

BEFORE THE  
GOVERNING BOARD OF THE  
HEMET UNIFIED SCHOOL DISTRICT  
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

Certificated Employees Listed in Exhibit "A"  
  
Respondents.

OAH No. 2011030913

**PROPOSED DECISION**

Administrative Law Judge Vallera J. Johnson, State of California, Office of Administrative Hearings, heard this matter in Hemet, California on April 14, 2011.

William A. Diedrich, Esq., Mark W. Thompson, Esq., Atkinson, Andelson, Loya, Ruud & Romo represented LaFaye Platter, Deputy Superintendent, Human Resources.

Joyce E. Paul, Esq., Parker & Covert, LLP, represented Respondents Pam Alvarado, Ellen Burgess, Megan Haley, Paul Kankowski, all administrators.

Jon A. Vanderpool, Esq., Tosdal, Levine, Smith, Steiner & Wax, represented all other Respondents.

The matter was submitted on April 24, 2011.<sup>1</sup>

**SUMMARY OF PROPOSED DECISION**

The Board of Education of the Hemet Unified School District determined to reduce or discontinue particular kinds of services provided by teachers for budgetary reasons. The

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<sup>1</sup> The record remained open for receipt of briefs from the Deputy Superintendent and the Respondents who are administrators. On April 19, 2011, the Deputy Superintendent filed Memorandum of Points and Authorities Re Education Code section 44951 (Exhibit 21). Respondents Ellen Burgess, Megan Haley and Paul Kankowski filed Administrative Respondents' Brief on April 22, 2011, and it was marked Exhibit 22. On April 24, 2011, the Deputy Superintendent filed her Reply Brief, and it was marked Exhibit 23.

On April 24, 2011, the record was closed, and the matter was submitted.

decision was not related to the competency and/or dedication of the individuals whose services are proposed to be reduced or eliminated.

District staff carried out the Board's decision by using a selection process involving review of credentials and seniority, "bumping," competency and breaking ties between/among employees with the same first dates of paid service. The selection process was in accordance with the requirements of the Education Code.

## FACTUAL FINDINGS

1. Respondents listed in Exhibit "A" (Respondents) are certificated employees of the Hemet Unified School District (District).

2. On February 15, 2011, the District's Governing Board (Board) took action to reduce or eliminate particular kinds of certificated services and adopted competency criteria "for the purposes of bumping and reemployment", commencing the 2011-2012 school year; on January 18, 2011, the Board adopted criteria for resolving ties in seniority; on April 12, 2011, the Board amended the District's competency criteria.

3. On March 10, 2011, Dr. Steven Lowder, the Superintendent (Superintendent) designated LaFaye Platter, Ed.D., Deputy Superintendent - Human Resources (Deputy Superintendent), to act on his behalf in the certificated layoff proceeding, commenced by Board action on February 15, 2011.

4. No later than March 15, 2011, the Deputy Superintendent served Respondents with written notice that it had been recommended not to re-employ them in the 2011-2012 school year. The notice stated the reasons for the recommendation. In addition, the notice advised Respondents of the right to hearing, that the request for hearing must be delivered to the District's office no later than March 24, 2011, and that the failure to request a hearing would constitute waiver of the right to a hearing.

5. No later than March 15, 2011, the Deputy Superintendent served notice on permanent, probationary and temporary employees. In the notice, she stated, in pertinent part:

Inclusion of categorically funded services is not intended to grant those individuals who are impacted any rights greater than provided by law, nor to nullify any provisions within each impacted individual's employment contract, nor to supersede any other Resolution by this Governing Board to release or otherwise terminate the services of any impacted individual.

6. The Deputy Superintendent made and filed an Accusation for lay-off of certificated employees. She served each individual who submitted a Request for Hearing with an Accusation, form for a Notice of Defense, Notice of Hearing and related materials.

Respondents submitted a Notice of Defense. Some employees did not file a timely Request for Hearing and/or Notice of Defense.

