

BEFORE THE
GOVERNING BOARD OF THE
NEVADA CITY SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Reduction in Force of:

CERTAIN CERTIFICATED EMPLOYEES
OF THE NEVADA CITY SCHOOL
DISTRICT,

Respondents.

Case No. 2012030033

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on April 10, 2012, in Nevada City, California.

Attorney Allen R. Vinson represented the Nevada City School District (District). Superintendent Roxanne Brown Gilpatric also attended the hearing on behalf of the District.

Attorney Andrea Price represented respondents Julie Blair, Monica Daugherty, Kimberly Ewing, Laurie Kempenaar, Vanessa Lackey, Andrea Marks, Jacqueline Nielsen, Tiffany Rae-Looney, Antonina Shumaker, Jennifer Tayler, Kimberly Weber (Silvera), and Sharon Whitlock.

Evidence was received, the record was closed, and the matter was submitted for decision on April 10, 2012.

SUMMARY

The Board of Trustees of the Nevada City School District has determined that it is necessary to reduce or eliminate particular kinds of services at the end of the 2011-2012 school year and therefore seeks to reduce or eliminate 20.30 full-time equivalent (FTE) certificated positions. Respondents have been given preliminary notice that their services will be reduced or eliminated at the end of the 2011-2012 school year. As discussed below, cause exists for the Board of Trustees to reduce or eliminate 20.30 FTE certificated positions. But the District incorrectly determined Angela Marks' seniority date. The District shall determine whether Ms. Marks has any right to bump a more junior employee based on her correct seniority date of August 5, 2002. The District also improperly allowed Joe Limov to "bump" into Jennifer Tayler's position teaching science because he is not "competent" to

perform such services. Preliminary layoff notices were properly issued to all other respondents, and the District may give those respondents notice that their services will be reduced or will not be required for the 2012-2013 school year. Notice shall be given in inverse order of seniority.

FACTUAL FINDINGS

1. Roxanne Brown Gilpatric is the superintendent of the District. She made and filed the Accusation in her official capacity.

2. The parties stipulated that all respondents: 1) were properly and timely served with a preliminary layoff notice; 2) properly and timely requested an administrative hearing; 3) were properly and timely served with the Accusation, Statement to Respondent, form Notice of Defense, Notice of Hearing, and relevant statutes; and 4) properly and timely filed a Notice of Defense.¹

3. Each respondent is a certificated employee of the District.

4. On February 14, 2012, at a regular meeting, the District's Board of Trustees was given notice of Superintendent Gilpatric's recommendation that certificated employees holding 17.00 FTE positions be given notice that their services would be reduced or not required for the next school year and stating the reasons for that recommendation.

5. On February 14, 2012, the District's Board of Trustees determined that it was necessary to reduce or eliminate programs and services and therefore necessary to reduce or eliminate teaching and other certificated services affecting employment of 17.00 FTE positions. The Board of Trustees adopted Resolution No. 1112-20 providing for the reduction or elimination of the following particular kinds of services:

Services

FTE

Administration Positions

a. Principal

1.50

¹ The District also served preliminary layoff notices on certificated employees Ericka Clawson, Renee Creamer, Steve Davies, Brian Ellis, Timothy Floyd, Tracy Green, Evie Pardini, and Richard Thomas. However, no evidence of the date of service of those notices was introduced, and no evidence that any of those people requested a hearing to challenge his or her notice was introduced. None of those employees appeared at the hearing in an attempt to assert his or her rights under Education Code section 44949, subdivision (a). Therefore, this Proposed Decision does not apply to any of those certificated employees and no factual findings or legal conclusions are made with regard to the propriety of any of their preliminary layoff notices.

Certificated Positions

b.	Counseling	.50
c.	Science	1.00
d.	Special Education	1.00
e.	K-6 Elementary	11.00
f.	7-8 Middle School	2.00
Total FTE		17.00

6. On February 14, 2012, the Board of Trustees also adopted the following “tie-breaking” criteria for determining the relative seniority of two or more certified employees who share the same first date of paid service with the District:

- A. Preliminary vs. Clear/Life Credentials
Rating: +1 per preliminary, +2 per clear/life credential
- B. No Child Left Behind compliant
Rating: +1 per Highly Qualified area
- C. Credentials and experience to teach in teacher shortage areas (e.g., bilingual, math, science, and physical education)
Rating: +1 per credential, +1 per year of experience
- D. Number of Certifications/Authorizations to teach English Language Learners
Rating: +1 SDAIE/SB 1969, +2 LDS, +3 CLAD, +3 359, +4 BCLAD
- E. Number of Supplementary authorizations
Rating: +1 per supplementary authorization
- F. Number of teaching and/or special service credentials
Rating: +1 per credential

Final Tie-Breaking Procedure: In the event that certificated employees who first rendered paid service to this District on the same date have equal qualifications based on application of the above criteria[,] the District will the[n] break ties based on:

- G. The number of extra duty assignments (e.g., coaching, cheerleading, decathlon, journalism, yearbook, etc.) that each certificated employee is assigned within the current year.

