

BEFORE THE  
BOARD OF TRUSTEES  
DRY CREEK JOINT ELEMENTARY SCHOOL DISTRICT  
PLACER COUNTY, CALIFORNIA

In the Matter of the Accusations Against:

ROBERTA BLYNN  
AMBERLY BRANSON  
ALLISON CARTER  
JENNIFER CHIESA  
CORRINNE CLAY  
FRANCISCA DIAZ  
SUZETTE DOCHERTY  
MELISSA DURRANS  
KIMBERLY EMMERICH  
KARMJEET FISHBURN  
LAUREN HAMILTON  
MELISSA HANSEN  
THERESA HARRISON  
DANIELLE LAUER  
MELANIE MACLEAN  
CLARE MACLEOD  
TUESDAY MAHLBERG  
MARLA MION  
KATHERINE O'SULLIVAN  
BRANDI PAYNE  
NANCY RIEBEEK  
JENNIE RUVALCABA  
MATTHEW SEPAROVICH  
KRISTI SEPAROVICH

Respondents.

OAH No. 2012030295

**PROPOSED DECISION**

This matter was heard before Rebecca M. Westmore, Administrative Law Judge, Office of Administrative Hearings, State of California, on April 20, 2012, in Roseville, California.

Thomas E. Gauthier, Attorney at Law, Lozano Smith, represented the Dry Creek Joint Elementary School District.

Michael N. McCallum, Attorney at Law, Law Office of Michael N. McCallum, represented the respondents.

Evidence was received and the parties offered oral closing arguments. The record was then closed, and the matter was submitted for decision on April 20, 2012.

## PRELIMINARY MATTERS

### *Rescissions*

1. Pursuant to stipulation, the district rescinded respondent Nancy Riebeek's "Notice of Recommendation that Services Will Be Terminated" (Preliminary Notice) on 3/19/12, and respondent Kimberly Emmerich's Preliminary Notice on 3/21/12.

### *Tuesday Mahlberg*

2. Pursuant to stipulation, the parties agreed to amend the district's records to reflect that respondent Tuesday Mahlberg is highly qualified, pursuant to No Child Left Behind (NCLB), in Language Arts and History.

## FACTUAL FINDINGS

1. Mark Geyer is the Superintendent of Dry Creek Joint Elementary School District (district). Colleen Slattery is the Director of Personnel Services. The district serves a total of 7,000 students in one preschool, four transitional Kindergarten schools, four elementary schools, and two middle schools. The district employs 325 certificated employees, 175 classified employees, and 50 campus supervisors. Ms. Slattery's duties include recruitment, employee discipline, negotiations, workers' compensation, credentials, authorizations, and wellness. She is also designated as the district's custodian of records.

2. The actions of Superintendent Geyer, Director Colleen Slattery, and those of the district's staff and governing body, the Board of Trustees (board), were taken solely in their official capacities.

3. The district is facing a budget shortfall for the 2012-2013 school year of approximately \$1 million.

4. On March 1, 2012, the board adopted Resolution No. 2012-02, reducing or eliminating particular kinds of services (PKS) of the district, affecting 23.3 Full Time Equivalent (FTE) certificated positions.

5. The Resolution states that it will be necessary to reduce the following PKS of the district, and to decrease a corresponding number of certificated employees in the district not later than the beginning of the 2012-2013 school year:

<b>SERVICE</b>	<b>F.T.E.</b>
Teacher – Reading Resource/English Language Learner	6.0
Teacher – 4/5 Science	0.3
Teacher – Elementary	13.0
Teacher – Middle School: Language Arts	3.0
Teacher – Middle School: Social Science	1.0
Total	23.3

6. As a result of the above PKS reductions and/or eliminations, the board determined that it was necessary to decrease 23.3 FTE positions for certificated employees in the district at the close of the 2011-2012 school year, in accordance with Education Code section 44955.<sup>1</sup>

7. On March 2, 2012, Superintendent Geyer timely served a Preliminary Notice on each of the permanent and probationary certificated employees affected by the PKS reductions and/or eliminations set forth in the Resolution. The Preliminary Notice advised that it had been recommended to the board that the recipient be given preliminary written notice that his/her services might not be required for the 2012-2013 school year, due to reductions in PKS.

8. On March 8, 2012, Superintendent Mark Geyer gave the board written notice that he had given notice to respondents that their services would not be required for the ensuing school year, and the reasons therefor.

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<sup>1</sup> All further statutory references are to the California Education Code unless otherwise indicated.