7. All prehearing jurisdictional requirements were satisfied.

8. Prior to conclusion of the hearing, the District rescinded layoff notices issued to Respondents Toni Hunter, Frances Pratt, Mary Mikolayoik and Pamela Alvarado.

9. The District employs certificated teachers under Education Code section 44909 (categorical programs) and has released these temporary teachers.

10. On February 15, 2011, the Board adopted Resolution No. 2046B taking action to reduce or eliminate the following particular kinds of certificated services, commencing 2011-2012 school year as follows:

Elementary (K-5) Classroom Teaching Services	45	F.T.E.
Middle School Core Teaching Services	5	F.T.E.
Nursing Services <sup>2</sup>	3	F.T.E.
High School Librarian Services	2	F.T.E.
High School Geography Teaching Services	5	F.T.E.
High School Behavioral Health Teaching Services	4	F.T.E.
Counseling Services	3.5	F.T.E.
Subtotal	67.5	F.T.E.
<b>Categorically Pooled temporary services as follows:*</b>		
Self Contained 6 <sup>th</sup> Grade Classroom Teaching Services	1	F.T.E.
Middle School Core Teaching Services	1.8	F.T.E.
Middle School Science Teaching Services	3.2	F.T.E.
High School Physics Teaching Services	.2	F.T.E.
High School Earth Science Teaching Services	.2	F.T.E.
High School Chemistry teaching Services	1.2	F.T.E.
High School Physical Education Teaching Services	1	F.T.E.
Middle School Math Teaching Services	1	F.T.E.

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<sup>2</sup> Subsequent to the adoption of Resolution No. 2046B, the Board adopted a resolution removing nursing services from the services to be reduced or eliminated. Respondents Toni Hunter, Frances Pratt and Mary Mikolayoik are the nurses originally identified for layoff. When the District took action to remove nursing services from the services to be reduced or eliminated, the District dismissed the Accusation as to these Respondents. Pamela Alvarado is an administrator.

Directed Study Teaching Services	.63	F.T.E.
High School Social Science Teaching Services	2.2	F.T.E.
Middle School Social Science Teaching Services	1.4	F.T.E.
Middle School English Teaching Services	.6	F.T.E.
High School Math Teaching Services	1.0	F.T.E.
Nursing Services	.2	F.T.E.
School Psychologist Teaching Services	1.0	F.T.E.
High School intervention Foundation Teacher	.8	F.T.E.
Elementary (K-5) Classroom Teacher	1.0	F.T.E.
Subtotal	18.43	F.T.E.
<b>Total</b>	<b>85.93</b>	<b>F.T.E.</b>

The proposed reductions totaled 85.93 full-time equivalent (FTE) positions.

11. The District's Deputy Superintendent was responsible for implementing the technical aspects of the layoff. She developed a seniority list for probationary and permanent certificated employees who received preliminary notice of layoff. It included, among other matters, the teacher's name, seniority date, tie-breaker number (if applicable), status, site, assignment (subject/grade) and credential(s).

The seniority date was based on the first date of paid service rendered in a probationary position.<sup>3</sup> A teacher hired as a probationary employee who worked as a substitute or temporary employee for at least 75 percent of the school days during the previous year and who had performed the duties normally required of a certificated employee of the District was deemed to have served a complete school year as a probationary employee if that individual was employed as a probationary employee the following school year. The individual was entitled to have that earlier year counted as a year of probationary service. The prior year was "tacked" on for seniority purposes but only one year could be tacked.<sup>4</sup>

12. The District used the seniority list to develop a proposed order of layoff list to determine the least senior employees currently assigned in the various services being reduced. Then, the District determined whether those employees held credentials in another area that would entitle them to "bump" other junior employees. In determining who would be laid off for each kind of service reduced, the District counted the number of reductions and determined the impact on incumbent staff in inverse order of seniority. Then, the District checked the credentials of affected individuals and whether they could "bump" other

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<sup>3</sup> Education Code section 44845

<sup>4</sup> Education Code section 44918

employees, considering the District's "competency" criteria established by the Board in its resolution, which states, in pertinent part:

.... (1) possession of a valid credential in the relevant subject matter area; (2) "highly qualified" status under the No Child Left Behind Act in the position into which the employee is bumping/being reemployed; (3) an appropriate EL authorization (if required by the position); (4) at least one (1) year of experience in the position or assignment within the last five (5) years; and (5) special training and experience necessary to meet the job requirements of positions containing specialized assignments (such as Athletic Directors, Activities Directors, Teachers on Special Assignment, AVID teachers, AdvancePath Academy teachers and Academic Coaches).