7. Sometime after February 14, 2012, but before March 13, 2012, the District hired two part-time employees to support students in math and reading. Superintendent Gilpatric determined that those employees needed to be laid off and concluded that the District’s finances are worse than she previously thought. Therefore, on March 13, 2012, at a regular meeting, the District’s Board of Trustees was given notice of Superintendent

Gilpatric's recommendation that certificated employees holding 20.30 FTE positions be given notice that their services would be reduced or not required for the next school year and stating the reasons for that recommendation.

8. On March 13, 2012, the Board of Trustees determined that it was necessary to reduce or eliminate programs and services and therefore necessary to reduce or eliminate teaching and other certificated services affecting employment of 20.30 FTE positions. The Board of Trustees adopted Resolution No. 1112-20-A providing for the reduction or elimination of the following particular kinds of services:

<u>Services</u>	<u>FTE</u>
<u>Administration Positions</u>	
a. Principal	1.50
<u>Certificated Positions</u>	
b. Counseling	.50
c. Science	1.00
d. Reading Specialist	.407
e. Math Instructor	.8929
f. Special Education	2.00
g. K-6 Elementary	12.00
h. 7-8 Middle School	2.00
Total FTE	20.30 ²

9. In determining the extent by which to reduce or eliminate particular kinds of services, the Board of Trustees considered all positively assured attrition up to and including the date of the resolution. The total number of positions to be reduced or eliminated under the resolution is 20.30 FTE certificated positions. The Board of Trustees determined that the services of a corresponding number of certificated employees shall be terminated at the close of the current 2011-2012 school year.

10. For purposes of making assignments and reassignments of certificated employees in order for the District to meet its obligations under Education Code section 44955, the resolution provided that a certificated employee is deemed "competent" to perform a particular certificated service if he/she:

- a) has preliminary clear, professional clear, lifetime, full credential or supplementary authorization for the subject matter in which he/she intends to displace another employee; and b)

² Resolution No. 1112-20-A incorporates the 17.0 FTE specified in Resolution No. 1112-20.

has at least one complete school year actual teaching experience in the assignment within the past 5 years.

11. Pursuant to Education Code section 44955, subdivision (d), the Board of Trustees determined that there is a specific need in the District for personnel to teach specific courses of study or provide pupil personnel or health services and to retain certificated employees possessing the special training and experience needed to teach such courses of study or provide such services that other employees with greater seniority do not possess. The specific needs of the District are within the following courses of study:

1. Special education classes
2. Physical education classes
3. Technology classes
4. Bike shop classes

The District's Seniority List

12. The District maintains a seniority list that contains the names of all of its certificated employees and each of their ranking order numbers, which is determined solely from the employee's date of first paid service with the District. The list also includes the following information about each employee: 1) his or her date of first paid service with the District; 2) the type of advance degree, if any, he or she has; 4) the number of usable credentials he or she has; 5) the type, if any, of English Learner certification he or she has; 6) the type of credential(s) he or she has and their expiration dates; and 7) the number of years he or she has taught in the District, in public schools elsewhere in California and other states, and in private schools.

13. The seniority list is provided to each certificated employee every year on January 1 for his or her review for accuracy and completeness. Each employee has through February 15 of that year to notify the District of any inaccurate or missing information. Superintendent Gilpatric explained that a deadline for providing such information is necessary because the list is relied upon in determining who will be sent a preliminary layoff notice. The District reached an agreement with its employees to update the seniority list on an annual basis, rather than continuously, so all employees will know there is a specific time period during which the District will publish the list and they may update their information. However, Superintendent Gilpatric conceded that in reality updates tend to be made on a continuous basis.

The District's Tie-Breaking Criteria

14. As discussed above in Factual Finding 6, the Board of Trustees adopted criteria for determining the relative seniority between two or more certificated employees who share the same date of first paid service with the District. Prior to the 2011-2012 school year, one tie-breaking criterion the District used was each employee's years of service with other districts. Based on recent court cases involving the use of such criterion, however,

Superintendent Gilpatric recommended that it be eliminated as a tie-breaking criterion, and the Board of Trustees accepted her recommendation. The Board of trustees acted within its discretion by eliminating such criterion.