9. All the respondents in this action timely filed a Request for Hearing to determine whether there was cause for not reemploying them for the 2012-2013 school year.

10. On March 23, 2012, Superintendent Geyer made and filed the Accusation, and caused it to be served on respondents. All of the respondents timely filed a Notice of Defense requesting a hearing in this matter.

#### *Implementation of Layoff Procedure*

11. In anticipation of the PKS reduction, Superintendent Geyer and his staff began updating the district's seniority list. On January 6, 2012, Director Slattery posted the seniority list at all work locations, and sent the seniority list to the teachers to allow them to report inaccurate information and request corrections to their first date of paid service and credentials on or before February 23, 2012.

12. Director Slattery identified the individuals serving in the positions affected by the PKS reductions. She then used the updated seniority list to identify vacant positions and to identify the least senior persons occupying the positions affected by the PKS reductions. Director Slattery took into account known attrition and existing vacancies.

13. When the least senior persons occupying the positions affected by the PKS reductions were identified, Director Slattery looked at each individual's credentials to determine whether he or she could displace any less senior certificated employees. On March 2, 2012, district staff served the Preliminary Notices identified in Factual Finding 7, on the most junior employees affected by the PKS reduction.

#### *Employee Classification - Melissa Durrans*

14. Melissa Durrans first rendered paid service to the district on 8/6/07. Ms. Durrans was laid off at the end of the 2010-2011 school year. Director Slattery confirmed that Ms. Durrans was a permanent employee of the district prior to her layoff in 2011. On Friday, August 5, 2011, Director Slattery contacted Ms. Durrans by telephone and offered to rehire her as a temporary 1.0 FTE Kindergarten teacher for the 2011-2012 school year.<sup>2</sup> Later that day, Director Slattery again contacted Ms. Durrans by telephone to explain the nature of the temporary full-time elementary teaching position. On Monday, August 8, 2011, the district typed up a Temporary/Categorical Employment Contract (Contract) for Ms. Durrans' 1.0 FTE Kindergarten teaching position at Antelope Meadows School, and placed it in the intra-district mail. According to Director Slattery, the inter-district mail is delivered on a daily basis by a

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<sup>2</sup> The 2011-2012 school year began on Tuesday, August 9, 2011 and will end on Thursday, June 7, 2012.

bus driver using a “bucket route” from the district office to all the district’s school sites. Once the mail is delivered to each school site, it is then distributed to the teachers’ mailboxes. Director Slattery contends that the latest the Contract would have been delivered to Ms. Durrans’ mailbox was Tuesday, August 9, 2011. At hearing, Director Slattery admitted that “I truly could not say since her signature was after the start of school that she in fact on August 9 went to her mailbox and received it.”

15. Ms. Durrans accepted, signed and returned the employment contract to the district office on August 15, 2011. She maintains that she should be classified as a permanent employee because she did receive notice of her temporary employment status until after she began her teaching assignment in the 2011-2012 school year.

16. The district served Ms. Durrans with a precautionary layoff notice, pursuant to Education Code section 44916.<sup>3</sup>

17. In *Kavanaugh v. West Sonoma County Union High School District* (2003) 29 Cal.4th 911, a teacher filed a petition for a writ of mandate, alleging that the district had a duty to classify her as a probationary employee pursuant to Education Code section 44916 because it had failed to provide her with timely written notice that she was only a temporary employee. The Supreme Court determined that: Section 44916 thus mandates that a school district comply with three requirements if it desires to hire a certificated employee as a temporary employee: it must (a) notify the employee of his or her salary and status as a temporary employee; (b) do so in a written notice; and (c) give such notice “[a]t the time of initial employment.” The Court determined that the time the notice was provided to a new certificated employee was crucial:

As we have seen, the time of classification is important in determining a teacher’s rights to reelection and promotion, if

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<sup>3</sup> Education Code section 44916 provides that “[t]he classification shall be made at the time of employment and thereafter in the month of July of each school year. At the time of initial employment during each academic year, each new certificated employee of the school district shall receive a written statement indicating his employment status and the salary that he is to be paid. If a school district hires a certificated person as a temporary employee, the written statement shall clearly indicate the temporary nature of the employment and the length of time for which the person is being employed. If a written statement does not indicate the temporary nature of the employment, the certificated employee shall be deemed to be a probationary employee of the school district, unless employed with permanent status.”

any, and to determining the level of procedural protections to which a teacher is entitled should he or she be dismissed or nonreelected. Because section 44916 places the burden on the governing boards of school districts to inform teachers of their classification and salary, and enforces this burden with a default classification that benefits teachers, we conclude the Legislature's intent and purpose in enacting section 44916 was to benefit teachers. Stated differently, section 44916 reveals the Legislature's intent that certificated teachers be informed of their classification at a time that is sufficiently early in the process to enable them to make informed decisions regarding their future employment.

