

BEFORE THE  
GOVERNING BOARD  
SACRAMENTO CITY UNIFIED SCHOOL DISTRICT  
COUNTY OF SACRAMENTO  
STATE OF CALIFORNIA

In the Matter of the Reduction in Force of:

CERTAIN CERTIFICATED PERSONNEL  
EMPLOYED BY THE SACRAMENTO  
CITY UNIFIED SCHOOL DISTRICT,

Respondents.

OAH No. N2006030552

PROPOSED DECISION

Administrative Law Judge Stephen J. Smith, Office of Administrative Hearings, State of California heard this matter in Sacramento, California on April 25, 26, 27 and 28, 2006.

Alison C. Neufeld, Attorney at Law, of Ruiz and Sperow, L.L.P., represented the Sacramento City Unified School District (District). She was assisted by Nicholas Calderon, Attorney at Law, of Ruiz and Sperow on April 26, 2006.

Margaret Geddes, Attorney at Law, of Beeson, Tayer and Bodine, Attorneys, represented the Sacramento City Unified Teacher's Association (the Association), which represented 111 of the certificated District employees receiving notice that their services would not be required for the upcoming school year are members.

Respondents Ryan Fernald, Audrey Tuthill, Staci DiSantis, Julie Caldwell, Mahn Wenthe, Oriana Wehner, and Jenny Reinke represented themselves, even though many were also members of the Association, due to potential conflicts of interest, since each of these respondents have the same first day of paid service.

RESOLUTIONS OF MOTIONS PENDING FROM PREHEARING CONFERENCE

1. The Association's motion in limine to offer evidence of positively assured attrition known to the District between March 15, 2006 and May 15, 2006 was denied at the evidentiary hearing. "A district need not consider positively assured attrition occurring between the preliminary notice and the final notice in determining the number of certificated employees to be terminated by reason of a reduction or discontinuation of a particular kind of

service.”<sup>1</sup> As a practical matter, however, positively assured attrition that occurs between the preliminary and final notice dates will have an impact in determining the number of final notices that the District must send to its certificated employees.

2. The District’s motion to exclude respondents receiving a March 15, 2005 notice that their services will not be required for the upcoming school year (the preliminary notice) who failed to timely file Notices of Defense was made moot by developments at the evidentiary hearing. Respondents Danilo Campos and Susan McSherry Higgins, who were the subjects of the motion, were each notified by the District during the evidentiary hearing that they were to be retained for the upcoming school year, and that preliminary notices served on each of them were rescinded.

3. The District’s motion to seal two confidential Resolutions of the Governing Board regarding nonreelection of probationary teachers in the District was granted. The Resolutions were ordered sealed, not to be opened except by a duly designated and authorized representative of the Board, the Administrative Law Judge (ALJ) or another ALJ assigned to preside over further proceedings in the matter, or by a reviewing court of competent jurisdiction.

4. The Association’s motion to exclude evidence of reductions in average daily attendance (ADA) was granted.

#### EXTENSION OF SUBMISSION DATES

5. The parties requested leave to submit closing argument and points and authorities in writing. The parties agreed that the closing arguments would be due May 4, 2006, six days past the close of the evidentiary portion of the hearing. The parties stipulated that the statutory time requirements for submission of the Proposed Decision to the Governing Board by the ALJ, and for the Governing Board’s consideration and action on the Proposed Decision are waived and are extended by an equivalent period of time.

#### FACTUAL FINDINGS

1. The District is a large urban school district that provides elementary, middle and high schools, a continuation high school, a charter school and an adult center community school. The District provides services to approximately 48,000 students at 83 school sites in and surrounding the City of Sacramento.

2. Carol Mignone is the Assistant Superintendent for Personnel and Human Resources of the District. M. Magdalena Carillo Mejia, Ed.D., is the Superintendent of the District.

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<sup>1</sup> *San Jose Teacher’s Association v. Allen* (1983) 144 Cal.App.3d 627, 630.

3. The District has experienced declining enrollment over the last several years and increasing costs. In January 2006, the Board was advised that the District faces a projected \$9.5 million budget shortfall for the upcoming school year, if services offered and staffing remain the same during the upcoming school year. The Board directed the Assistant Superintendent and her staff to determine whether reduction or elimination of particular kinds of services could be made for the upcoming school year to close the projected budget gap. The Assistant Superintendent and her staff met and formed a District wide budget committee (the Committee) composed of stakeholders charged with the task of coming up with ways to conserve the District's programs and meet the budget restraints. The Committee presented its findings to the Board. The Board then directed the Assistant Superintendent to identify particular kinds of services that could be reduced or eliminated for the upcoming school year, in accordance with its direction.

4. The Assistant Superintendent and her staff met and compiled a list of particular kinds of services that could be reduced or eliminated and not fall beneath minimum state mandates. On March 9, 2006, the Assistant Superintendent notified the Board of her conclusions and recommended to the Board that particular kinds of services being offered by the District be discontinued or reduced. The Assistant Superintendent stated the reasons for the recommendation. The Board approved the recommendations and, following the adoption of the Resolution set forth below, directed the Assistant Superintendent to implement the recommendations. The Board also charged the Assistant Superintendent and her staff to identify an equivalent number of certificated personnel and give those certificated employees notice in writing of the Superintendent's recommendation that their services would not be required for the ensuing school year. The recommendation that any certificated personnel so identified for layoff from employment with the District was not related to their skills or competence as teachers.