The District's Competency Standard for Employee Bumping

15. As previously discussed in Factual Finding 10, the Board of Trustees adopted a standard for determining whether a certificated employee whose service is being reduced or eliminated is “competent” to perform the certificated service currently being performed by a junior employee. Superintendent Gilpatric explained that this is the first time the Board of Trustees adopted a competency standard for evaluating a certificated employee’s bumping rights. When she prepared the list of certificated employees whom she recommended to the Board of Trustees be given preliminary layoff notices, she looked solely at each employee’s seniority date and credentials. After the Board of Trustees adopted the competency standard and she applied that standard, she discovered that two senior employees were not “competent” to perform the services currently being performed by junior employees and would therefore be laid off. Therefore, the District indicated its intention to “waive” the competency standard adopted by its Board of Trustees.

The evidence is not clear as to who made the decision to waive the competency standard. To the extent that the Board of Trustees made that decision, such decision is not controlling because there is no evidence that the Board of Trustees adopted a resolution rescinding the competency standard or authorizing Superintendent Gilpatric to waive the standard. To the extent that it was Superintendent Gilpatric or another District employee’s decision, such person is powerless to waive the competency standard. (See, Ed. Code, § 35010, subd. (a) [every school district is governed by a board of education or board of trustees].) Therefore, the competency standard adopted by the Board of Trustees applies to any instance where a senior certificated employee asserts his or her bumping rights.

Challenges to Individual Preliminary Layoff Notices

16. While each respondent properly and timely requested an administrative hearing to contest the merits of her preliminary layoff notice as discussed in Factual Finding 2, only six of them actually contested their notice at the hearing.

A. Julie Blair – Challenge to Tie-Breaking Criteria

17. Julie Blair is an elementary school teacher at Deer Creek School, the District’s only traditional elementary school.³ According to the District’s seniority list, she shares the same date of first paid service with fellow teachers Andrea Marks and Vanessa Lackey –

³ The District also includes Nevada City Charter School, a charter school that serves the District’s kindergarten through eighth grade students who are being home schooled.

August 20, 2002.⁴ After applying the District's tie-breaking criteria, the relative seniority for those three teachers is that Mss. Marks and Lackey are equal to one another in seniority but are senior to Ms. Blair.

18. Ms. Blair challenges the tie-breaking criteria outlined in Factual Finding 6 as being arbitrary and vague because there is no "exhaustive list" of all of the criteria. Her challenge is made in response to Superintendent Gilpatric's explanation that the list of "Teacher shortage areas" in Criteria C is intended to provide only examples of such areas rather than be an exhaustive list of them. She said the same about the examples of "extra duty assignments" in Criteria G. Ms. Blair's challenge is to the facial validity of the tie-breaking criteria, as opposed to the application of those criteria to her or Mss. Marks or Lackey since she does not argue that she should have been awarded points under a particular criterion that she was not, or that Mss. Marks or Lackey were inappropriately awarded points for a particular criterion.

19. Ms. Blair's arguments are not persuasive. Education Code section 44955, subdivision (b), provides the following with regard to determining the relative seniority date between two certificated employees: "As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof...." And the law gives governing boards broad discretion in determining what those particular needs are. (See, *Zalac v. Governing Board of Ferndale Unified School District* (2002) 98 Cal.App.4th 838, 854-855.) The Board of Trustees adopted specific criteria for breaking ties between employees who share the same first date of paid service with the District, and the fact that Criteria C and G list examples which meet those particular criteria does not make the criteria any less specific.

20. Ms. Blair also challenges the criterion based on the number of certifications/authorizations to teach English Language Learners (Criteria C) a certificated employee holds on the grounds that it is not based on the "needs of the district and the students thereof" because there are only a "handful" of students in the District who are English Language Learners. For the reasons discussed in Factual Findings 18 and 19, her argument is unpersuasive.

B. *Monica Daugherty – Challenge to the Competency Standard*

21. Monica Daugherty teaches sixth grade at Seven Hills School, the District's only traditional middle school. Her seniority date is August 21, 2001, which she shares with no other certificated employee. She has a clear multiple subject teaching credential and a clear specialist instruction credential in special education, with an authorization for learning handicap. Ms. Daugherty also has a master's degree in special education. However, she has not taught special education classes since the 2003-2004 school year, although she currently has special education students "mainstreamed" into her sixth grade class.