On April 12, 2011, the Board adopted Resolution No. 2058 (Resolution Authorizing District Staff to Strike Competency Requirement D, Item 4 from Resolution 2046B) and removed competency criterion (4) "at least one (1) year of experience in the position or assignment within the last five (5) years."

13. Some employees named as Respondents have the same seniority date. In compliance with Education Code section 44955, subdivision (b), in order to determine the order of termination of employees with the same seniority date, in Resolution No. 2038, dated January 18, 2011, the Board adopted "Resolution To Adopt Criteria For Resolving Ties In Seniority Related to Certificated Layoffs." According to the evidence in the record, the District properly applied this tie breaker criteria to rank employees hired on the same date; under these criteria the District properly retained certain employees while Respondents were properly given notice that their services would no longer be required for the ensuing school year.

14. Respondents Janel Ramirez (Respondent Ramirez), Casie Husby (Respondent Husby) and Hugo Gorosave (Respondent Gorosave) assert that they were improperly identified for layoff. Each testified regarding the specific reasons. However, none of these Respondents identified a person more junior who is being retained to perform a service she/he is certificated and competent to perform. None of these Respondents established that the District abused its discretion or otherwise acted arbitrarily in issuing a layoff notice to her/him. Insufficient evidence was offered to establish that Respondents Ramirez, Husby and Gorosave were improperly identified for layoff.

15. Respondent Matthew Pailles (Respondent Pailles) contends that employees who are junior to him are being retained to perform services he is credentialed and competent to perform.

Respondent Pailles' seniority date is March 5, 2007. During second semester, he taught at Hemet Academy for Applied Academics and Technology (HAAAT); according to

the District's seniority list, under credential, it states "Multiple Subject (exam) SB2042" and assignment "1-Computer Lab, 1-Algebra, 1-Math, 2-English and 1-PE;" he testified that the seniority list was erroneous in that he is no longer teaching Computer Lab or Algebra but is teaching World History; he stopped teaching Computer Lab at the semester break, presumably after first semester.

Respondent Pailes argued that he is credentialed and competent to teach Language Arts, a service Emily Hulstrom, a more junior employee is being retained to perform. He does not hold a credential to teach English; he testified that since HAAAT is a charter school, "it is not necessary to have a credential in any subject that is not written into the charter as being necessary to teach that subject." He has 17 units in English and asserts that this would entitle him to a board waiver or authorization. He offered no documentary evidence to support his testimony about the contents of the school charter or to establish that he has a board waiver or authorization to teach language arts or that he is credentialed to do so.

Darlene Marcus (Marcus) bumped .2 Computer Lab of Respondent Pailes position. Her seniority date is August 21, 2002; regarding her credential and assignment, the seniority list states "Single Subject (Health Science) Ltd. Assign, PE, CLAD." No evidence was offered to establish that she is credentialed to teach Computer Lab. Further, the Deputy Superintendent testified that the District considered second semester assignments (those identified prior to March 15, 2011) in determining bumping in the layoff. The District offered no evidence to rebut Respondent Pailes' testimony that he was not assigned to teach computer lab during second semester.<sup>5</sup> Given the foregoing, the District improperly allowed Marcus to bump .2 Computer Lab of Respondent Pailes position. If the District retains Darlene Marcus to perform this service, Respondent Pailes is entitled to retention for .2 FTE.

16. Respondents Ellen Burgess (Respondent Burgess), Megan Haley (Respondent Haley)<sup>6</sup> and Paul Kankowski (Respondent Kankowski) are assigned to provide administrative services (principal and assistant principal) for the District for the 2010-2011 school year. They argue that because they did not receive a written notice of release and reassignment pursuant to Education Code section 44951, they are not subject to the present layoff pursuant to Education Code sections 44949 and 44955.