5. In response to the Assistant Superintendent's recommendation above, the Board adopted Resolution # 2447 on March 9, 2006. The Board resolved that the District needs to reduce or eliminate particular kinds of services as recommended by the Assistant Superintendent, and accordingly, it was resolved that it is necessary to terminate the employment of an equivalent number of certificated employees of the District due to the reductions. Resolution #2447 authorized the Assistant Superintendent to take action to reduce or discontinue the following particular kinds of services for the 2006-2007 school year:

<u>Particular Kind of Service</u>	<u>Full-Time Equivalent</u>
I. Administrators	
High School Assistant Principals	4.0
II. Teachers	
Elementary Teachers-Class Size Reduction	60.0 (K or 3d Grade)
Elementary Teachers	35.0

III. Other Teachers	
Middle School Counselors	5.0
Librarians	11.6
School Social Workers	4.0
Home Economics	1.0
Art	5.0
Industrial Art	2.0
Designated Subjects: Airframe and Powerplant Mechanics	1.0
Designated Subjects: Landscaping	1.0
Adult Education Program Specialist	1.0
Adult Education Teacher	5.0
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	135.6 FTE's

The proposed reductions total 135.6 FTE, with an equivalent number of certificated positions.

6. Resolution #2447 specified certain exceptional District needs in its future staffing that the Board directed should be preserved, regardless of seniority, and directed that these needs be accommodated in determining which certificated employees should receive preliminary notices of layoff and who should not. The Resolution acknowledged a "severe statewide shortage of certificated employees qualified to serve the needs of K-12 students with respect to the following programs and services: Special Education, English Language Learner (ELL) and Bilingual Education." The Resolution also noted that ELL/Bilingual Education are highly specialized programs that require the possession of additional, specialized credentials by certificated employees. The Board noted a special need to retain employees with these specialized credentials, regardless of seniority.

7. At the same meeting, the Board also adopted Resolution #2448. This Resolution set forth criteria for breaking ties when two or more certificated employees with the same first day of paid service were facing potential layoff. The Board gave particular preferences in determining these criteria to those employees who possessed English Language Learner (ELL) certifications and those who were teaching subjects within their college majors. In case of ties continuing through listed criteria, a lottery was to be used to break such ties.

8. The services set forth in Resolution #2447 are "particular kinds of services" that may be reduced or discontinued within the meaning of Education Code section 44955. The Association contended that the selection of "Designated Subjects: Airframe and Powerplant Mechanics, and "Designated Subjects: Landscaping" are not legitimately particular kinds of services to be reduced because they do not set forth services or positions

to be reduced, but rather by designating the credentials required for the service, it actually singles out individuals to be terminated without cause. The contention lacks merit.

9. There was no dispute that the District offers one FTE of classes of Landscaping and one FTE of Airframe and Powerplant Mechanics. The District intends to eliminate these offerings in the upcoming school year. If the individuals staffing these classes possess credentials and qualifications that would permit them to bump into other classes the District is retaining, they will have the same rights as all those other District employees being displaced by this reduction in services but who have enough seniority to bump into a continuing assignment. The elimination was not of the particular individual staffing these FTEs but of the classes in these disciplines, which require specific single subject credentials to teach. No evidence was offered that either of the individuals staffing these classes has a credential or qualifications that would permit them to bump into any other classes being retained by the District.

10. There was no evidence that the Board's decision to reduce or discontinue these particular kinds of services was arbitrary or capricious. The reduction or elimination of the particular kinds of services set forth in Resolution #2447 constituted a proper exercise of the Board's discretion, within the meaning of Education Code section 44955.

11. On March 13, 2003, the District personally served a written preliminary notice that advised the respondents, pursuant to Education Code sections 44949 and 44955, that their services would not be required for the next school year. The preliminary notices were served on 177 certificated employees of the District. Each written notice set forth the reasons for the recommendation and noted that the Board had passed Resolution #2447, reducing or eliminating particular kinds of services by 136.5 FTE positions.

12. Each preliminary notice was served by certified mail, return receipt requested. Of the 177 employees served a preliminary notice, 139 certificated employees timely requested in writing a hearing to determine if there is cause for not reemploying them for the ensuing school year.

13. The Assistant Superintendent made and filed Accusations against each of the 139 certificated employees of the District who timely requested a hearing after receipt of the preliminary notice. It was not disputed that the Accusations, with required accompanying documents and blank Notices of Defense, were timely served on the responding employees.

14. Of the 139 District employees served a preliminary notice, 19 failed to timely file a Notice of Defense requesting an evidentiary hearing.

15. The Board determined on April 20, 2006 to rescind the elimination of the 60.0 FTE of Elementary Teachers-Class Size Reduction K-3. These services are to be retained for the upcoming school year. The Assistant Superintendent and her staff reviewed the District's master seniority list to determine which employees that received a preliminary notice of

layoff could be advised that their preliminary notice was rescinded. The process of so advising such affected employees continued through the time of the evidentiary hearing. On the first day of the evidentiary hearing, the District mailed written notices to 55 certificated employees who had received preliminary notices that those notices had been rescinded. By the final day of the evidentiary hearing, the District had rescinded notices to all but 43 of those originally served with a preliminary notice of layoff.

#### METHOD OF EFFECTUATING THE REDUCTION IN SERVICES AND IDENTIFYING AFFECTED EMPLOYEES

16. The Board's Resolutions delegated to the Assistant Superintendent and her designees the authority to implement the reduction and elimination of the listed particular kinds of services, to identify and determine which District employees would be affected by the reductions and to draft and serve the preliminary notices upon those identified employees. The District divides its schools into four geographic learning service units (LSUs) and assigns a human resources analyst to each, all of whom are supervised by the Assistant Superintendent. Immediately following the passage of the Resolutions, the Assistant Superintendent met with her four personnel analysts and instructed them to work together to identify employees of the District who would be affected by the reduction or elimination of the particular kinds of services set forth in the Resolution.