The Court held that because Ms. Kavanaugh did not receive such notice on or before her first day of paid service, she was not given written notice of her status as a temporary employee "at the time of [her] initial employment." Accordingly, the Court determined that, pursuant to section 44916, she must be considered a probationary employee as a matter of law.

18. In this case, the district established that Ms. Durrans was contacted by Director Slattery on Friday, August 5, 2011 regarding the temporary 1.0 FTE Kindergarten teaching position. However, no evidence was presented to establish that Ms. Durrans actually received notice of her employment status prior to the first day of school on Tuesday, August 9, 2011. Director Slattery admitted that although Ms. Durrans' Contract was typed up and placed in the intra-district mail on August 8, 2011 and delivered no later than August 9, 2011, she could not be sure that Ms. Durrans actually received the contract on August 9, 2011. The district has the burden of establishing that Ms. Durrans received actual notice of her status as a temporary employee at the time of her employment. The district has not met that burden. Under the rationale of *Kavanaugh*, Ms. Durrans would ordinarily be classified as a probationary employee pursuant to Education Code section 44916. However, Ms. Durrans achieved permanent status with the district prior to her layoff in 2011. Therefore, Ms. Durrans remains a permanent employee of the district with a seniority date of 8/6/07. Having been released from her 2011-2012 temporary contract with the district, and served with a precautionary layoff notice, Ms. Durrans is subject to layoff.

#### *Reduction of 6.0 FTE Reading Resource/English Language Learner Teachers*

19. The district has reduced 6.0 FTE Reading Resource/English Language Learner (ELL) teachers for the 2012-2013 school year. Respondents contend that because the district is not reducing ELL services in the 2012-2013 school year, it has failed to firmly establish how it intends to provide those mandated services in the 2012-2013 school year with six fewer teachers, and therefore must rescind the

preliminary notices issued to the five most senior teachers in the district, and the most senior English teacher in the district.

20. Director Slattery contends that certificated teachers who hold a Cross-Cultural, Language and Academic Development (CLAD) authorization, or its equivalent, can teach ELLs. According to Director Slattery, with the exception of the Speech Pathologist, all the district's certificated classroom teachers hold a CLAD, or equivalent, authorization. And, while the district has not developed the Master Schedule for the 2012-2013 school year, the district contends it will have no difficulty providing ELL services for its ELL students.

21. As all of the district's certificated classroom teachers hold a CLAD authorization, or its equivalent, the district established that despite the reduction of 6.0 FTE Reading Resource/English Language Learner teachers, it is able to continue to provide mandated ELL services to its ELL students in the 2012-2013 school year.

#### *Competency Criteria*

22. In Resolution No. 2012-02, the board defined "competency" for the purposes of Education Code sections 44955, 44956 and 44957 as follows:

Retain certificated employees that are needed to teach a course for which they hold a credential, certificate, or other authorization that other teachers with more seniority do not possess.

#### *Individual Challenge to the Application of the Competency Criteria*

23. The respondent adversely affected by the competency criteria has been teaching a subject, and, because of the resolution reducing her services, wishes to exercise her right to displace junior employees. The junior employees are teaching a different subject that the senior teacher believes she is certificated and competent to teach. When the competency criteria were applied to the senior teacher, Allison Carter was deemed not credentialed or competent to bump junior teachers Kristi Edmonson or Nathalie Paiva.