On February 15, 2011, separate from Resolution No. 2046B (Finding 10), in closed session, the District's Governing Board adopted Resolution No. 2058 and thereby took action

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<sup>5</sup> The Deputy Superintendent testified that determinations regarding which certificated staff to layoff were based on second semester assignments.

<sup>6</sup> For the 2010 – 2011 school year, the District employed Respondent to perform .50 assistant principal duties and .50 teaching third grade students (described as non-instructional duties). Respondent Haley challenges her layoff only as to the administrative services that she provided; she does not challenge the layoff based on her assignment to perform non-instructional duties.

“to release” certain “administrative employees from their positions and reassign them to the classroom pursuant to Education Code section 44951, effective at the end of the 2010-2011 school year and directed the Superintendent or designee to send appropriate legal notices to them”. Based on the employee numbers identified in this resolution, Respondents Burgess, Haley and Kankowski were among the administrators so identified.

Prior to March 15, 2011, the Deputy Superintendent orally advised Respondents Burgess, Haley and Kankowski that he/she was being released from his/her administrative duties for the 2011/2012 school year. In addition, prior to March 15, 2011, the District served these Respondents with written Notice of Recommendation that Services will not be Required, the Reduction of Particular Kinds of Certificated Services (Resolution No. 2046B), the Notice of Accusation and the other documents served on certificated teachers. Respondents Burgess, Haley and Kankowski filed timely Requests for Hearing and Notices of Defense.

The “March 15 preliminary notice” served on these Respondents recommended a reduction or discontinuance of a particular kind of service but did not designate a category of services that applied to Respondents Burgess, Haley and Kankowski’s administrative assignments as principals and assistant principals. Respondents testified that when they reviewed their preliminary notice of layoff and accusation, they did not think it applied to them because their administrative services were not identified in the particular kinds of services. They testified that they were confused as to why their services were not listed and what the notice actually meant.

The District identified Respondents as subject to the particular kind of services layoff under “Elementary (K-5) Classroom Teaching Services.” Respondents Burgess, Haley and Kankowski’s current assignments are administrative services (principal and assistant principal), not classroom teaching services.

The parties stipulated and agreed to the accuracy of the seniority date for each of these Respondents (Exhibit 13) and placement within the layoff as reflected in the District’s bump analysis (Exhibit 16).

17. Education Code section 44951 describes the procedure that the District must follow in order to release an administrator from a position that requires an administrative credential; the statute does not entitle the administrator to a hearing regarding this release and reassignment. An administrator attains no tenure and serves at the pleasure of the appointing power. (*Hentschke v. Sink* (1973) 34 Cal.App.3d 19, 22.)

The Board authorized the District to release and reassign certain administrators to the classroom, including Respondents Burgess, Haley and Kankowski. The evidence will not support a determination that the District followed this procedure required by Education Code section 44951. These Respondents did not receive written notice of the release and reassignment to the classroom pursuant to Education Code section 44951 by March 15. Without reassigning Respondents Burgess, Haley and Kankowski to the classroom for the

2011 – 2012 school year, the District laid these Respondents off under the category “Elementary K-5 teaching positions”. The District did not establish that these Respondents may be laid off for a reduction in elementary classroom teaching services based on their possession of credentials authorizing them to provide those services, regardless of assignment.

Given the facts in the Findings 15 and 16, pursuant to Education Code section 44955, subdivision (c), Respondents Burgess, Haley and Kankowski are entitled to be re-employed as administrators for the 2011 – 2012 school year.

18. The services that the District proposed to reduce were “particular kinds of services” that can be reduced or discontinued within the meaning of Education Code section 44955. The Board’s decision to reduce or discontinue these particular kinds of services was not arbitrary or capricious but constituted a proper exercise of discretion.

19. The District’s reduction or elimination of particular kinds of services related to the welfare of the District and its pupils. The reduction or elimination of particular kinds of services was necessary to decrease the number of certificated employees of the District as determined by the Board.

