

BEFORE THE  
BOARD OF EDUCATION OF THE  
BARSTOW UNIFIED SCHOOL DISTRICT

In the Matter of the Employment Status of:

OAH No. L2004030271

All Certificated Employees of the Barstow  
Unified School District Receiving  
Preliminary Layoff Notices for the 2004-  
2005 School Year,

Respondents.

**PROPOSED DECISION**

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Riverside, California, on April 23, 2004.

Sherry G. Gordon and Mark W. Thompson, Attorneys at Law, represented the Barstow Unified School District.

Marianne Reinhold, Attorney at Law, represented Scott Jester, a certificated employee of the Unified School District who received a preliminary layoff notice for the 2004-2005 school year. Scott Jester was present throughout the entire proceeding.

The matter was submitted on April 26, 2003.

**FACTUAL FINDINGS**

*The Barstow Unified School District*

1. The Barstow Unified School District (the District) is located about 80 miles northeast of Riverside, California. The District serves the education needs of approximately 7,000 students at the 14 schools within the District, from Kindergarten through 12<sup>th</sup> Grade. The District employs about 360 certificated employees.

2. The District is governed by a Board of Education (the Board).

Jerry Bergmans, Ph.D. (Dr. Bergmans), is the Superintendent of Schools and is the Board's Chief Executive Officer. Donald Haught (Director Haught) is the Interim Director of Personnel Services.

### *The Economic Layoff*

3. Proposition 13 limited the imposition of local property taxes and reduced a major source of assured revenue for funding public education. Following the passage of Proposition 13, public school districts have looked primarily to the State of California and to other governmental entities for necessary funding.

A school district cannot determine the level of state funding it will receive until the state budget is chaptered, an event usually occurring in late June. Before then, the school district's governing board must take steps to make certain that ends meet if the worst-case financial scenario develops.

A school board's obligation to balance its budget often requires that some teachers, administrators and/or other certificated employees be given preliminary layoff notices, warning them that their services will not be required in the next school year. These preliminary layoff notices must be given no later than March 15.

The economic layoff statutes found in the Education Code generally require the retention of senior employees over more junior employees and the retention of permanent employees over probationary employees and others with less seniority.

4. On March 9, 2004, Dr. Bergmans recommended to the Board in writing that preliminary notices be served on several certificated employees advising them that their services would not be necessary in the 2004-2005 school year because of the recommendation that the District reduce or eliminate particular kinds of services.

### *Resolution #33, 2003-04*

5. On March 9, 2004, Resolution #33, 2003-04 was adopted. That resolution provided:

WHEREAS, the Board of Education of the Barstow Unified School District has determined that the particular kinds of services set forth herein must be reduced or discontinued; and

WHEREAS, it is the opinion of the Board that because of the aforementioned reason it is in the best interest of the District that the number of regular certificated employees of the District must be reduced; and

WHEREAS, this Board does not desire to reduce the services of regular certificated employees based upon reduction of average daily attendance during the past two years.

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the Barstow Unified School District as follows:

- A. That the particular kinds of services set forth below be reduced or eliminated commencing in the 2003-2004 school year.

HIGH SCHOOL SCIENCE TEACHER	1 F.T.E.
HIGH SCHOOL FINE ARTS TEACHER	1 F.T.E.
HIGH SCHOOL BUSINESS TEACHER	1 F.T.E.
HIGH SCHOOL ENGLISH TEACHER	1 F.T.E.
<u>INDEPENDENT STUDY TEACHERS</u>	<u>2 F.T.E.</u>
<b>TOTAL CERTIFICATED EMPLOYEES</b>	<b>6 F.T.E.</b>

- B. That due to the reduction or elimination of particular kinds of services the legal number of certificated employees of the District be terminated pursuant to Education Code section 44955.
- C. That the reduction of certificated staff be affected by termination of regular employees and not by terminating temporary and substitute employees.
- D. That the District Superintendent (or legal designee) is directed to initiate layoff proceedings pursuant to Education Code sections 44955 and 44949.

PASSED AND ADOPTED at the regular meeting of the Board of Education held on March 9, 2004.

