

**BEFORE THE GOVERNING BOARD  
OF THE LANCASTER SCHOOL DISTRICT**

In the Matter of the Accusation Against:

OAH Case No.: 2008030388

CERTIFICATED EMPLOYEES OF THE  
LANCASTER SCHOOL DISTRICT,  
identified in Exhibit A, hereto, incorporated  
by reference,

Respondents.

**PROPOSED DECISION**

The hearing in the above-captioned matter was held on April 16 and 17, 2008, at Lancaster, California. Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), presided. Complainant was represented by Fagen, Friedman & Fulfroost, by Howard Friedman and Maggy Athanasious. Respondents were represented by Trygstad, Schwab & Trygstad, by Richard J. Schwab.

Oral and documentary evidence was received at the hearing, and some argument was received, but the record was held open for closing briefs. Complainant's Closing Brief was received on time and is identified for the record as Exhibit 13. Respondent's Closing Brief<sup>1</sup> was also received in a timely manner, and is identified as Exhibit GG.

The matter was submitted for decision on April 25, 2008. The Administrative Law Judge hereby makes his factual findings, legal conclusions, and orders, as follow.

**FACTUAL FINDINGS**

1. Complainant Jim Schettig filed the accusations<sup>2</sup> in this proceeding in his official capacity as Assistant Superintendent, Human Resources, of the Lancaster School District (District).

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<sup>1</sup> Respondents' brief was in letter format without a title, but titled here for convenience.

<sup>2</sup> The term "accusation" refers to a type of pleading utilized under the Administrative Procedure Act, Government Code sections 11500 and 11503. As noted by Complainant's counsel and by the ALJ during the hearing, it should be made clear that the Respondents are not "accused" in the every-day sense of that word; they have done nothing wrong, and all demonstrated during the course of the hearing that they are dedicated professionals. Instead, it might be said they are accused of not having enough seniority to retain their positions with the District in the face of a resolution to reduce positions.

2. The persons listed on Exhibit "A" hereto are certificated employees of the District, and are the Respondents in this case. On the day of the hearing, Respondents Jose Esparza, Margaret Seal, Lori Christensen, Kira Brown, and Kiley Barton-Kissem were dismissed, as the District determined that it would not need to lay them off.<sup>3</sup> Prior to the hearing, Respondent Nancy Saroyan informed the District that she would not be renewing her contract, and that she was withdrawing her notice of defense.

3. (A) On March 4, 2008, Howard E. Sundberg, Ph.D., Superintendent of the District, gave his recommendation to the District's Board of Trustees that there be a reduction or elimination of particular services, and that notice be given to various certificated personnel that their services will be terminated at the close of the current school year (2007-2008).

(B) On March 4, 2008, the District's Board of Trustees passed resolution number 2007-08:34, "Intention to Dismiss Certificated Employees" (Reduction Resolution). The purpose of the Reduction Resolution was to reduce and discontinue particular kinds of certificated services no later than the close of the 2007-2008 school year, in light of budgetary projections and other factors.

(C) The Board determined in its Reduction Resolution that it would have to reduce elementary school teachers, class size reduction, grades kindergarten and third, by 58 Full Time Equivalents, or "FTE." It also determined to reduce 12 FTE of math and literacy coaches.

4. (A) A In its Reduction Resolution the Board directed the Superintendent of the District, or a designee of the Superintendent, to give notice of termination to certificated employees in accordance with Education Code sections 44949 and 44955,<sup>4</sup> informing them that Respondents' services would not be required for the following school year (2007-2008).

(B) Further, when the Board adopted the Reduction Resolution, it also identified tie-breaking criteria to be used when employees shared the same first date of paid service. That criteria was set forth on Exhibit B to the Reduction Resolution.

5. The services which the District seeks to discontinue or reduce are particular kinds of services that may be reduced or discontinued under section 44955.