20. No certificated employee junior to any Respondent has been retained to perform services that any Respondent was certificated and competent to render.

## LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in these sections are satisfied.

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.” (*Rutherford vs. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)

3. Cause exists under Education Code sections 44949 and 44955 for the District to reduce or discontinue particular kinds of services. The cause for the reduction or discontinuance of particular kinds of services is related solely to the welfare of the schools and the pupils thereof.

4. As reflected in case law, categorically funded teachers are treated like temporary employees. (*Zalac v. Ferndale Unified School District* (2002) 98 Cal.App.4<sup>th</sup> 838, 840-841 [A kindergarten teacher’s first two years of employment was as a temporary employee in a categorically funded program pursuant to Education Code section 44909].) In



*Bakersfield Elementary Teachers Association v. Bakersfield City School District* (2006) 145 Cal.App.4<sup>th</sup> 1260, the Court of Appeal found that teachers in categorically funded positions “are treated in much the same way [as temporary employees] in that they may be dismissed without the formalities required for probationary and permanent employees in the event the program expires or is terminated, and their service does not count toward acquiring permanent status (unless they are reemployed the following year in a probationary position).” Here, there is no evidence that the categorical programs have expired. However, the *Bakersfield* Court, citing *Zalac*, noted the purpose of Education Code section 44909 was “to prevent a person from acquiring probationary status solely through teaching in a categorically funded program. This permits the hiring of qualified persons for categorically funded programs of undetermined duration without incurring responsibility to grant tenured status based on such teaching services alone.’ [Citation.] The section ‘was intended to give school districts flexibility in the operation of special educational programs to supplement their regular program and to relieve them from having a surplus of probationary or permanent teachers when project funds are terminated or cut back.’ [Citation.]” (*Bakersfield Elementary Teachers Association v. Bakersfield City School District*, *supra*, 145 Cal.App.4<sup>th</sup> 1260, 1286.) To characterize categorically funded Respondents as probationary employees would be contrary to that purpose. (See also *Haase v. San Diego Community College District* (1980) 113 Cal.App.3d 913 [for additional support through analysis of a certificated employee in a categorically funded position in a community college district not found to be a probationary employee].)

5. Furthermore, in Education Code section 44909, the Legislature directed categorically funded employees who replace other teachers to be subject to the provisions of Education Code section 44918, but “without regard to other requirements of this code respecting the termination of probationary or permanent employees.” This direction provides further support for the conclusion reached here, that categorically funded employees are treated as temporary employees.

6. Thus, in this case, the Respondents in categorically funded programs are temporary employees. The District may dismiss them in the manner the law allows regarding temporary employees. It is noted that the District served these Respondents with the jurisdictional documents and provided them the opportunity to participate in the instant hearing. These Respondents participated in the hearing to the fullest extent possible, as if probationary employees. Had the administrative law judge concluded that categorically funded Respondents were probationary, they would have been entitled to the hearing that was had and in which they participated.

7. A senior teacher whose position is discontinued has the right to transfer to a continuing position that he/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. (*Lacy vs. Richmond Unified School District* (1975) 13 Cal. 3d 469.)

8. The District has the discretion to determine whether teachers are certificated and competent to hold the position for which said teachers have been skipped and retained.

(*King v. Berkeley Unified School District* (1979) 89 Cal.App.3d 1016) Junior teachers may be given retention priority over senior teachers if the junior teachers possess superior skills or capabilities that their more senior counterparts lack. (*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).

9. The District established cause to not reemploy Respondents for the ensuing school year and Respondents did not establish facts or sufficient legal argument to the contrary.

11. No employee with less seniority than any Respondent is being retained to perform a service that any Respondent is certificated and competent to render.

12. All arguments not addressed herein are not supported by the evidence and therefore rejected.

#### ORDER

1. The Accusation against Respondents Toni Hunter, Frances Pratt and Mary Mikolayoik is dismissed.

2. If Darlene Marcus is retained to perform .2 FTE Computer Science, Respondent Matthew Pailes is entitled to be retained .2 FTE.