17. The Assistant Superintendent gave the analysts admittedly brief, general instructions and guidance, including directions to review the District's comprehensive master seniority list and select the least senior employees of the District teaching in the positions that would be eliminated or reduced. She testified the analysts had considerable experience between them in analyzing the District's master seniority list and effectuating District reductions in force in previous years. She provided a copy of the Resolutions to each analyst for reference and reviewed with them the Board's directions and preferences set forth in each. She also instructed the analysts to identify any positively assured attrition that occurred before service of the preliminary notices, such as deaths, resignations, confirmed leaves of absence or retirements.

#### INTERNS AND TEMPORARIES

18. As part of her instructions, the Assistant Superintendent advised the four analysts during this initial briefing that the District was releasing all interns and 162 temporary employees. The analysts testified that they understood this to mean that any position being currently held by an intern or a temporary employee was available for potential reassignment for a certificated employee subject to layoff due to the reduction or elimination of particular kinds of services set forth in Resolution #2447. The analysts prepared a list of all interns serving in the District (Exhibit 13). The analysts identified 117 interns serving in the District during the current school year. The analysts also identified 184 temporary employees serving in the District and prepared a list of these persons (Exhibit 12). Each list sets forth the names of each temporary employee or intern, and, in the case of the interns, lists the school site where the intern is assigned. Neither list shows how many FTE

or portion thereof, or the class assignments each temporary employee or intern occupies. The Assistant Superintendent advised the analysts that the Board had already authorized the release of 162 of the temporary employees, and that the Board intended to release an additional 85 temporary employees on or before June 30, 2006. There was no evidence that the analysts had any difficulty identifying the vacancies that will be created by the release of the interns and the temporary employees.

#### PROBATIONARY NONREELECTS

19. The Board acted pursuant to two confidential Resolutions adopted March 2, 2006 and March 9, 2006, to not reelect certain first and second year probationary teachers in the District. These nonreelections were an appropriate exercise of the Board's absolute right not to reelect probationary teachers. By necessary implication, some probationary teachers in the District were reelected, but since they are probationary, they have relatively low seniority in the District, and are thus potentially subject to layoff in this process. There was no evidence that any probationary teacher that was reelected was being retained in favor of a more senior teacher for an assignment where that more senior teacher was credentialed and competent to teach.

20. The Assistant Superintendent told the analysts that the Board had met and adopted the two confidential resolutions and instructed the analysts to also account for the release of these probationary nonreelects in determining which employees must be given preliminary notices of layoff. The analysts identified the probationary teachers being released and made a list of these employees, identifying 32 such persons by current assignment and school site. There was no evidence this information was inadequate or insufficient to enable any respondent receiving a preliminary notice to determine whether he or she would be qualified to occupy the positions being vacated by the termination of the probationary employees. The other probationary employees who were not terminated by the nonreelection process were still subject to the layoff, and if they occupied a position being eliminated or reduced, or if the analysts determined they could be bumped by a more senior employee, they received a preliminary notice. No probationary employee except Mr. Garrison (below) was identified who is being retained to teach in a position for which a more senior employee is certificated and competent to teach who is subject to the layoff.

#### MASTER SENIORITY LIST AND SUBLISTS

21. The analysts worked long hours between March 10 and March 13, 2006 to compile a list of 177 certificated employees they determined would need to receive preliminary notices of layoff in order to effectuate the 135.6 FTE reductions in particular kinds of services authorized by Resolution #2447. The analysts acknowledged that they "over-noticed" in order to account for unanticipated problems such as potential errors or additional changes and in view of the limited time they had to determine the individuals who would be subject to receiving notices in order to effectuate the reduction in the services. The analysts accomplished the task by pulling out and creating a separate seniority sublist specific to each area or classification of service being reduced or discontinued. These

sublists were created by extracting those employees serving in the specific assignments subject to reduction or elimination from the District's comprehensive master seniority list. Thus, sublists were created for those serving as "Administrators-High School Assistant Principals," "Elementary Teachers," "Counselors," "Social Workers," Librarians," and so forth, for each service, even if the service was for one FTE. The analysts testified they used the sublists in conjunction with the master seniority list. The sublists proved to be effective and useful in determining and identifying individuals who would be impacted by the reduction and elimination of the services authorized by the Board.

#### ELEMENTARY TEACHING SUBLISTS

22. The analysts' sublist for "Elementary Teachers", according to the analysts, reflected their effort to pull out of the master seniority list and flag every certificated employee teaching in an elementary (K-6) classroom in the District. The Elementary Teachers sublist was assembled by culling the master seniority list for teachers teaching in the District job assignment "Teacher, Elementary." In all but a few instances, the Elementary Teachers sublist was effective.

23. However, the analysts acknowledged that the District has some K-8 schools, where some elementary classrooms exist along with single subject classrooms for the middle school grades. The analysts and the District's credential specialist acknowledged in their respective testimonies that a certificated employee teaching at a District middle school with only a multiple subjects (MS) credential could only be assigned to an elementary self-contained classroom, and could not be assigned to teach specific individual subjects. Only employees with a single subject credential or authorization could be assigned to teach the specific subjects, such as math, English or science, offered at the middle schools in the District. No person teaching in a District elementary or K-8 school was identified as having a current assignment requiring that employee to teach outside of that employee's credential and authorizations. Thus, by necessary implication, persons assigned to a District K-8 school possessed of only a MS credential must have been assigned to teach self-contained elementary classrooms at the K-8 school. The analysts acknowledged that they did not look for and attempt to identify any District employees teaching at a K-8 school who were teaching a wholly self-contained elementary classroom. It was evident that there were three District teachers who were so assigned, as set forth below. The analysts were not directed to seek out and identify District employees teaching in self-contained elementary classrooms in District K-8 schools. The analysts did not create any separate sublists for District job classifications "Teacher, Middle School," "Teacher, Elementary Special Subjects," or "Teacher, K-8," that might have identified these individuals.