⁴ As discussed below, Ms. Marks contends her seniority date should be earlier.

22. Ms. Daugherty challenges the application of the Board of Trustees' competency standard for determining her bumping rights as arbitrary and vague because it results in the retention of an employee who has less seniority and experience teaching special education classes than she. Specifically, she contends that Michael Malakian is being retained to teach a special day class, even though his seniority date is August 15, 2008 – almost seven years after hers. Ms. Daugherty was originally hired by the District to teach that special day class. After teaching that class for three years, she was offered, and accepted, the sixth grade teaching position she currently holds.

23. Ms. Daugherty's challenge to the Board of Trustees' competency standard is not persuasive. Governing boards have broad discretion in determining competency criteria. (*Duax v. Kern Community College District* (1987) 196 Cal.App.3d 555, 564-565.) This discretion is limited only by reasonableness, a standard which permits "a difference of opinion on the same subject." (*Campbell Elementary Teachers Association v. Abbott* (1978) 76 Cal.App.3d 796, 808.) Here, the Board of Trustees determined that a teacher is deemed "competent" if she has taught the particular subject for at least one full school year within the last five years, a standard which the court in *Bledsoe v. Biggs* (2008) 170 Cal.App.4th 127, suggested was reasonable. (*Id.*, at p. 142.) Ms. Daugherty has not taught special education classes for at least one year within the last five years and is not entitled to "bump" into Mr. Malakian's position teaching a special day class. (See, *Moreland Teachers Association v. Kurze* (1980) 109 Cal.App.3d 648 [the senior teacher seeking to exercise her bumping rights has the burden of establishing her competency].)

24. Ms. Daugherty also contends that she has more seniority than Erika Clawson, a former principal who was recently reassigned to the classroom and then issued a preliminary layoff notice. According to the seniority list, Ms. Clawson's date of first paid service with the District was August 13, 2007 – nearly six years after Ms. Daugherty's.⁵ However, Ms. Clawson received a preliminary layoff notice and will not be retained for the 2012-2013 school year. Therefore, Ms. Clawson does not hold a position for Ms. Daugherty to "bump" into. (See, *Bledsoe v. Biggs Unified School District*, *supra*, 170 Cal.App.4th 127, 131 fn. 1 ["For purposes of a school district reduction in force, 'bumping' refers to a senior teacher moving into the position of a junior teacher."])

C. Andrea Marks – Challenge to Her First Date of Paid Service with the District

⁵ No finding is made about Ms. Clawson's seniority date because no evidence was introduced about when she became a principal. (See, Ed. Code, § 44956.4 ["For a certificated employee initially employed in an administrative position on or after July 1, 1983, who transfers to a teaching position, the period of employment in the administrative position shall not be included in determining seniority for purposes of Section 44955 and 44956, except for school site administrators who shall earn up to a maximum of three years seniority while serving as site administrators."])

25. Andrea Marks teaches second grade at Deer Creek. Her first date of paid service with the District was August 20, 2002, according to the seniority list, which places her in a three-way tie with Mss. Bair and Lackey as previously discussed. Based on the application of the tie-breaking criteria, the District determined the teachers' relative seniority to be that Mss. Marks and Lackey share the same seniority date and are senior to Ms. Blair.

26. Ms. Marks agrees that August 20, 2002, was the first day of school for the school year for which she was hired. She was hired as a reading specialist. She signed her "paperwork" on July 3, 2002. However, she attended mandatory training from August 5 through 9, 2002, for which she received a \$1,000 stipend. The District does not dispute Ms. Marks' attendance at the training, the dates of her attendance, the mandatory nature of the training, or that she received a stipend for attending. The District, however, disputes that it paid the stipend and contends that the stipend was paid by the Nevada County Superintendent of Schools, an entity which Ms. Marks concedes is different than the Nevada City School District.

The District's argument is unpersuasive. While Ms. Marks agreed that the stipend was paid by a check from the Nevada County Superintendent of Schools, she also explained that her regular pay checks come from the same source – a fact that the District did not dispute. This is consistent with the law designating each county treasury as the depository of funds for school districts within the particular county. (See, Ed. Code, § 41001.) Therefore, Ms. Marks' seniority date shall be adjusted to August 5, 2002, her first date of paid service. (Ed. Code, § 44845.)⁶ The District should determine whether Ms. Marks has any right to bump a more junior employee and, if so, shall rescind her preliminary layoff notice.