6. The decision by the Board to reduce or discontinue services was neither arbitrary nor capricious, but rather was a proper exercise of the District's discretion given uncertainty regarding the state budget and the District's financial resources, and other factors considered

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<sup>3</sup> Two other teachers not listed among those on Exhibit A hereto who had filed a notice of defense were also "dismissed", Jason Godde and Kelsy Lee.

<sup>4</sup> All further statutory references are to the Education Code unless otherwise noted.



by the Board. The record establishes that District management attempted to consider a wide array of information regarding the District's needs, including the need to remain solvent, in determining to reduce or discontinue services.

7. The reduction and discontinuation of services is related to the welfare of the District and its pupils, and it has become necessary to decrease the number of certificated employees as determined by the Board.

8. Prior to March 15, 2008, Respondents and other certificated employees of the District were given a preliminary written notice, to the effect that that pursuant to sections 44949 and 44955, their services would be terminated at the end of the 2007-2008 school year.

9. The Respondents requested a hearing to determine if there is cause for not reemploying them for the 2008-2009 school year. Those requests for hearing were timely filed, or the Board waived objection to any late filing.

10. Thereafter, on or about between March 27 and April 4, 2008, an Accusation was served upon those persons who requested a hearing. That Accusation was accompanied by a notice which stated that failure to deliver a Notice of Defense to the Board within five days of service of the Accusation would constitute a waiver of the right to a hearing, and that the Board might then proceed against the Respondents without a hearing. The Respondents herein requested a hearing.

11. In the course of the reduction in force process, the District created a seniority list. That seniority list took into account a number of factors, including first date of paid service and various tie-breaking criteria that were developed by the District and adopted by it.

12. (A) The District determined that certain junior teachers possessed superior skills, training, or capabilities which more senior teachers did not possess, which would allow the more junior teachers to be exempted from lay off or "skipped." Such teachers were needed by the District to teach particular courses or to provide particular services, and could do so in light of their credentials and qualifications. No lay off notices were sent to those teachers.

(B) A number of the junior teachers who were retained were teaching classes on the basis of "district authorizations" obtained pursuant to section 44256, or on what was referred to as "district waivers." Among those teachers were Briggs, Kennedy, Otto, and Sink.

(C) Numerous Respondents had the education sufficient to be granted a district authorization or waiver, but none of the Respondents held such an authorization as of March 15, 2008.

(D) During the hearing, no Respondents were able to show that they could bump or skip another teacher.

13. The District also considered attrition by retirement, resignation, and re-assignment in making its decision to lay off certificated personnel.

14. (A) During the course of the hearing it was established that the seniority date of some Respondents had been miscalculated, as follows:

(B) It was established that the seniority of Respondent Margree Oggs had been miscalculated by the District, and that her seniority date should have been August 15, 2006. The Accusation against her was therefore dismissed during the hearing, and she shall be retained.

(C) It was established that the seniority date of Respondent Elizabeth Murphy was miscalculated, and that her proper seniority date is October 30, 2006.

(D) It was established that the seniority date of Respondent Amy Roth was miscalculated by one week, and that her proper seniority date is January 24, 2007.

15. No certificated employee junior to any Respondent was retained by the District to render a service for which a Respondent was certificated and qualified to render.

### **LEGAL CONCLUSIONS**

1. Jurisdiction was established to proceed in this matter, pursuant to Code sections 44949 and 44955, based on Factual Findings 1 through 10.

2. (A) A District may reduce a particular kind of service (PKS) 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 v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.) The Court of Appeal has made clear that a PKS reduction does not have to lead to less classrooms or classes; laying off some teachers amounts to a proper reduction. (*Zalec v. Governing Bd. of Ferndale Unified School Dist.* (2002) 98 Cal.App.4th 838, 853-854. See also *San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 631, 637 [Reduction of classroom teaching can be a reduction of a PKS; as long as there is a change in the method of teaching or in a particular kind of service in teaching a particular subject any amount in excess of the statutory minimum may be reduced]; *California Teachers Assn. v. Board of Trustees* (1982) 132 Cal.App.3d 32.)