24. The Association contended that since no sublist specific to K-8 assignments, such as "Teacher-Middle School," and no sublist that included other elementary school classifications, such as "Teacher-Elementary-Special Subjects," were created, no person teaching in an elementary classroom in a K-8 school, even if that person was possessed only of a multiple subjects (MS) credential, was identified and noticed for layoff. It was also contended that some of those retained who were assigned to the middle schools were junior



to those classified as elementary teachers and given preliminary notices. The contentions have merit.

25. The Association identified four employees, Ms. Power, Ms. Schnack, Ms. Cooperman and Mr. Searle, who allegedly "should have" received preliminary notices because they were teaching at a District middle school and have only MS credentials, and, by implication, must have been teaching self-contained elementary classes. The District offered no evidence to rebut the contentions, and did not demonstrate that any of these teachers were teaching in the middle schools in other than an elementary classroom. It was not disputed that these individuals have only MS credentials with no other credentials or authorizations. It was alleged that these individuals are junior to some individuals teaching elementary classrooms at District K-6 schools subject to reduction or elimination. The contention is incorrect for Mr. Searle and inaccurate for the three women. Mr. Searle is not subject to layoff, and had he been initially identified as a person who should have received a preliminary notice of layoff, his notice would have been rescinded at or before the commencement of the evidentiary hearing. The District noted at the evidentiary hearing that all elementary teachers who received a preliminary notice and have a seniority date before September 7, 2004 are being retained and their preliminary notices of layoff are in the process of being rescinded. In addition, evaluation of the 37 employees with the same first day of paid service to the District of September 7, 2004 shows that as of the close of the evidentiary hearing, all but six of these persons are being retained. Mr. Searle would either not have received notice or would have had his notice rescinded before the close of the hearing.

26. The three women identified above have the same seniority date as six elementary teachers who are still subject to layoff after application of the District's tie breaker criteria (below). These three women all have seniority dates of September 7, 2004, as do 40 other District employees, which makes them among some of the most junior employees in the District. These three women with September 7, 2004 seniority dates were not placed into the tie breaker evaluation or considered against all the others with the same seniority date, as they were overlooked as elementary classroom teachers because they were serving in a middle school. Absent persuasive evidence to the contrary, which was not produced, it appears these three employees should have received preliminary notices and added to the tie breaker analysis along with the 40 other District employees teaching in elementary classrooms who have the same September 7, 2004 seniority date.

27. Beyond the three employees set forth just above, there was no persuasive evidence that there is any teacher teaching in a District K-6 elementary classroom who was given a preliminary notice who should have been retained because there exists a teacher junior to him or her that is being retained to teach in any elementary classroom in a District K-6 or K-8 school.

## SKIPS

28. The Board's resolution directed the Assistant Superintendent and her staff to retain, regardless of seniority ("skip"), any employee possessed of certain credentials that were identified by the Board as being of particular need to the District. In performing their analysis of which elementary teachers were to receive a preliminary notice, the analysts "skipped" a few junior employees who were possessed of the credentials identified in the Resolution; Special Education, ELL or Bilingual Education credentials. There was no difficulty interpreting the first two portions of the Board's directions, but the Association challenged the portion of the Resolution authorizing retention of "Bilingual Education credentials" as impermissibly vague. The challenge lacks merit.

29. The Assistant Superintendent and the analysts interpreted the "Bilingual Education credentials" portion of the Resolution to mean that in order for an employee to meet the standard and be skipped, the employee must have both a BCLAD credential authorization and be currently assigned to a classroom where that BCLAD authorization was required to staff that assignment. Thus, seven junior elementary teachers possessed of BCLAD certifications but not assigned to a classroom requiring BCLAD certification were identified for layoff, while three elementary classroom teachers whose assignments did require BCLAD certification were skipped. The Association contended the skipping of the three BCLAD teachers and laying off more senior elementary teachers is an abuse of the District's discretion, and that Resolution #2447's language describing what positions may be skipped is impermissibly vague. The Association also contends that the District failed to present evidence of any teacher being skipped due to having special education credentials who is junior to teachers being laid off.

30. The analysts' interpretations of the Board's direction were reasonable and appropriate, and it was not demonstrated otherwise. The analysts did not just skip any junior employee with a BCLAD certification, as they might have done under the broad authorization of the Resolution; they only skipped those with BCLADs who were actually using the certification to discharge their classroom duties. One could argue the analysts' interpretation was an overly narrow reading of the Resolution's direction, but if that is so, then at least seven more junior teachers would have to be retained at the expense of more senior teachers who did not possess the BCLAD certification. It is difficult to imagine the Association wanting a skipping provision to be applied more broadly than it was, when to do so would result in the layoff of several more senior teachers than would have otherwise been necessary. The interpretation was reasonable and was effectuated reasonably.

## BUMPS

31. The analysts then checked to see if any employee not skipped and identified as a potential recipient of a preliminary notice had the credentials and competencies necessary to "bump" anyone being retained who was junior to them and was providing a service they were credentialed and competent to teach. On a number of occasions, the analysts made outside contacts, such as calling the school site where the affected teacher was assigned, to

verify assignments. They did not contact every school site to verify the assignment of every employee who was a potential recipient of a layoff notice, but did check each time there was a question or a conflict, with an eye toward reassigning everyone they could, limited by that employee's credentials and competencies. The analysts prepared several Reassignment Analysis Worksheets ( Exhibit 11). The worksheets reveal the District has many openings, but most of those require specialized credentials and qualifications that many of those receiving a preliminary notice do not possess.