D. *Laurie Kempenaar – Challenge to the District's Application of the Tie-Breaking Criteria*

27. Laurie Kempenaar teaches physical education and language arts at Seven Hills School. Her first date of paid service with the District was August 13, 2007, which is the same date as Rachel Smith's. Ms. Smith also teaches physical education at Seven Hills School. Superintendent Gilpatric applied the tie-breaking criteria and awarded Ms. Smith 18 points and Ms. Kempenaar 12 points. Therefore, Ms. Smith was determined to be the more senior employee and was not issued a preliminary layoff notice, while Ms. Kempenaar was. Ms. Kempenaar challenges Superintendent Gilpatric's award of 18 points to Ms. Smith and contends that Ms. Smith should have been awarded only 11 points, which would make Ms. Kempenaar the more senior teacher. The specific challenges are to Criteria C (Credentials and experience to teach in teacher shortage areas (e.g., bilingual, math, science, and physical

⁶ In light of the adjustment of Ms. Marks' seniority date, her challenge to the Board of Trustees' tie-breaking criteria as arbitrary and vague is moot. Furthermore, the merits of such challenge is not persuasive for the reasons discussed in Factual Findings 18 and 19 above.

education)), D (Number of Certifications/Authorizations to teach English Language Learners), and F (Number of teaching and/or special service credentials).⁷

A. Criteria C: Ms. Kempenaar contends that Ms. Smith should not be awarded one point for her supplemental introductory authorization for social science because that subject is not identified as a “teacher shortage area” in the tie-breaking criteria adopted by the Board of Trustees. But Superintendent Gilpatric explained that the list of shortage areas in Criteria C is not all-inclusive. She also explained that teacher shortage areas include those subjects identified as “core” subjects under No Child Left Behind, which social science is. Ms. Kempenaar did not introduce any evidence to the contrary. Therefore, her argument is not persuasive.

Ms. Kempenaar also argues that Ms. Smith should not be awarded one point for her supplemental introductory authorization for social science because such authorization does not constitute a separate credential. Her argument is persuasive. (See, Ed. Code, § 44256 [the four basic types of teaching credentials are the single subject, multiple subject, specialist, and designated subject credential]; see also, Cal. Code of Regs., tit. 5, § 80089.3, subd. (a) [a holder of a multiple subject or single subject credential may have one or more introductory supplemental authorizations added to her credential].) It is clear from Superintendent Gilpatric’s testimony that she thought the supplemental introductory authorization constituted a separate credential, and that is why she awarded Ms. Smith one point for it. Therefore, Ms. Smith is only awarded one point for her single subject credential in physical education and two points for her two years of experience teaching physical education, for a total of three points under Criteria C.

B. Criteria D: Ms. Smith was awarded three points for having received both of her teaching credentials under the new SB 2042 requirements for obtaining a credential. Superintendent Gilpatric explained that it is her understanding that the requirements for obtaining a CLAD certificate are now imbedded in the requirements for obtaining a teaching credential required by SB 2042, and that is why she awarded Ms. Smith three points. Superintendent Gilpatric’s understanding is consistent with the Commission on Teacher Credentialing’s interpretation of applicable law:

⁷ Ms. Kempenaar’s challenge to Criteria G (The number of extra duty assignments (e.g., coaching, cheerleading, decathlon, journalism, yearbook, etc.) that each certificated employee is assigned within the current year.) is moot since that criterion becomes relevant only if there is a tie after awarding the applicable points under the other criteria. (Factual Finding 6.) As discussed below, there is no such tie. For the same reason, her argument that Superintendent Gilpatric made a mathematical error in calculating the number of points awarded her (which the District correctly concedes) is also moot. The error made was not including the one point awarded Ms. Kempenaar under Criteria G in her total number of points.

The Commission has been receiving requests to issue a CLAD certificate when an individual has already been issued a credential with either an AB 1059 or SB 2042 English learner authorization. The reasons given to Commission staff to request the second English learner authorization is to meet the stipulations in a stipend given by an employing agency that states that an individual must hold a CLAD certificate or emphasis. The Commission does not issue documents that have duplicative authorizations. In licensure the most important information on a credential is the authorization. The English learner content authorization (whether completed as part of an AB 1059 or SB 2042 program) has the same authorization for English learner students as the CLAD certificate. The CLAD emphasis program is being phased out and fewer individuals will be issued documents listing this subject area. The review currently being conducted on the CLAD certificate examination may result in a change in the name of that document. In this case, the Commission would at some date cease to issue a CLAD certificate. The Commission suggests that employing agencies review the language related to their stipends and change the language from being document specific to authorization specific....