AYES: 5 (Acevedo, Clemmer, Hailey, Hemingway, and Vogt.)  
NOES:  
ABSENT:  
ABSTAIN:

I certify under penalty of perjury that this is a true and correct copy of the Board of Resolution, adopted by the Board of Education, March 9, 2004.

Jerry Bergmans  
Superintendent

#### *Jurisdictional Matters*

6. On March 11, 2004, a Notice of Recommendation That Services Will Not Be Required, a Notice of Accusation, an Accusation, a (blank) Notice of Defense and Request for Hearing, copies of relevant Education and Government Code statutes and a Notice of Hearing were served on Mark Hassell (Hassell) and Scott Jester (Jester).

Jester timely filed a Notice of Defense and requested a hearing.

Hassell did not file a Notice of Defense or request a hearing.

Thereafter, Jester and his attorney were served with an Amended Notice of Hearing.

7. On April 23, 2004, the record in the administrative hearing was opened. Counsel for the District gave an opening statement. Counsel for Respondents waived the giving of an opening statement. Stipulations were recited. Sworn testimony and documentary evidence was received.

Each counsel was given through the close of business on April 26, 2004, to file a closing written argument.

On April 26, 2004, the matter was submitted.

#### *Stipulations*

8. Stipulations were reached concerning the validity and admissibility of Exhibits 1 through 5 and 8 through 14.

9. It was stipulated that on November 18, 2002, Jester began his employment with the District under a Pre-Intern Certificate and that he continued his employment for the remainder of the 2002-2003 school year under that certificate.

It was stipulated that on October 9, 2003, Jester began serving the District under an Individualized Internship Certificate and that he has continued and will continue his employment with the District for the remainder of the 2003-2004 school year under that certificate.

#### *The District's Seniority List*

10. According to Director Haught, the District's Interim Director of Personnel Services, the District's administrative staff created a 10 page Certificated Seniority List (Exhibit 6) under his supervision.

The Certificated Seniority List contained the names of all certificated employees, each employee's seniority date, status (Permanent, Probationary II, Probationary I, Intern or Temporary), the school site where the employee's services were provided in the 2003-2004 school year, the employee's assignment, the grade(s) taught, the employee's credential, the subject(s) the employee was credentialed to teach, whether a Board resolution was passed authorizing the employee to teach another subject(s), and the amount of services being provided by the employee measured by a full time equivalent (F.T.E.)

Director Haught testified the District assigned a "seniority date" to each employee based upon the employee's first day of paid service as a probationary employee. If an employee provided service to the District as "temporary" employee,

under a temporary credential, an emergency credential or a pre-intern certificate, the employee was not given a seniority date until his or her service with the District began under something other than a provisional credential.

There was no direct attack on the seniority list on the basis that it was false or inaccurate.

### *The Bump Analysis*

11. Under Director Haught's supervision, the District's staff created a "Bump Analysis," a schedule used to determine which employees should receive a final layoff notice.<sup>1</sup>

The "Bump Analysis" contained the particular kinds of services being reduced, the names of the certificated employees providing services in those areas, each employee's status (i.e., Permanent, Probationary II, Probationary I, Intern or Temporary), each employee's first date of paid service as a probationary employee, the employee's credential(s), and whether the employee was senior to other employees providing the same particular kind of service.

12. In the 2003-2004 school year, Jester provided services as a Middle School Language Arts teacher. His seniority date, based on his first date of paid employment with the District when he held an Individualized Internship Certificate from the Commission on Teacher Credentialing, was October 9, 2003.

Gilberto Pena (Pena) was a District employee with an Internship Certificate (Single Subject English) who taught high school English. Pena was the District's most recently employed high school English teacher and his position was eliminated with the passage of Resolution #33, 2003-04. However, Pena's seniority and

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<sup>1</sup> The concept of "bumping" relates to the statutory right of a senior certificated employee to displace a more junior employee who renders a particular kind of service the senior employee can lawfully provide.

Upon determining a need for a reduction in the number of permanent employees, a school district must comply with the layoff procedures enumerated in Education Code section 44955. Senior employees are given "bumping" rights and will not be terminated if there are junior employees retained who render services which the senior employee is certificated and competent to render. Conversely, 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. Seniority is not an inherent or constitutional right. Seniority itself confers no rights on employees but entitles them to preferential treatment only to the extent that a statute or collective bargaining agreement so provides. Seniority rights may be limited by subsequent legislation. (See, Ozsogomonyan, *Teacher Layoffs in California: An Update* (1979) 30 Hastings L.J. 1727.)

credential entitled him to "bump" Jester and to teach Language Arts in Middle School under the "Bump Analysis."

13. Jester was not and is not credentialed and competent to provide any service presently being provided by any less senior employee within the District, assuming, as the District does, that service under a pre-intern certificate does not provide an individual with probationary employment status.

#### *Jester's Testimony*

14. Jester testified that he was a day-to-day substitute teacher with the District before he began his employment on November 18, 2002. Jester taught Language Arts to students with mild to moderate disabilities in his first year with the District; since then, he taught Language Arts to 7<sup>th</sup> and 8<sup>th</sup> graders.

Jester taught the same classes and the same students in the 2003-2004 school year under his Pre-Intern Certificate and his Individualized Internship Certificate.

Jester was taking classes from Chapman College when working under his Pre-Intern Certificate and he is taking classes from Chapman College under his Individualized Internship Certificate.

#### *Seniority and Service under a Pre-Intern Certificate*

15. There is no factual dispute. Jester claimed his seniority date should be the date he first started working for the District under his Pre-Intern Certificate – November 18, 2002 – and his seniority date should not be the date he began working under his Individualized Internship Certificate – October 9, 2003 – which was the date his certificate was issued. Jester argued all employees, including pre-interns, should be treated as probationary employees for the purpose of this economic layoff proceeding.

The District argued that persons serving under a pre-intern certificate cannot receive seniority credit under the Education Code in economic layoff proceedings and that Jester should be given final notice that his services are not needed in the 2004-2005 school year.

#### *Other Matters*

16. It was not established that any particular kinds of services were lowered to levels less than those levels mandated by state or federal law.

It was not established that any certificated employee junior to any more senior employee was retained to perform any service which a more senior employee was certificated and competent to perform.

The Board considered all known attrition, including resignations, retirements and requests for transfer, in determining the number of layoff notices.

## LEGAL CONCLUSIONS

1. *Jurisdiction:* 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 certificated employees identified in the seniority lists.

2. *Reduction of Particular Kinds of Services:* A school board's decision to reduce or discontinue particular kinds of services need not be tied to any statistical computation, such a reduction in the number of students. It is within a board's discretion, subject to the minimum level required by law, to determine the extent to which a reduction of services is necessary and proper under the circumstances. The board's decision is made at the time of the final notice. *San Jose Teachers Assn. v. Allen* (1983) 144 Cal. App. 3d 627

3. *Credentialing:* The following information and opinion is taken from "Symposium: Access to Quality Teaching: An Analysis of Inequality in California's Public Schools," appearing in 43 Santa Clara Law Review 1045 (2003).

The primary tool California uses to ensure teachers are prepared to teach is its teacher credentialing system. The California Commission on Teacher Credentialing (CCTC) is charged with ensuring that candidates recommended for a credential have demonstrated satisfactory ability to assist students to meet or exceed state content and performance standards. The CCTC has integrated preparation for teaching the standards into both the subject matter and professional preparation requirements for receiving a credential (primarily in the form of courses, tests and supervised practice teaching) and the accreditation requirements that pertain to schools of education.

California issues two types of clear teaching credentials: Single subject (for teachers who teach a specific subject in a departmentalized class, usually in secondary school) and multiple subject (for teachers who teach all subjects in a self-contained classroom, most often used in elementary school). In order to earn either type of credential, candidates must demonstrate subject matter competence. This can be accomplished either by completing an approved subject matter preparation program in a California college or university or by passing one or more subject matter competency tests adopted by the CCTC.

In addition to demonstrating subject matter competence, candidates for a single subject or multiple subject credential must also complete an accredited program of professional preparation.

The courses and tests required of candidates are carefully mapped onto the CCTC's standards, which describe what teachers should know and be able to do, which are in turn directly related to the content standards expected of students.

Equally important are the state's expectations - reflected in its requirements for the teacher credential and for the accreditation of teacher education programs - for teaching content to diverse learners: knowledge of second language acquisition and development, knowledge of child development, and knowledge of the needs of exceptional learners and strategies for teaching to these special needs.

A sizeable minority of California's teachers - well over 40,000 in 2000-2001 - lack a full credential for all or part of their teaching assignment, and many have not completed, or even begun, a teacher education program. Candidates who receive other credentials, permits or waivers satisfy some but not all of the requirements necessary to obtain a teaching credential.

To hold an intern credential, candidates must have satisfied most of the subject matter requirements, passed the CBEST, and hold a bachelors degree. They must also be enrolled in an approved internship program providing coursework and a supervised teaching experience. Generally, interns serve as the teacher of record for all or part of the school day. Some intern programs provide some student teaching experience before candidates take on this role, others do not. Interns generally complete the professional preparation requirements over a two-year period while they are teaching.

Teachers on emergency permits or pre-intern certificates lack either the professional preparation and/or the content preparation expected of a fully prepared teacher or both. To hold an emergency permit or a pre-intern credential, candidates must pass the CBEST, hold a bachelor's degree and meet a less rigorous subject matter standard.

Emergency permit holders must submit a statement "demonstrating intent" to complete requirements for a credential. Emergency permits can be renewed for five consecutive years, during which the candidate is expected to complete a minimum of six semester units of coursework annually to renew the permit. Some teachers who are fully prepared and credentialed in another state teach on emergency permits while they are completing specific California requirements; some who are credentialed in another field hold emergency permits while they teach out of field.

Pre-interns are emergency permit teachers who have not yet satisfied the subject matter competence requirement for entry into an internship program and who have agreed to work toward subject matter competence while they are teaching as teachers of record. They also generally have not begun studying toward the professional preparation requirements. They must "demonstrate intent" to take the state's subject matter examinations for teachers and take content courses in a



university while they hold the certificate. Pre-interns are not expected to have met the longer list of professional preparation requirements. If they enter an intern program, they then will be expected to pursue those requirements.

Finally, the Commission on Teacher Credentialing also grants short-term and variable term waivers that allow non-credentialed teacher candidates to waive any of the statutory and regulatory requirements for credentials. Waivers are generally issued to candidates who have not passed the CBEST or met the subject matter standards.

None of these adjunct categories of credentials, permits, or waivers requires that the candidates fully meet the state's subject matter competence standards, which are tied to the student learning standards, before assuming teaching responsibilities. Furthermore, none of them requires that teachers have studied or demonstrated proficiency in standards-based methods of teaching subject matter, reading, English language learners, or special education students before they take responsibility for students, as full (preliminary or clear) credential holders are required to have done. None of the alternative credentials require that teachers have had the opportunity to work under the direct daily supervision of a practicing veteran teacher available to demonstrate effective strategies.

Thus, while it is possible that some individuals working in California on less-than-full credentials, permits or waivers have the preparation and teaching skill needed to teach students to the state's learning standards, there are few guarantees that non-credentialed teachers have the depth of content knowledge and the breadth of teaching skills needed to assure access to equal educational opportunities for the diverse set of learners found in California classrooms.

*Statutes and Appellate Decisions re Probationary and Temporary Status:*

4. Education Code section 44845 provides:

"Every probationary or permanent employee employed after June 30, 1947, shall be deemed to have been employed on the date upon which he first rendered paid service in a probationary position."

5. Education Code section 44929.21(b) provides in part:

"Every employee of a school district . . . having an average daily attendance of 250 or more who, after having been employed by the district for two complete consecutive school years in a position or positions requiring certification qualifications, is reelected for the next succeeding school year to a position requiring certification qualifications shall, at the commencement of the

succeeding school year be classified as and become a permanent employee of the district.”<sup>2</sup>

6. Education Code section 44911 provides:

“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.

This section shall not be applicable to teachers granted a one-year emergency credential under the conditions specified in subdivision (b) of Section 44252 and subdivision (h) of Section 44830.”

7. Education Code section 44466 provides:

“An intern shall not acquire tenure while serving on an internship credential. A person who, after completing a teaching internship program authorized pursuant to this article, is employed for at least one complete school year in a position requiring certification qualifications by the school district that employed the person as an intern during the immediately preceding school year and is reelected for the next succeeding school year to a position requiring certification qualifications shall, at the commencement of the succeeding school year, acquire tenure.”

8. *Arguments:* As Jester pointed out, no Education Code section requires the “temporary” classification of a person who serves under an emergency permit, a pre-intern certificate or an intern credential; however, there is no Education Code section that authorizes a person serving under a pre-intern certificate to receive seniority credit for such service.

As the District argued:

“If the Legislature had intended pre-interns to receive the same retroactive credit as interns receive, it knew how to craft such language. Since the language is missing, we must assume that no such right was either intended or conferred.”

*Golden Valley and Summerfield:*

9. *California Teachers Association v. Governing Board of the Golden Valley Unified School District* (2002) 98 Cal.App.4<sup>th</sup> 369 stated “teachers serving

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<sup>2</sup> A complete school year for purposes of seniority is attained by serving at least 75% of the number of days the regular schools are maintained. Education Code section 44908.

under an emergency permit who satisfy the requirements of section 44915 are entitled to the statutory protections governing the dismissal of a probationary employee.”

*Golden Valley* involved a mid-year “for cause” termination action rather than an economic layoff action. In *Golden Valley*, the written contract between the employee and the district specifically provided the employee with contingent probationary status.

10. *Summerfield v. Windsor Unified School Dist.* (2002) 95 Cal.App.4<sup>th</sup> 1026 involved the question of whether service under a temporary permit should count towards the completion of a mandatory two-year probation period.

*Summerfield* concluded that under Education Code section 44911, time spent teaching under an emergency teaching credential should not be counted in computing progress toward permanent status unless the employee was credentialed in another state and demonstrated adequate basic skills pending successful completion of the California Basic Educational Skills Test.

*Summerfield* reasoned that the plain language of Education Code section 44911 suggested that emergency credentials were the same as provisional credentials, or are at least were one type of provisional credential, and under Education Code section 44911 service by an individual under a provisional credential could not be included in computing the mandatory probationary service.

11. A teacher serving under an emergency permit continues to serve under that permit and under the contract to which the teacher agreed until the teacher is issued a credential and registers the credential with the district. The district has no duty to classify a teacher as probationary employee retroactive to the validity date of the credential. No statutory provision suggests a contrary conclusion, and precedent confirms that contract terms to which a teacher has agreed should not be abrogated unless the statutory mandate is clear. Moreover, this conclusion comports with related statutory provisions, as well as considerations of practicality and common sense. *Fine v. Los Angeles Unified School Dist.* (2004) 116 Cal. App. 4th 1070, 1078.

12. *Estoppel*: Jester did not present a factual argument that the District misled him into believing he was a probationary employee. This is not a case of the District’s manipulation of the classification system to any temporary employee’s detriment. See, *American Federation of Teachers v. Board of Education* (1977) 77 Cal. App. 3d 100, 109.

13. *Conclusion*: Within the context of this economic layoff proceeding – as opposed to a termination for cause proceeding – it makes little sense to provide seniority status to persons holding pre-intern certificates and to grant them more rights than others with intern status or preliminary or permanent credentials. The economic layoff statutes were designed to ensure to the greatest extent possible that

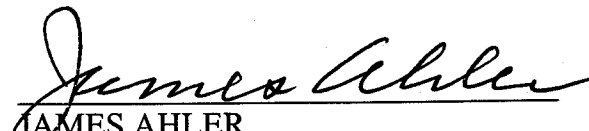
qualified and competent senior employees would be retained over more junior employees and that permanent employees would be retained over probationary employees. A teacher cannot become a permanent (tenured) employee without serving a mandatory two year probationary period first, and a teacher cannot attain probationary status under a pre-intern certificate.

For these reasons, and based on a review of the authority, opinion and arguments cited in Legal Conclusions 3-12, it is concluded that Jester was not entitled to seniority credit for serving under a pre-intern certificate in this layoff proceeding.

### RECOMMENDATIONS

The Barstow Unified School District shall give notice to Mark Hassell and Scott Jester that their services will not be required for the 2004-2005 school year.

Dated: April 30, 2004.

  
JAMES AHLER  
Administrative Law Judge  
Office of Administrative Hearings