#### *Allison Carter*

24. Allison Carter has a seniority date of 7/27/05. She holds a Single Subject Credential in English with AB 1059 Content. She teaches eighth grade English at Creekview Ranch School, and is being laid off 1.0 FTE pursuant to the board's reduction of 6.0 FTE Reading Resource/English Language Learner teachers. Ms. Carter maintains that she can bump Kristi Edmonson and Nathalie Paiva who are being retained to teach social science in the 2012-2013 school year. Kristi Edmonson has a seniority date of 7/26/06. She holds a Multiple Subject Credential,

Supplementary Authorization in Physical Education (PE), and EL Authorization, and is authorized to teach Middle School Science, pursuant to Education Code section 44256, subdivision (b). Ms. Edmonson teaches three courses in science, one course in social science and one course in exploratory science at Creekview Ranch School. Nathalie Paiva has a seniority date of 8/5/05. She holds a Multiple Subject Credential, Supplementary Subject Matter Authorization in Biological Sciences, and EL Authorization. She teaches three courses of science and one course of social science at Silverado Middle School. Ms. Carter contends that she passed the California Subject Examinations for Teachers (CSET) Exam in 2006, and with the exception of one year, has taught social studies in the district every year since 2005, and therefore is “qualified to teach social science.” The district did not permit Ms. Carter to bump into either of these teaching positions because she is not credentialed, certificated or authorized to teach social science.

25. Ms. Carter holds a holds a Single Subject Credential in English with AB 1059 Content. She is seeking to bump junior teachers who hold Multiple Subject Credentials and are authorized to teach social science in middle school. Although Ms. Carter has passed the CSET Exam and has taught social science for six years in the district, her accomplishment and experience do not authorize her to teach social science. The district may reasonably require that one seeking to bump a junior social science teacher hold a credential, certificate or authorization to teach the subject matter. Ms. Carter does not possess the appropriate subject area credential, certificate or authorization to teach social science, and therefore cannot bump Kristi Edmonson or Nathalie Paiva.<sup>4</sup>

#### *Positively Assured Attrition*

26. Gregory Motarjeme is a certificated employee of the district, and President of the Teachers Association (Association). At hearing, Mr. Motarjeme testified that on January 19, 2012, the Association and the district agreed to send notices to affected teachers to offer them an opportunity to sign up for early retirement. According to Mr. Motarjeme, five teachers submitted their applications for early retirement. Mr. Motarjeme contends, however, that the district had its plan in place to reduce 23.3 FTE PKS reductions prior to the finalization of these early retirements and therefore failed to consider these five early retirements prior to approving 23.3 FTE reductions of certificated employees. Mr. Motarjeme believes that the district must now rescind five preliminary notices as a result of these five retirements.

27. Director Slattery asserted that at its meeting on March 1, 2012, the board considered the five early retirements in determining the PKS reductions, even

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<sup>4</sup> Allison Carter also alleged at hearing that she can job-share with Kristi Edmonson and Nathalie Paiva. However, given the fact that Ms. Carter is not credentialed, certificated or authorized to teach social science, this issue is moot.



though the retirements had not yet been approved. However, according to Director Slattery, only two of those retirements involved teachers holding multiple subject credentials. Director Slattery asserted that the district did not reduce the 23.3 FTE PKS reductions as a result of those two retirements because the district also had to consider Kindergarten enrollment, and inter- and intra-district transfers, which are “on-going.” Of the three remaining retirement applications, Director Slattery, asserted that they involved teachers who taught subjects that were not selected for PKS reduction, and therefore the board did not reduce the 23.3 FTE PKS reductions as a result of those three retirements.

28. The board considered five retirements when it resolved to reduce or eliminate PKS, and opted not to reduce the number of PKS reductions due to projected declining Kindergarten enrollment and inter- and intra-district transfers, and because three of the retirements involved teachers who taught subjects that were not selected for PKS reduction. As the proponent of the argument that the district failed to consider these retirements prior to its issuance of the preliminary notices of layoff, the burden rests with Mr. Motarjeme to show that these retirements were positively assured. Mr. Motarjeme has not met that burden. No evidence was presented to establish that the board approved these retirements prior to the district’s issuance of the Preliminary Notices. Nor did Mr. Motarjeme present evidence to establish that three of the retirements were from teachers who taught subjects that the district selected for reduction or elimination. Finally, no authority was cited for the proposition that the district is required to reduce the number of PKS reductions by the number of retirements if the district is also facing declining Kindergarten enrollment and inter- and intra-district transfers, or that the district is required to consider subsequent attrition before final notices are issued.<sup>5</sup> Therefore, the district is not required to rescind five Preliminary Notices issued to teachers affected by the PKS reductions.

#### *Leaves of Absence*

29. Respondents contend that two certificated employees who are currently on special assignment with the district office (Melissa Hansen and Kelly Hall) are not officially on Leave of Absence because they are being paid on the salary scale, and are working for the district, and therefore two certificated employees who have been noticed for layoff should be retained to perform Ms. Hansen and Ms. Hall’s duties.

30. Director Slattery confirmed that Ms. Hansen and Ms. Hall are on special assignment at the district office. However, according to Director Slattery, Ms. Hansen and Ms. Hall are officially on leave of absence from their classroom teaching positions, and have rights to return to their regular assignments.

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<sup>5</sup> *San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627, 636.

31. Education Code section 44917 provides that “[e]xcept as provided in Sections 44888 and 44920, governing boards of school districts shall classify as substitute employees those persons employed in positions requiring certification qualifications, to fill positions of regularly employed persons absent from service.” In *Levy v. San Francisco Unified School Dist.* (1978) 79 Cal.App.3d 953, 955-956, the court construed the predecessor statute to section 44917, and upheld the employment of substitute teachers to fill a position of a regular employee on temporary assignment to the district office as being “absent from service.” A substitute teacher “by definition is one who fills a position of a regular employee absent from service.” (*Centinela Valley Secondary Teachers Assn. v. Centinela Valley Union High Sch. Dist.* (1974) 37 Cal.App.3d 35, 43, 112 Cal.Rptr. 27.)

32. Respondents’ contention that two certificated employees noticed for layoff should be retained to perform Ms. Hansen and Ms. Hall’s regular assignments while they are on special assignment to the district, is without merit. Not only would it make it difficult for a school district to offer a tenured teacher a temporary assignment as an administrator, but it would also create the potential of overstaffing or threaten the layoff of a teacher if the teacher were to return to his or her prior assignment.

33. Substitute teachers do not maintain the same employment rights as probationary or permanent employees, and can be terminated at will once the teacher on leave of absence returns to his or her regular assignment. Only substitute teachers, and not permanent or probationary teachers, can fill a position for a teacher who is on leave of absence from his or her regular assignment. (See *Santa Barbara Federation of Teachers v. Santa Barbara High Sch. Dist.* (1977) 76 Cal.App.3d 223, 142 Cal.Rptr. 749.) Therefore, the district is not required to retain two permanent or probationary employees noticed for layoff to perform the duties of two certificated employees who are on special assignment and have a right to return to their regular assignments.

#### *Other Defenses to Layoff*

34. Any other assertions raised by the parties at hearing which are not addressed above are found to be without merit.

### LEGAL CONCLUSIONS

1. As set forth in the Factual Findings, all notice and jurisdictional requirements set forth in sections 44944 and 44945 were met. The notices sent to respondents indicated the statutory basis for the reduction of services and, therefore, were sufficiently detailed to provide them due process. (*San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627; *Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831.) The description of services to be

reduced, both in the board's Resolution and in the notices, adequately describe particular kinds of services. (*Zalac v. Ferndale USD* (2002) 98 Cal.App.4th 838. See, also, *Degener v. Governing Board* (1977) 67 Cal.App.3d 689.)

2. The board may reduce, discontinue or eliminate a particular kind of service and then provide the needed services to the students in another manner. (*Gallup v. Board of Trustees* (1996) 41 Cal.App.4th 1571; *California Teachers Association v. Board of Trustees of Goleta Union School Dist.* (1982) 132 Cal.App.3d 32.) A school board may reduce services within the meaning of the statute either by determining that a certain type of service shall not be performed at all or by reducing the number of district employees who perform such services. (*Rutherford v. Board of Trustees of Bellflower Unified School District* (1976) 64 Cal.App.3d 167.)

3. The services identified in PKS Resolution No. 2012-02 are particular kinds of services that may be reduced or discontinued pursuant to sections 44949 and 44955. The board's decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion. Cause for the reduction or discontinuance of services relates solely to the welfare of the district's schools and pupils within the meaning of section 44949.

4. Respondent Melissa Durrans is a permanent employee of the district with a seniority date of 8/6/07; however, as set forth in Factual Finding 18, she is still subject to layoff.

5. No employee with less seniority than any respondent is being retained to render a service which any respondent is competent to render.

6. The board may give respondents final notice that their services will not be required for the 2012-2013 school year.

## RECOMMENDATIONS

1. The Accusations served on respondents are sustained.

2. The district shall comply with Legal Conclusion 4 as it relates to the employment status of respondent Melissa Durrans.

3. Final Notices shall be given to respondents that their services will not be required for the 2012-2013 school year because of the reduction or discontinuation of particular kinds of services.

4. Final Notices shall be given to respondents in inverse order of seniority.

Dated: May 2, 2012

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REBECCA M. WESTMORE  
Administrative Law Judge  
Office of Administrative Hearings