(Exhibit 3 – CTC Coded Correspondence 04-0001 (Dated January 2, 2004, and updated May 13, 2004), pg. 3; see, *In re Cellphone Termination Fee Cases* (2011) 193 Cal.App.4th 298, 313, fn. 13 [“‘In general, an agency’s interpretation of statutes within its administrative jurisdiction is given presumptive value as a consequence of the agency’s special familiarity and presumptive expertise with satellite legal and regulatory issues.’ (Citation.)”]; see also, Cal. Code of Regs., tit. 5, §§ 80015 [requirements for obtaining a CLAD certificate are identical to those for obtaining an English learner authorization], 80015.2, subd. (b) [a CLAD certificate authorizes the holder to perform the same services as an English learner authorization].)

Superintendent Gilpatric correctly awarded Ms. Smith three points for obtaining both of her credentials under the new SB 2042 requirements. While the evidence establishes that a CLAD certificate and a teaching credential issued pursuant to SB 2042 are two separate and distinct documents, the Commission on Teacher Credentialing’s Coded Correspondence 04-0001 makes it clear that Ms. Smith cannot obtain a CLAD certificate even though she completed the same requirements for obtaining such certificate as Ms. Kempenaar did. It would be arbitrary and capricious for the District to treat a teaching credential obtained under the new SB 2042 requirement differently from a CLAD certificate for purposes of awarding tie-breaking points. The District’s action was reasonable and did not constitute an abuse of discretion.

C. Criteria F: As previously discussed for Criteria C, a supplemental introductory authorization does not constitute a separate teaching credential. Therefore, Ms. Smith is only awarded one point each for her single subject credential in physical education and multiple subject credential, for a total of two points in Criteria F.

Based upon the above adjustments to Criteria C and F, the following is the correct application of the tie-breaking criteria to Mss. Kempenaar and Smith. Ms. Smith remains senior to Ms. Kempenaar. Therefore, Ms. Kempenaar failed to establish that she has bumping rights to the position for which Ms. Smith is being retained.

Criteria	Rachel Smith	Laurie Kempenaar
A. Preliminary vs. Clear/Life Credentials. Rating: +1 per preliminary +2 per clear/life credential	4	4
B. NCLB. Rating: +1 per Highly Qualified Area	1	1
C. Credentials and experience to teach in teacher shortage areas (e.g., bilingual, math, science, and physical education) Rating: +1 per credential +1 per year of experience	3	2
D. Number of Certifications/Authorizations to teach English Language Learners. Rating: +1 SDAIE/SB 1969, +2 LDS, +3 CLAD, +3 R359, +4 BCLAD	3	3
E. Number of supplementary authorizations. Rating: +1 per supplementary authorization	1	0
F. Number of teaching and/or special service credentials	2	2
Subtotal:	14	12
G. The number of extra duty assignments (e.g., coaching, cheerleading, decathlon, journalism, yearbook, etc.) that each certificated employee is assigned within the current	Moot. (Factual Finding 9.)	

year.		
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E. *Vanessa Lackey – Raised No Legal Challenges at the Hearing*

28. Vanessa Lackey teaches fourth grade at Deer Creek School. As previously discussed, she is more senior than Ms. Blair based on the application of the tie-breaking criteria. Ms. Lackey's concern that a coin toss not be used to break the tie between her and Ms. Marks is moot in light of Factual Finding 26.

F. *Jennifer Tayler – Challenge to the District's Assertion of Joe Limov's Alleged Right to Bump into Her Position*

29. Jennifer Tayler teaches science at Seven Hills School. She has a clear single subject credential in biological sciences. Her date of first paid service with the District is July 9, 2013, which is the same held by Ms. Kempenaar, Ms. Clawson, and Brian Ellis. Based on the application of the tie-breaking criteria, she is the least senior of the four – all of whom received a preliminary notice of layoff. None of the other three teachers has a clear single subject credential in biological science or any other science field.

30. Joe Limov was a principal who is reassigned to the classroom. The District allowed him to assert his bumping rights and "bump" Ms. Tayler out of her position teaching science and did not issue him a preliminary layoff notice. But Mr. Limov is not "competent" to teach science because he has not taught that class in at least 11 years, even though he has a clear single subject credential in general sciences. Furthermore, the District did not introduce any evidence of Mr. Limov's seniority date.⁸ (See, *Alexander v. Board of Trustees of the Delano Joint Union High School District* (1983) 139 Cal.App.3d 567, 571 [Senior employees are given "bumping" rights in that they will not be terminated if there are junior employees retained who are rendering services which the senior employee is certificated and competent to render.]) The District did not satisfy its burden of establishing that Mr. Limov has bumping rights to Ms. Tayler's position teaching science, and Ms. Tayler's preliminary layoff notice must be rescinded.