(B) The services to be discontinued by the District in this case are particular kinds of services within the meaning of section 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 discontinuation of services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949. (See *Campbell Elementary Teachers Association, Inc. v. Abbott* (1978) 76 Cal.App.3d 796, 808.) This Conclusion is based on Factual Findings 3 through 7 and the foregoing authorities.

3. (A) A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated to fill. In doing so, the senior employee may displace or "bump" a junior employee who is filling that position. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469.) At the same time, junior teachers may be given retention priority over senior teachers—may "skip" that senior employee—if the junior teacher possesses superior skills or capabilities not possessed by their more senior colleagues. (*Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399; *Santa Clara Federation of Teachers, Local 2393 v. Governing Bd. of Santa Clara Unified School Dist.* (1981) 116 Cal.App.3d 831.)

(B) The District properly skipped a number of employees based on their qualifications. No Respondent established the right to displace a senior employee. This Conclusion is based on Factual Findings 12 and 15, the foregoing authority, and the discussion in Legal Conclusion 4, below.

(C) No Respondent established at the hearing that they had the right to bump a junior employee, based on Factual Finding 12(D).

4. (A) The junior teachers who hold "district authorizations" may be retained over more senior teachers who don't hold those authorizations.

(B) The District skipped several teachers holding multiple subject credentials, but with relatively low seniority dates. They were skipped because they hold a "district authorization" to teach certain single subjects, such as math and science, and the District needed teachers to instruct in those areas. (See Factual Finding 12(B).) The authorizations were issued pursuant to section 44256.

(C) Section 44256 provides two pertinent "authorization[s] for teaching credentials." Section 44256, subdivision (a) provides that where a person holding a single subject credential has completed 20 semester hours of coursework, or 10 semester hours of upper division or graduate coursework at an accredited institution in a subject other than the one they are accredited to teach, then that credential holder is "eligible to have this subject appear on the credential as an authorization to teach this [other] subject."

(D) Subdivision (b) of section 44256 also speaks to the issue of adding authorization to a multiple subject credential. It provides that a person holding such a credential who has 20 semester hours or 10 upper division or graduate hours in a subject commonly taught in grades 9 and below "shall be eligible to have that subject appear on the

credential as an authorization to teach the subject in departmentalized classes in grades 9 and below.” The statute then goes on to provide that “the governing board of a school district by resolution may authorize the holder of a multiple subject teaching credential or standard elementary credential to teach any subject in departmentalized classes to a given class or group of students below grade 9, provided that the teacher has completed at least 12 semester units or six upper division or graduate units, of coursework . . . .” The authorization must be with the teacher’s consent.

(E) Testimony established that the retained junior teachers had obtained the authorizations because they were willing to teach single subject classes, and that they could obtain the authorization because they had the requisite college credits in the subject area, math. They had obtained the authorizations in 2007. During the course of the hearing many of the Respondents established that they had sufficient course work to qualify them for such authorizations; indeed, a substantial number of teachers had sufficient college credits to qualify for more than one authorization and up to four, but these Respondents did not have such an authorization.

(E) Respondents assert that the district authorizations are not credentials, and that therefore the senior teachers can not be displaced by the junior staff holding such credentials. (Respondent’s Closing Brief, Ex. GG, p. 3.) That is, Respondents assert they are qualified to teach the courses. That contention, at the heart of the main claim that junior teachers are being improperly retained, can not be sustained.

(F) Section 44203 provides a number of general definitions relevant to credentials. Subdivision (d) of that statute states that “‘authorization’ means the designation that appears on a credential, certificate, or permit that identifies the subjects and circumstances in which the holder of the credential, certificate, or permit may teach, or the services which the holder may render in the public schools of this state.” It should also be noted that the Education Code defines “credential” and “certificate.” Specifically, “a ‘credential’ includes a credential, certificate, life document, life diploma, permit, certificate of clearance, or waiver issued by the commission.” (§ 44002.) “Certificate,” when used as a noun, refers to the document issued by a county board of education to license the holder to perform the service specified in the certificate. (§ 44004.)