#### TIE BREAKER FOR SEPTEMBER 7, 2004 TEACHERS

32. The analysts found 40 elementary teachers serving in the District that had the same first day of paid service, September 7, 2004. The analysts had already determined that not all of these employees were required to receive a preliminary notice to effectuate the layoff. The analysts created a score sheet and scored each of the 40 using the tie breaker criteria set forth in Resolution # 2448. Use of the tie breaker criteria to determine their relative seniority was necessary. Application of the tie-breaker criteria of Board Resolution resulted in some reranking of the employees, but fifteen teachers were still tied after the application of the criteria. The relative seniority of these remaining fifteen was then determined by a lottery in which their names were written on pieces of paper and placed inside a box. It was decided that the first name drawn would be most senior, the second name would be next senior, and so forth, until the least senior. One of the analysts drew the names, with another as a witnesses and scribe of the results. The employees' names were drawn and 10 were selected that were required to receive a preliminary notice.

33. Of the ten employees who were selected in the lottery, the District rescinded the preliminary notices to four. The District stipulated that preliminary notices sent to employees Fernauld, Tran, Kothman and Scott were being rescinded, leaving only six of the original 40 with the same first day of paid service to the District still subject to the layoff. These six are Mr. Rule; Mr. Moore; Ms. Wehner; Ms. DiSantis; Ms. Wenthe and Ms. Tuthill.

34. Several of the employees subject to the lottery objected to the manner in which the analysts applied the scoring criteria, and contended the application was thus arbitrary, unfair and capricious. The complaints concern denial of credit for major, and denial of credit for participation in quasi-mandatory teacher support programs, particularly the District's two year teacher support program, Beginning Teacher Support and Assessment (BTSA). Some of the respondents complained that the affected teachers were not informed of the criteria in time to submit additional information or challenge the application of the criteria.

#### INDIVIDUAL RESPONDENTS SUBJECT TO THE TIE BREAKER

35. The District has broad discretion to select its criteria for breaking ties in first days of paid service. That discretion is only limited by the fact that the criteria must be rational and fairly applied to all affected employees. The District decided not to recognize or give credit for time spent in the BTSA program, for general studies majors such as Humanities or Liberal Studies, even where the employees subsequently passed the CSET or

MSAT subject matter competency examinations, participation in the District's "Passport" program, for time dedicated to coaching, mentoring or for certification as a "highly qualified teacher." The District also determined not to provide credit for previous service to the District in the form of substitute teaching, but did provide credit for temporary teaching under a contract. The District's rejection of the criteria advanced by the individual respondents as worthy of consideration was not an abuse of the District's broad discretion to make such choices. It did not appear that the Board failed to find these qualifications worthy or valuable, particularly participation in its BTSA program. It appears that these exclusions were more likely the product of quick work without larger consideration of the value to the District of having its teachers have these achievements and participations, and delegation of implementation of the determinations to the analysts. The District's failure to give tie breaker credit for participation in BTSA, which requires a considerable amount of a new teacher's time and, although not mandatory, is "highly recommended," or for other time consuming extra curricular service to the District was arguably unwise and sends a discouraging message to its young teachers, but it is not an abuse of the District's discretion.

36. However, the analysts did make some mistakes. They were given broad discretion with little guidance in interpreting and applying the criteria. The mistakes were made with respect to denying credit for majors for some respondents, and a mistake regarding bilingual competence for another. To the analysts' credit, the facts supporting each of these claims were not fully known until the evidentiary hearing, and under the extreme compression of time for this layoff were understandable. Ms. Wehner and Ms. DiSantis received no credit for their college majors in the application of the tie breaking criteria. Ms. DiSantis and Ms. Wehner both majored in childhood development with precredential preparation. This major prepares a teacher candidate for teaching at the elementary level. The major focuses on childhood cognitive development and preparation for teaching in a linguistically diverse environment. Unlike liberal studies or humanities, which truly are general education majors, the childhood development majors taken by Ms. DiSantis and Ms. Wehner are directly related to the subject matter and the manner in which they teach in the elementary classrooms they staff for the District. The analysts erred when they excluded points for major credit for these two employees. They did not err when they declined to credit the much more general humanities or liberal studies majors of many of the other employees. Had the major credit been given to Ms. Wehner and Ms. DiSantis, both would not have been subject to the lottery and would have had their preliminary notices rescinded, as did others with the additional credits.

37. Ms. Wenthe is a liberal studies major and received no credit for her major. However, she is bilingual and has BCLAD type multicultural education training. She is a Mien speaker, but since there is only one Mien speaker in her present elementary classroom, she is not considered to be serving in a bilingual required classroom. She has sought to obtain a BCLAD certification, but has been advised that there is no one certified and available to test and certify her. It appears Ms. Wenthe has bilingual assets the Board identified should be retained in the District, regardless of seniority. There was no way the analysts could have known she had these linguistic competencies because the District records do not show the competency until it has been certified. Even then, there was evidence the

District record keeping system is significantly behind in bringing employee records of certifications and competencies up to date. Since the District did not skip BCLAD possessed employees who were not serving in classrooms where BCALD certification was mandatory to staff the classroom, it is unlikely Ms. Wenthe would have been skipped for her de facto possession of BCLAD certification in Mien. But she should have been credited for the competency in the tie breaker, which would have removed her from the lottery and would have resulted in her notice being rescinded.

#### PKS- 4.0 FTE ADMINISTRATORS

38. The 4.0 FTE of administrators being eliminated by Resolution #2447 were identified as four high school assistant principals who are being reassigned to the classroom. There was no issue regarding whether the reassignments were appropriate or whether any of the administrators being reassigned were certificated and competent to take the reassignments made.

#### SKIP OF SHANNON TORRES

39. Shannon Torres teaches the "Pregnant Minor" program at the District's American Legion Continuation High School. Her seniority date is March 28, 2005. She has a MS credential and no other certifications and competencies. The analysts testified that they skipped her from receiving a preliminary notice because of the "unique nature of the program and the assignment." It is not disputed that many of the respondents receiving preliminary notices are senior to her. The District is not terminating the Pregnant Minors program in these proceedings. But it is intending to lay off several teachers senior to Ms. Torres who also have MS credentials. The analyst's determination that the program is "unique" does not determine whether another more senior teacher with the same credentials and competencies can bump into that assignment. The District produced no evidence that would support a conclusion that Ms. Torres, despite her credentials, was uniquely qualified over the more senior teachers being laid off to staff that class. The Board did not direct in its Resolutions to skip the person staffing this program. This decision was that of the analyst alone, and it cannot stand. The most senior of the remaining respondents possessed of a MS credential and still subject to layoff may bump into that class, and the preliminary notice as to that teacher must be rescinded.

#### RACHEL CLARIN AND JOHN SYNHORST

40. Preliminary notices issued to these two employees were rescinded by the District and they have been reassigned.

#### SHEILA PAGE

41. Sheila Page's District seniority date is January 17, 2001. She is currently assigned as an elementary teacher. She was not given a preliminary notice of layoff, evidently because of this seniority date. An inference was raised that Ms. Page's seniority

date may have been an error. Her records with the District show her as a "first year probationary" teacher. One or the other entry in the District's records is likely an error. There was some speculation from one of the analysts regarding how these discrepancies might have occurred, including the possibility that Ms. Page taught special education in the District in 2001, then had a break in service, and taught elementary beginning in 2004-2005 when she obtained her MS credential in November 2004. Ms. Page certified in January 2006 that her seniority date of January 17, 2001 was correct. The District was entitled to rely on the certification when the preliminary notices were sent. Speculation about how Ms. Page's seniority date might not have been accurate is not evidence. If there is indeed an error in Ms. Page's seniority date, the District is obligated to correct it, but not as part of these proceedings.

#### SARAH CHANEY

42. Sarah Chaney occupies one of the District's CBET Program specialist positions, which is a categorically funded program in the District's Adult Education Program. Ms. Chaney was previously "surplussed" from this position, and has been retained and paid in the Program Specialist position, even though it has been eliminated. The District has permitted her to teach English as a Second Language (ESL) in an hourly position, and intends to continue to do so, as long as there is enrollment to support the position. It was not disputed that Ms. Chaney must be reassigned or laid off due to the overfilling of the categorically funded program in which she now teaches. Ms. Chaney has a seniority date of March 1, 2002 and a credential in Designated Subjects: Adult Education, with an ESL authorization. It was not disputed that the District intends to offer at least some ESL programs in its Adult Education Program in the upcoming year. Two of the current ESL teachers are temporaries and Ms. Hayes testified the District will not be rehiring them. But the District's Adult Education specialist testified that the District does not set the classes until the summer, and cannot determine in advance what the enrollment will be. Staffing is based entirely upon enrollment in this program. It may be that Ms. Chaney will be reemployed to teach ESL, and it appeared the District thought that likely. There is no evidence the District intends at this time to retain any employee junior to her to teach ESL in the upcoming school year in the Adult Education Program. If the enrollment materializes in the summer, Ms. Chaney is entitled to teach ESL before any other employee junior to her, if the classes are offered.

#### LIBRARIANS

43. The Board reduced the District's 13.0 FTE librarian services by 11.6, leaving 1.4 FTE. Twelve librarians received preliminary notices of layoff. All twelve were reassigned and retained. Nine were reassigned to teach single subject courses and three were reassigned to elementary classrooms. The most senior librarian is Ms. Vann. She has a special education certification and has been reassigned to teach 1.0 FTE special education. Mr. Campos is the least senior librarian. He received a preliminary notice but did not timely request a hearing. He is being retained to staff a split assignment, .6 FTE social studies and .4 FTE librarian. The Association contends that Ms. Vann, the most senior librarian, is being

improperly terminated from her librarian position and is entitled to bump Mr. Campos from the .4 FTE librarian position. Characterization of the retention of Ms. Vann and her reassignment to teach a 1.0 FTE of special education as a "termination" from her position as a librarian is inaccurate. Ms. Vann is not being terminated. She is being retained and reassigned. The details of the conflict with her reassignment and that of Mr. Campos is beyond the scope of these proceedings, which are to address only whether a senior person is being terminated from employment where a junior person is being retained to teach what the senior person is certificated to teach. Ms. Vann certainly has an arguable claim to the .4 FTE library assignment based on her seniority, but both Ms. Vann and Mr. Campos are being retained, and the District is vested with discretion to determine how to assign and reassign its employees after the decision to reelect them both has been made. This dispute is more appropriately addressed in a grievance, if the District does give the .4 FTE library assignment to Mr. Campos over Ms. Vann.

#### ART

44. Art teaching was reduced by the District by 5.0 FTE. Five employees received preliminary notices. Mr. Wadsworth is the most senior of the five receiving notice. He has a single subject credential in Art, and no other authorizations. One of the five art teachers has a single subject authorization in English. She is able to be reassigned. The other four, including Mr. Wadsworth, do not have any additional authorizations and cannot be reassigned.

45. The Association contends that the District failed to make all possible reassignments that would avoid laying off senior art teachers. The evidence was very muddled with respect to where Mr. Wadsworth might bump, if at all. This is the product of the fact that the District is laying off all its art teachers, from the most to the least senior. The Association sought to offer master schedule from certain school sites to demonstrate that there were art classes being offered in the current year being staffed by persons junior to the five art teachers given preliminary notices who were being retained. The evidence was excluded as irrelevant. Since the District is eliminating all its art classes, any such junior employees teaching art at any school will have to be reassigned. The only art teacher escaping the process has an additional authorization that allows her to teach in another non-art assignment. If the District offers Art in the upcoming school year, it may not employ any employee junior to Mr. Wadsworth to teach that subject.

#### INDUSTRIAL ARTS

46. Mr. Olcese has an Industrial Technology and Education single subject credential. His seniority date is September 3, 1991. He received a preliminary notice of layoff as part of the 2.0 FTE reduction in Industrial Arts teaching in the District. Mr. Garrison has the same credential and has a seniority date of September 7, 2004. Mr. Garrison teaches small engine technology at Rosemont High School. Mr. Garrison did not receive a preliminary notice. Mr. Olcese is competent and credentialed to teach the small engine technology class.

47. The District contends Mr. Garrison is a temporary employee as a matter of law and will be terminated along with the rest of the temporary employees. However, his name does not appear on the District list of temporary employees to be released that was prepared by the analysts. Testimony from Ms. Fong, one of the analysts, at the evidentiary hearing established that the small engine technology class is funded through the Regional Occupation Program (ROP), a categorical program. She testified that Mr. Garrison is classified by the District on the master seniority list as a second year probationary employee. There was no evidence he was included on the District's list or probationary nonreelects. There was no evidence where Mr. Garrison taught during his first year with the District. Mr. Garrison's contracts for the current and past school years were not offered in evidence. A certificated employee of the District who has been employed in the District's noncategorical teaching programs and then is assigned to teach in the ROP program is not subject to the provisions of Education Code section 44910, upon which the District relies. On this record, it cannot be determined whether Mr. Garrison was or was not employed in a District noncategorical position during his first year, or what his contract status was. It is apparent the District discovered the discrepancies with Mr. Garrison's status and records after the evidentiary hearing was concluded but before it filed its closing brief. The District did not prove enough facts to support its contention that Mr. Garrison is a temporary employee as a matter of law. The District's contention that Mr. Garrison is a temporary employee for the purposes of these proceedings fails for lack of evidentiary support.

48. However, it is apparent that there is no other position in the District into which Mr. Olcese may bump. The District has not committed to offering the small engine technology class in the upcoming school year, and does not yet know whether the ROP funding will be provided for the program. If the class is offered and the program is funded, Mr. Olcese must be assigned to teach it, as he is certificated and competent to teach it, and is more senior than any other District employee who is certificated to teach it who was not already assigned or reassigned. It appears Mr. Garrison will not be rehired, regardless of the final determination of his status.

#### AIRFRAME AND POWERPLANT MECHANICS AND LANDSCAPING

49. As briefly set forth above, the Association contended the layoffs of the 1.0 FTE for each of these two positions was inappropriate because the Resolution described the elimination of these services by the credentials of the employees staffing them. The contention lacks merit. There are instances where the description of the teaching service and the credentials required to teach it are similar, if not identical. This is particularly so in specialized vocational or technical subjects, such as these at issue. Although more care in finding a more artful fashion of describing the particular kind of service to be eliminated could have avoided this issue, there is no real issue regarding what service is being eliminated. Where 1.0 FTE of a highly specialized service is being eliminated and there is only one class of that service in the District, with one employee staffing it, a claim can always be made that the elimination of the service is really an elimination of the teacher. Such a claim requires additional proof that a particular teacher has been singled out for layoff



and that the elimination of the service is a pretext to eliminate the teacher. The claim is easily made but difficult to prove. It was not proved here.

50. Landscaping is a categorically funded program. The employee receiving the preliminary notice cannot displace any other person in the District. The employee teaching Airframe and Power Mechanics has a specialized credential and cannot bump any other employee.

## COUNSELING

51. The Association contended the layoff of counselors should have been a model for the determination of how elementary teachers were selected for receipt of preliminary notices. The analysts selected all counselors serving in the District, regardless of at what level, in any capacity and at any school, assembled the list and worked up from the least senior to the most in determining who got preliminary notices. The contention has considerable merit, and had the same process been followed with the elementary teachers as was with the counselors, a considerable amount of work and emotional upset with the employees might have been avoided. But the fact that the effectuation of the reduction in counseling in the District was performed efficiently and effectively does not affect the outcome of any issue here. There was some question raised regarding counselor Ms. Joseph. She was subject to a tie breaker analysis with another employee. The District noted that Ms. Joseph prevailed in the application of the criteria and will be retained.

## SOCIAL WORK; HOME ECONOMICS; AND ADULT SCHOOL TEACHING;

52. There was no evidence that the effectuation of the layoff of a corresponding number of certificated employee of the District necessitated by the Board's decision to reduce or eliminate social work services, home economics classes and adult school teaching was not accomplished appropriately.

## WELFARE OF THE DISTRICT AND ITS STUDENTS

53. Several of the Association's contentions suggest that the Board did not consider the welfare of District students in determining to reduce or eliminate the particular kinds of services set forth in Resolution #2447. To the extent the contention is actually advanced, it is not persuasive. The District must be solvent to provide educational services, and cost savings are necessary to resolve its financial crisis. The Board's decision was a proper exercise of its discretion.

54. Other than that set forth particularly above, the Assistant Superintendent's analysts correctly identified the certificated employees providing the particular kinds of services that the Board directed be reduced or discontinued. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render, unless skipped, as set forth above.

## LEGAL CONCLUSIONS

1. Jurisdiction for this proceeding exists pursuant to Education Code sections 44949 and 44955. All notices and other jurisdictional requirements of sections 44949 and 44955 were met.

2. A District may reduce services within the meaning of section 44955, subdivision (b), "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."<sup>2</sup> The burden is on the District to demonstrate that the reduction or elimination of the particular kinds of services is reasonable and that the District carefully considered its needs before laying off any certificated employee.<sup>3</sup>

3. Legal cause exists to reduce or eliminate 135.6 FTE of particular kinds of services offered by the District as set forth in detail in the Factual Findings. Cause for the reduction or discontinuation of services relates solely to the welfare of the District's schools and pupils, within the meaning of Education Code section 44949.

4. Legal cause also exists to accordingly reduce the number of certificated employees of the District due to the reduction and discontinuation of particular kinds of services. Cause exists to retain those credentialed and qualified to teach Special Education, English Language Learner and Bilingual Education, as set forth in Resolution #2448, regardless of seniority, and as set forth in the Factual Findings under the subheading "Skips."

5. 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 is filling that position.<sup>4</sup> Junior teachers may be given retention priority over senior teachers if the junior teachers possess superior skills or capabilities which their more senior counterparts lack.<sup>5</sup> Legal cause exists to permit certain respondents having appropriate credentials and competencies to "bump" into other existing District positions, as set forth in the Factual Findings, particularly those under the subheading "Bumps."

6. As set forth in Factual Findings 25 and 26, three persons identified as teaching elementary classes at the middle school level, all of whom have the same seniority date,

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<sup>2</sup> *Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.

<sup>3</sup> *Campbell Elementary Teachers Association v. Abbott* (1978) 76 Cal.App. 3d 796, 807-808

<sup>4</sup> *Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469, 474

<sup>5</sup> *Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399; *Santa Clara Federation of Teachers, Local 2393, v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831.

September 7, 2004, and all of whom appear to have only MS credentials, were overlooked for inclusion in the District's tie breaker analysis for elementary teachers having the same first day of service of September 7, 2004. These three persons did not receive a preliminary notice, but should have. It is not known whether any of these three have credentials and qualifications that would have resulted in scoring high enough when the analysts applied the tie breaker criteria to avoid the lottery. The District simply missed these employees, to the prejudice of the others who were identified and received preliminary notices. It is not the purpose of these proceedings to speculate what might have happened, had these three employees been identified and evaluated with all the others with the tie breaker criteria. It is also not the province of these proceedings to fix the errors that were inevitable and were identified by this process. The District must ultimately evaluate these three employees against the tie breaker criteria to determine their seniority relative to the 40 other persons with the same first day of paid service to the District. But for now, the preliminary notices issued to the corresponding number of remaining elementary classroom teachers still subject to layoff must be rescinded. Since the three from the middle school were not given preliminary notices, they are retained in any event.

7. Application of the tie-breaker criteria to certain respondent elementary teachers was inaccurate, as set forth in the Factual Findings under the subheading "Individual Respondents Subject to the Tie Breaker." Cause does not exist to issue a final notice of layoff to respondents Ms. Wenthe, Ms. DiSantis and Ms. Wehner. Preliminary notices of layoff issued to these three employees must be rescinded.

8. Cause does not exist to issue a final notice of layoff to the most senior of the respondent elementary teachers with seniority dates of September 7, 2004 still subject to layoff. That one respondent may bump into the pregnant minor program at the continuation high school. The District failed to produce evidence that Ms. Torres, who currently staffs the position, has special qualifications, credentials or experience that she should be skipped, as she is junior to the respondent elementary teachers being laid off. The District may still exercise its discretion to assign Ms. Torres to this valuable assignment. But it may not lay off a more senior and equally qualified teacher in order to accomplish that outcome.

9. Cause does not exist to rescind the preliminary notices issued to respondents Chaney, Wadsworth and Olcese. However, if the District offers ESL classes at the adult school or small engine technology in the ROP program or Art in any single subject classroom in the upcoming school year, these employees are entitled to be rehired and to staff these classes. At the present time, however, legal cause does not exist to retain any of these employees.

10. Other than the foregoing, no employee with less seniority than any respondent is being retained to render a service which any respondent is certificated and competent to render. Except as set forth above, the Board may give the remaining respondents whose preliminary notices have not been rescinded final notice before May 15, 2006, that their services are longer required by the District.

## ORDER


The Accusations against respondents Wenthe, DiSantis, Wehner and four of the most senior remaining elementary teacher respondents with a September 7, 2004 seniority date are **DISMISSED** and preliminary notices of layoff served on these respondents are **RESCINDED**.

Prior to issuing final notices of layoff to any of the six remaining elementary teachers with first day of paid service of September 7, 2004 and identified as still subject to layoff as a result of the tie breaker lottery, the District shall apply the tie breaker criteria set forth in Resolution #2448 to the three middle school teachers identified in this Decision to determine how they rank against the other teachers having the same seniority date, September 7, 2004, in accordance with the guidance set forth in Legal Conclusion 6. One or more preliminary notices of layoff may have to be rescinded and final notices of layoff not given, depending upon the results.

Notice shall be given to the remaining respondents before May 15, 2006, that their services will not be required because of the reduction or discontinuation of the 135.6 FTE of particular kinds of services.

All other contentions and claims not specifically mentioned were considered and are **DENIED**.

DATED: May 10, 2006

  
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STEPHEN J. SMITH  
Administrative Law Judge  
Office of Administrative Hearings