3. The Accusation against Respondents Ellen Burgess, Megan Haley and Paul Kankowski is dismissed.

3. Except as provided in paragraphs 1, 2 and 3 of this Order, the Accusation served on Respondents listed on Amended Exhibit "A" is sustained. Notice shall be given to these Respondents before May 15, 2011 that their services will not be required for the 2011-2012 school year because of the reduction or discontinuance of particular kinds of services.

DATED: \_\_\_\_\_

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VALLERA J. JOHNSON  
Administrative Law Judge  
Office of Administrative Hearings

# HEMET UNIFIED SCHOOL DISTRICT

## AMENDED EXHIBIT “A”

AJA	KAREN	
AYOTTE	PATRICIA	
BEGA	FAIZA	
BETTS	DANIEL	
BROGAN	SUSANNE	
BURNETT	JACQUELINE	
CADLE	ANNA	
CARR	ERIN	
CAWTHON	AZURE	
CIAMPA	STACY	
CRAIN	BREANN	
DEEMY	JAMIE SUE	
DOHERTY	VALRIE	
ENSMINGER	MARK	
FARLEY	KRISTINE	
FINALE	RODOLFO	
FORD	LEZLI	
GOROSAVE	HUGO	.6 RED.
GRAY	KIMBERLY	
GREEN	FRANK	
HALEY	MEGAN	.5 RED
HALLBERG	CHELSEY	
HARRILL	KARISSA	.9 RED.
HILL	FELICE	
HOLSAPPLE	DUSTIN	
<del>HUBER</del>	<del>SUZANNE</del>	
HULSTROM	EMILY	.8 RED.
HUSBY	CASEY	
JENNINGS	TESSA	
KILLIEN	KRISTINA	.2 RED.
KNIPPLE	STEPHANIE	

LANNAMANN	JACQUELINE	
LEWIS	CAROL	
LOPEZ	MYRNA	
LOWE	BRIDGET	
LUNA	JASON	
MERCER	DARLENE	
MILLER	CRAIG	.4 RED.
MOORE	STACEY	
MUIZELAAR	TAMARA	
NORD	ERIC	
ORTIZ	AMELIA	
PAILES	MATTHEW	.2 RED.
PERSEK	DAWN	
PHAM	ERIKA	
POLLOCK	AMBER	
PRIEFER	BRENNEN	
RAMIREZ	JANEL	
ROMERO	PAULA	
ROMERO	JOSEPH	
ROWE	MEGAN	
SANCHEZ	KARI	
SPRAGG	JASON	.6 RED.
STRAWTER	BRIAN	
TRENCH	LAWRENCE	
TRENCH	BECKY	
VILTE	HORACIO	
VOSS	KRISTIN	
WELLS	BRENT	.4 RED.
WILSON	RUDY	.5 RED.
WINBERG	LISA	
WOLF	CHARLES	.2 RED.
WOOD	KRISTIN	

ADAMS	JESSICA
ANDREWS	HYRUM
CARPENTER	JENNIFER
CONANT	TAMMY
GALLIANO	AMANDA
GAONA-WILSON	ESTHER
HOOK	BRIAN
HYLAND	MARVA
JENKINS	LADAWN
KIRKENDALL	DAVID
LEES	DALE
LOPEZ	LOUISA
MASOUD	SHALABY
MAZZA	SUZETTE
NORMAN	CODY
ROBINSON	KRYSTINA
RUIZ	JESSICA
SIMPSON	LESLIE
SNOW	MELISSA
TRINH-ROSELI	JESSICA
VAN RYN	JANIE
WALDEN	ROBERT
WILLIAMS	ANDRE

# HEMET UNIFIED SCHOOL DISTRICT

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CAWTHON	AZURE	
CIAMPA	STACY	
CRAIN	BREANN	
DEEMY	JAMIE SUE	
DOHERTY	VALRIE	
ENSMINGER	MARK	
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WILSON	RUDY	.5 RED.
WINBERG	LISA	
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