(G) From these basic definitions and a review of the statutes and regulations pertaining to credentials comes the conclusion that an authorization is inextricably intertwined with a credential or certificate. By definition, any credential authorizes the holder to do teach certain subjects or provide certain services; each type of credential comes with its own authorizations. (See § 44250.) Thus, for example, section 44203, subdivision (e), defines basic teacher credentials as two types, each “authorizing” the holder to teach subjects named on the credential or to provide services.

(H) Similarly, the holder of a single subject credential may be authorized to teach one of the 13 subjects for which a single subject credential may issue. (See § 44257, subd. (a).) If one of those 13 subjects is a foreign language, at the time the credential is



issued the Commission “shall issue” the single subject foreign language credential “with an authorization to teach Chinese, French, German, Russian, Spanish, or any other language that the commission determines is appropriate.” (§ 44257, subd. (b).) An authorization, then, defines the scope of the credential and might broaden it; the holder of a single subject foreign language credential might obtain it with authorizations to teach several languages, i.e., French, Spanish, and Latin, but in that case he or she would not be authorized—credentialed—to teach German.

(I) The concept that an authorization defines the scope of a credential, and may expand that license, is found in section 80499 of title 5 the California Code of Regulations (CCR), cited by Respondents. The regulation speaks to “adding an authorization to a credential.” Likewise, CCR section 80089 refers to adding authorizations to the credentials listed section 44256, subdivision (a), and goes on to state that the “supplementary authorizations” authorize the holder to teach the additional subjects. (CCR § 80089, subd. (b).) CCR sections 80057.5, 80089.3, and 80089.4, also pertain to adding authorizations to credentials pursuant to section 44256, and all of those regulations make clear that the scope of the underlying credential is being expanded.

(J) It is plain that the authorizations in issue do not exist in a vacuum; whether actually issued by the Commission on Teacher Credentialing or by Board resolution, the authorizations effectively credential a teacher to teach the newly-authorized subject. One can not obtain the authorization without a credential,<sup>5</sup> conversely, a teacher without such an authorization may not teach that subject if it is not within the authorizations set out in the teacher’s credential.

(K) The Respondents did not hold the additional authorizations as of March 15, 2008. That they *could* obtain them is not relevant; an employee may not bump or skip another employee with a credential obtained after March 15. (*Vassello v. Lowrey* (1986) 178 Cal. App.3d 1210 1217; *Campbell Elementary Teachers Association, Inc. v. Abbott* (1978) 76 Cal.App.3d 796, 815.)

5. (A) No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render, based on Legal Conclusions 3 and 4, and Factual Findings 12 and 15.

6. (A) The probationary teachers must be laid off before permanent teachers may be laid off.

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<sup>5</sup> The ALJ, whose college major was in history, has more than 20 semester hours of history courses, but can not obtain the authorization because he has no teaching credential.

(B) Respondent's contend that a permanent employee who has less seniority than a probationary employee can be terminated before that probationary employee. They argue that "if the cases of *Bakersfield, Vallejo and Golden Valley, supra*,<sup>6</sup> represent a new interpretation that status cannot be exalted over seniority, then those Respondents must be retained by the Lancaster School District." (Respondent's Closing Brief, Ex. GG, p. 5; emphasis in original.)

(C) The analysis is misplaced, mixing apples and oranges. The cases cited by Respondents stand for the proposition (among others) that one's job classification is not a function of one's credential type, and credential type does not trump seniority within the two job classes that are protected by the procedures set out in section 44955, absent skipping. Those cases also provide that entry into the probationary class is not necessarily a function of the type of credential held by a teacher, even if exit from the probationary classification upward into the rank of permanent employees is a function of the type of credential held by the teacher.