31. With due consideration and adjustments made for the matters noted above, no permanent or probationary employee with less seniority is being retained to render a service for which respondents are certificated and competent to perform.

32. The District's reductions of particular kinds of services and certificated staff relate solely to the welfare of the District's schools and their pupils.

LEGAL CONCLUSIONS

⁸ For the reasons discussed in footnote 5, evidence of his first date of paid service – August 26, 1986 – is not persuasive evidence of his seniority date.

1. Education Code section 44955, subdivision (b), provides the following with regard to a school district's authority to layoff certificated employees.

Whenever in any school year the average daily attendance in all of the schools of a district for the first six months in which school is in session shall have declined below the corresponding period of either of the previous two school years, whenever the governing board determines that attendance in a district will decline in the following year as a result of the termination of an interdistrict tuition agreement as defined in Section 46304, whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, or whenever the amendment of state law requires the modification of curriculum, and when in the opinion of the governing board of the district it shall have become necessary by reason of any of these conditions to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.

In computing a decline in average daily attendance for purposes of this section for a newly formed or reorganized school district, each school of the district shall be deemed to have been a school of the newly formed or reorganized district for both of the two previous school years.

As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof. Upon the request of any employee whose order of termination is so determined, the governing board shall furnish in writing no later than five days prior to the commencement of the hearing held in accordance with Section 44949, a statement of the specific criteria used in determining the order of termination and the application of the criteria in ranking each employee relative to the other employees in the group. This requirement that the governing board provide, on request, a written statement of reasons for

determining the order of termination shall not be interpreted to give affected employees any legal right or interest that would not exist without such a requirement.

2. Education Code section 44949 provides the following with regard to a school district's jurisdiction to layoff certificated employees:

(a) No later than March 15 and before an employee is given notice by the governing board that his or her services will not be required for the ensuing year for the reasons specified in Section 44955, the governing board and the employee shall be given written notice by the superintendent of the district or his or her designee, or in the case of a district which has no superintendent by the clerk or secretary of the governing board, that it has been recommended that the notice be given to the employee, and stating the reasons therefor.

Until the employee has requested a hearing as provided in subdivision (b) or has waived his or her right to a hearing, the notice and the reasons therefor shall be confidential and shall not be divulged by any person, except as may be necessary in the performance of duties. However, the violation of this requirement of confidentiality, in and of itself, shall not in any manner be construed as affecting the validity of any hearing conducted pursuant to this section.

(b) The employee may request a hearing to determine if there is cause for not reemploying him or her for the ensuing year. A request for a hearing shall be in writing and shall be delivered to the person who sent the notice pursuant to subdivision (a), on or before a date specified in that subdivision, which shall not be less than seven days after the date on which the notice is served upon the employee. If an employee fails to request a hearing on or before the date specified, his or her failure to do so shall constitute his or her waiver of his or her right to a hearing. The notice provided for in subdivision (a) shall advise the employee of the provisions of this subdivision.

(c) In the event a hearing is requested by the employee, the proceeding shall be conducted and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code and the governing board shall have all the power granted to an agency therein, except that all of the following shall apply:

(1) The respondent shall file his or her notice of defense, if any, within five days after service upon him or her of the accusation and he or she shall be notified of this five-day period for filing in the accusation.

(2) The discovery authorized by Section 11507.6 of the Government Code shall be available only if request is made therefor within 15 days after service of the accusation, and the notice required by Section 11505 of the Government Code shall so indicate.

(3) The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof. The proposed decision shall be prepared for the governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition. None of the findings, recommendations, or determinations contained in the proposed decision prepared by the administrative law judge shall be binding on the governing board. Nonsubstantive procedural errors committed by the school district or governing board of the school district shall not constitute cause for dismissing the charges unless the errors are prejudicial errors. Copies of the proposed decision shall be submitted to the governing board and to the employee on or before May 7 of the year in which the proceeding is commenced. All expenses of the hearing, including the cost of the administrative law judge, shall be paid by the governing board from the district funds.

The board may adopt from time to time such rules and procedures not inconsistent with provisions of this section as may be necessary to effectuate this section.

(d) Any notice or request shall be deemed sufficient when it is delivered in person to the employee to whom it is directed, or when it is deposited in the United States registered mail, postage prepaid and addressed to the last known address of the employee.

