categorically funded projects which are not required by federal or state statutes. The terms and conditions under which such persons are employed shall be mutually agreed upon by the employee and the governing board and such agreement shall be reduced to writing. Service pursuant to this section shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee unless (1) such person has served pursuant to this section for at least 75 percent of the number of days the regular schools of the district by which he is employed are maintained and (2) such person is subsequently employed

⁹ The District attached a declaration of Ms. Rosales which is summarized.

as a probationary employee in a position requiring certification qualifications. 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.

Based on this code section, arguments have been made that, so long as the funding for “categorical” or “specially funded” project has not expired, the teacher in that project is not subject to layoff. Even if it was found that Mr. Quemada was employed in a categorically funded project, and the funding for that project has not expired, although the District might be required to retain a specific position in that project, it is not required to retain Mr. Quemada specifically in that project. Any teacher with the appropriate qualifications and more seniority would retain the right to “bump” Mr. Quemada. The happenstance of a junior teacher being assigned to a particular project does not supercede the seniority rights of other teachers.

Mr. Quemada failed to establish that he should be exempted from layoff based on his work as a Student Achievement Project Coordinator. The funding source of the program in which he is involved is not at issue here; nothing in the Education Code prevents a layoff based on seniority simply because a program is specially funded and the funding has not expired.

n. Sally Lane, Evelyn Ramirez, Christopher Lee, Nichole Dotson, Bradley Sterling, Delilah Karagouz

In his hearing brief (Exhibit A) submitted at the beginning of the hearing, Mr. Perez argued that the above-named teachers, who have supplementary authorizations in math or science, were improperly skipped, in light of the fact that the layoff resolution specifically provides: “That the District shall retain regardless of their seniority certificated employees considered necessary to meet the District's program staffing needs. Such employees shall be retained based upon their qualifications and credentials and include, but are not necessarily limited to, special education teachers, speech and language specialists and math and science teachers.” Mr. Perez argues that, “[i]n this lay off proceeding, the District has elected to ‘skip’ math, science and special education teachers; however, the District has refused to skip over teachers who, according to the District, do not qualify as ‘highly qualified’ under the federal No Child Left Behind (NCLB) law even though those teacher are lawfully authorized to teach math or science based on the credential issued to them by the California Commission on Teacher Credentialing (CCTC).”

Response:

If re-called, Marlene Hernandez would testify as follows: Sally Lane is a career education teacher at Saddleback High School. She has an Intern Single Subject credential authorized in Business and has a supplement in Mathematics, which was issued on September 1, 2002. She also holds a Clear Single Subject credential in Business and has a

supplement in Mathematics issued on April 26, 2007. In addition, she has a CLAD credential. Ms. Lane has 22 units on file. She would need a CSET test in Math or 32 total units in Math [in order to be considered “highly qualified” under NCLB].¹⁰

Evelyn Ramirez is Block Core Subjects teacher at Carr Intermediate. She holds a Clear Multiple Subject credential, which was issued on August 3, 2004 and can teach two or more subjects for two or more periods per day to the same group of students. Ms. Ramirez is authorized to teach General Subjects/BCLAD and has a supplement in Mathematics. She has to have at least 20 semester units for a supplement. Currently, her file only has transcripts from Cal State University at Fullerton with only 10 units of Math. Ms. Ramirez would need a CSET test in Math or 32 total units in Math.

Christopher Lee holds a Preliminary Single Subject credential authorized in Business with EL and has a supplement in Intro Math, which was issued on February 4, 2005. He has a total of 15.0 units from Cal State University at Fullerton and the University of Alaska. Mr. Lee is eligible with 10 upper units. He would need a CSET test in Math or 32 totals units in Math.

Nichole Dotson has a credential in Preliminary Multiple Subject authorized in General Subjects with EL and has a supplement in Mathematics, which was issued on September 1, 2005 as well as holds a Clear Multiple Subject credential in General Subjects with EL and has a supplement in Mathematics issued on February 14, 2008. She has 25 units on file from Vanguard University and Irvine Valley College. Ms. Dotson would need a CSET test in Math or 32 total units in Math.

Bradley Sterling holds a Preliminary Multiple Subject credential authorized in General Subjects with EL and has a supplement in Mathematics issued on August 23, 2006. He has 22 units on file from Point Loma. Mr. Sterling would need a CSET test in Math or 32 total units in Math.

Delilah Karaoguz holds a Preliminary Multiple Subject credential authorized in General Subjects with EL and has a supplement in Mathematics, which was issued on August 10, 2004. She has to have at least 20 semester units for a supplement. Currently, her file only has transcripts from the University of California at Irvine and Santiago College with 16.332 units of Math. Ms. Karaoguz would need a CSET test in Math or 32 total units in Math.

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¹⁰ At the hearing, Ms. Hernandez testified that in order to be considered “highly qualified,” a teacher must achieve “100 points” under criteria set forth in Federal law. These “points” can be achieved in one of two ways: a teacher has completed no less than 32 semester units of credit in the subject in question; or, a teacher has no less than 20 semester units, has taught the subject, and has passed a competency examination. Ms. Hernandez further testified that as of the date of the hearing, the District was not using any “non-NCLB compliant” teachers in math classes.

Finding:

The authority for “skipping,” meaning deviation from the order of seniority for purposes of layoff, is found in Education Code section 44955, subdivision (d)(1):

(d) Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons:

(1) The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess.

The undisputed evidence at trial was that, under NCLB regulations promulgated as part of Title 1 funding, a teacher must be “highly qualified” (see footnote 10) to teach particular subjects, and the District skipped only those math teachers who were not considered highly qualified under federal law. Other than the challenge to not skipping teachers who have supplemental math or science credentials, but are not NCLB compliant, there were no challenges to District skipping. As is set forth in the response to the offer of proof, Ms. Hernandez clearly sets forth why each one of the employees who have a supplemental authorization and who received a layoff notice is not considered highly qualified. The layoff resolution clearly authorized skipping with respect to math teachers, and the District properly skipped those math teachers who have “special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess.” Accordingly, it is found that the District properly skipped Sally Lane, Evelyn Ramirez, Christopher Lee, Nichole Dotson, Bradley Sterling and Delilah Karagouz on the master seniority list.

CONCLUSIONS OF LAW

1. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied as to those respondent certificated employees identified herein.

2. A school board’s decision to reduce or discontinue particular kinds of services (PKS) need not be tied to any statistical computation, such as a reduction in the number of students. The number of terminations through PKS reductions depends totally upon the decision about how many services to reduce. A board may consider the school district’s economic circumstances in making the determination to eliminate particular kinds of services. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627.)

A school board may "reduce services" by eliminating certain types of service or by reducing the number of district employees providing such services. The decision to reduce or discontinue a particular kind of service is not unfair or improper simply because a school board made a decision it was empowered to make. (*Rutherford v. Board of Trustees of Bellflower Unified School District* (1976) 64 Cal.App.3d 167.)

Each of the services set forth in Finding 2 is a particular kind of service which may be reduced or discontinued in accordance with applicable statutes and case law.

3. As of the time the layoff notices were given, cause existed, because of the reduction in particular kinds of services, to reduce the District's teaching positions by 573 Full Time Equivalents and to give notice to the affected teachers pursuant to Education Code Section 44955. The District's decision to reduce or discontinue the services was neither arbitrary nor capricious, but rather a proper exercise of the District's discretion. As of the time the layoff notices were given, cause existed, because of the reduction in particular kinds of services, to reduce the District's teaching positions by 573 Full Time Equivalents and to give notice to the affected teachers pursuant to Education Code Section 44955. (*Campbell v. Abbot* (1978) 76 Cal.App.3d 796; *Degener v. Governing Board* (1977) 67 Cal.App.3d 689).

4. The District's decision to reduce or discontinue the services was neither arbitrary nor capricious, but rather a proper exercise of the District's discretion. During the pendency of this matter, the District rescinded a total of 352 layoff notices. The District is now proceeding to layoff 221 Respondents, all of whom are listed on Exhibit 14 which is attached hereto.

5. Education Code section 44955, subdivisions (b) and (c), set forth the general rule requiring school districts to retain senior employees over more junior employees and to retain permanent employees over temporary employees. Any exception to this general rule must be based on statute. 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."

6. A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated and competent to fill. In doing so, the senior employee may displace or "bump" a junior employee who holds that position. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469; *Alexander v. Board of Trustees* (1983) 139 Cal.App.3d 567.)

7. As a result of the District's lawful reduction of particular kinds of services, cause exists under Education Code section 44955 for the District to give notice to all respondents who were previously served with preliminary layoff notices that their employment will be terminated at the close of the current school year and that their services will not be needed for the 2008-2009 school year, except for the following: Andrea Cortez, Bertha Benavides, Dawn Mohammadi and Nereida Prado. This conclusion is based on all Factual Findings and on all Legal Conclusions.

RECOMMENDATIONS

1. It is recommended that the Board give notice to all Respondents identified in Exhibit 14 attached to this Proposed Decision who were previously served with a preliminary layoff notice that their employment will be terminated at the close of the current school year and that their services will not be needed for the 2008-2009 school year, save and except for those Respondents named in Recommendation 2.

2. It is recommended that the layoff notice be rescinded and the Accusation be dismissed as to the following named Respondents: Andrea Cortez, Bertha Benavides, Dawn Mohammadi and Nereida Prado.

DATED: _____

RALPH B. DASH
Administrative Law Judge
Office of Administrative Hearings