(D) As a matter of law, permanent status is "exalted" over probationary status. The statutory scheme has not been changed by recent cases, and the governing statute still states that "no permanent employee may be laid off if a probationary employee, or any other employee of less seniority" occupies a position that the permanent employee can take. (§ 49555, subd. (c).) Thus, for all practical purposes all of the probationary class of a school's certificated employees must be eliminated before any permanent employee is terminated; if a probationary teacher could be properly skipped, then they might survive where other permanent teachers without the particular qualifications would be laid off. Within each class, seniority remains the key issue in determining who in each class will be laid off. An important impact of the cases cited by Respondents is that persons in the probationary class who are not earning credit toward permanent status may still earn seniority, leading to their retention over those with less seniority, even if the latter are closer to permanent status. But, no matter how much seniority one has within the probationary group, that seniority does not trump the most junior permanent teacher's seniority. Hence, none of the permanent teachers of the District may be laid off until all of the probationary teachers are laid off.

7. (A) The District has not failed to comply with Constitutional equal protection requirements.

(B) Respondents rightly point out that under section 44955, subdivision (d)(2), a school district may deviate from seniority for the purpose of maintaining or achieving compliance with Constitutional requirements relating to the equal protection of the laws.

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<sup>6</sup> The cases referenced are *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911; *Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist.* (2006) 145 Cal.App.4th 1260; *California Teachers Assn. (CTA) v. Vallejo City Unified School District* (2007) 149 Cal.App.4th 135, and *CTA v. Governing Board of Golden Valley Unified School Dist.* (2002) 98 Cal.App.4th 369.



They then argue that at least one school will be bereft of any African-American teachers if Respondent Melanie Culver is laid off. And, there was testimony that the racial or ethnic balance of other site staffs would be diminished by the lay offs.

(c) This challenge must be denied. First of all, the power to depart from seniority in such instances is permissive, not mandatory, as the statute reads, "notwithstanding subdivision (b), a school district *may* deviate from terminating . . . in order of seniority for . . . [purpose of compliance with equal protection laws]." (Emphasis added.) Second, the Respondents did not establish that such a departure is in fact necessary to comply with Constitutional requirements pertaining to equal protection of the laws. The authority cited, *Coalition for Economic Equity v. Wilson* (9th Cir. 1997) 122 F.3d 692, is not apposite.

8. The seniority list must be modified, based on Factual Finding 14. Therefore, it must be ordered that Respondent Elizabeth Murphy shall have a seniority date of October 30, 2006, making her junior to Respondent Ilene Colton, and senior to Respondent Debra Wahe. Respondent Amy Roth shall have a seniority date of January 24, 2007, which will be the same date as Respondent Amy Horn. The District shall apply tie-breaking criteria, which may include a lottery, to determine which is senior.<sup>7</sup>

### **ORDER**

1. The Accusations are sustained, except as to Respondent Margree Oggs, who is dismissed.

2. Notice shall be given to the following Respondents listed on Exhibit A hereto that their services will not be required for the 2008-2009 school year because of the reduction and discontinuance of particular kinds of services.

3. Notice shall be given to Respondents in inverse order of seniority, based on the seniority list, exhibit 1 in the proceeding, with Laura Carreon being the most senior of the Respondents, and Tammy Riddle being the most junior of the Respondents. Provided, further, however, that the seniority list shall be modified so that Respondent Elizabeth Murphy shall have a seniority date of October 30, 2006, making her junior to Respondent

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<sup>7</sup> It can not be determined from the available record who would prevail on the tie breaking criteria. Ms. Horn and Ms. Roth both hold, according to the seniority list, preliminary multiple subject credentials, both are shown as NCLB compliant, "multiple subject," both are shown as EL/SDAIE. Hence, the last tie-break criteria, lottery, may be in order if other information in the District records do not resolve the matter.

Ilene Colton, and senior to Respondent Debra Wahe, and provided that Respondent Amy Roth shall have a seniority date of January 24, 2007, which will be the same date as Respondent Amy Horn. The District shall apply tie-breaking criteria, which may include a lottery, to determine which of the latter two respondents is senior.

May \_\_\_, 2008

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Joseph D. Montoya  
Administrative Law Judge  
Office of Administrative Hearings