(e) If after request for hearing pursuant to subdivision (b) any continuance is granted pursuant to Section 11524 of the

Government Code, the dates prescribed in subdivision (c) which occur on or after the date of granting the continuance and the date prescribed in subdivision (c) of Section 44955 which occurs after the date of granting the continuance shall be extended for a period of time equal to the continuance.

The District complied with all notice and jurisdictional requirements set forth above. (Factual Finding 2; see, *Gonzales v. Pacific Greyhound Lines* (1950) 34 Cal.2d 749, 754-758 [the parties' stipulation to facts constitutes a judicial admission of those facts]; see also, *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 48 ["A judicial admission is a party's unequivocal concession of the truth of the matter, and removes the matter as an issue in the case."])

3. The services identified in Resolution Nos. 1112-20 and 1112-20A are particular kinds of services that may reduced or eliminated under Education Code section 44955. The Board of Trustee'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 their pupils within the meaning of Education Code section 44949.

4. For the reasons explained in Factual Findings 18 and 19, the Board of Trustees' adoption of the tie-breaking criteria outlined in Factual Finding 6 was a valid exercise of its discretion pursuant to Education Code section 44955, subdivision (b).

5. For the reasons explained in Factual Findings 18 through 20, Julie Blair did not establish cause to adjust her seniority date.

6. For the reasons explained in Factual Finding 23, the Board of Trustees' adoption of the competency standard outlined in Factual Finding 10 was a valid exercise of its discretion. Any subsequent attempt by it to "waive" such standard, however, would be arbitrary and capricious, and therefore invalid, for the reasons discussed in Factual Finding 15.

7. Monica Daugherty is not "competent" to teach special education, and Ericka Clawson has been issued a preliminary layoff notice. (Factual Findings 23 and 24.) Therefore, Ms. Daugherty has not established that a more junior certificated employee is being retained to perform a certificated service that she is certificated and competent to perform in violation of Education Code section 44955, subdivision (b).

8. A certificated employee's seniority date is determined by her first date of paid service with the school district. (Ed. Code, § 44845.) For the reasons explained in Factual Finding 26, respondent Andrea Marks established legal cause for adjusting her seniority date to August 5, 2002. Before issuing final layoff notices, the District shall determine whether Ms. Marks has any right to bump a more junior employee and, if so, shall rescind Ms. Marks' preliminary layoff notice.

9. For the reasons discussed in Factual Finding 27, the District misapplied the tie-breaking criteria to determine the relative seniority between Rachel Smith and Laurie Kempenaar. However, the correct application of the criteria does not change the relative seniority between them, and Ms. Kempenaar has not established that she is more senior than a certificated employee who is being retained to perform a certificated service which she is certificated and competent to perform in violation of Education Code section 44955, subdivision (b).

10. For the reasons explained in Factual Finding 30, Joe Limov is not “competent” to perform the certificated services being performed by Jennifer Tayler and the District did not establish that Mr. Limov is more senior to Ms. Tayler. Therefore, the District shall rescind the preliminary layoff notice issued to Ms. Tayler.

11. The District correctly identified the certificated employees providing the particular kinds of services that the Board of Trustees directed by reduced or discontinued in Resolution Nos. 1112-20 and 1112-20A.

12. After the adjustments set forth in Legal Conclusions 8 and 10, no permanent or probationary employee with less seniority is being retained to render a service for which respondents are certificated and competent to perform.

13. Except as set forth in Legal Conclusions 8 and 10, individually and collectively, cause exists to give notice to respondents that their services will be reduced or will not be required for the 2012-2013 school year because of the reduction or discontinuance of particular kinds of services.

RECOMMENDATIONS

1. Cause exists for the Nevada City School District to reduce or eliminate 20.30 full-time equivalent certificated positions at the end of the 2011-2012 school year.

2. As set forth in Legal Conclusion 8, the seniority date of respondent Andrea Marks shall be changed to August 5, 2002. Before issuing final layoff notices, the District shall determine whether, as a result of the new seniority date, Ms. Marks has any right to bump a more junior employee and, if so, shall rescind Ms. Marks’ preliminary layoff notice.

3. As set forth in Legal Conclusion 10, the District shall rescind the preliminary layoff notice issued to respondent Jennifer Tayler.

4. Other than as set forth in Recommendations 2 and 3, notice may be given to respondents that their services will be reduced or will not be required for the 2012-2013 school year. Notice shall be given in inverse order of seniority.

DATED: April 18, 2012

COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings