

BEFORE THE
BOARD OF EDUCATION
FOLSOM-CORDOVA UNIFIED SCHOOL DISTRICT
COUNTY OF SACRAMENTO
STATE OF CALIFORNIA

In the Matter of the Reduction or Elimination
of Particular Kinds of Services and the
Employment Status of:

OAH No. 2013030572

CERTAIN CERTIFICATED EMPLOYEES
OF THE FOLSOM-CORDOVA UNIFIED
SCHOOL DISTRICT,

Respondents.

PROPOSED DECISION

Administrative Law Judge Stephen J. Smith, Office of Administrative Hearings, State of California, heard this matter at the Folsom-Cordova Unified School District Office, Rancho Cordova, California on April 22, 2013.

Kim Kingsley Bogard, Attorney at Law, of Kingsley Bogard LLP, Attorneys at Law, represented the Folsom-Cordova Unified School District (District). Karen Knight, Associate Superintendent, Human Resources, appeared on behalf of the District.

Andrea Price, Attorney at Law, of Langenkamp, Curtis & Price, LLP, represented all respondents, with the exception noted below.

The matter was submitted on April 22, 2013.

FACTUAL FINDINGS

1. After considerable discussion and negotiation, the parties, by and through their respective counsel, entered into a set of Stipulated Facts (the Stipulation) with respect to certain facts set forth below. The Stipulation was reduced to writing (Exhibit 14), and was confirmed orally on the record by both counsel. In accordance with the stipulation, the following facts were proved:

2. Deborah Bettencourt is the Superintendent of the District. Acting in her official capacity only, the Superintendent made and filed the Accusations.

3. All respondents are, and at all times relevant to this Decision were, certificated employees of the District subject to the provisions of Education Code sections 44949 and 44955. All respondents subject to this Decision were represented by counsel.

4. On or just before March 7, 2013, in accordance with Education Code sections 44949 and 44955, the Superintendent notified the Board of Education of the District (Board) in writing of the Superintendent's recommendation that certain particular kinds of services (PKS) would have to be reduced or eliminated for the upcoming school year. The Superintendent's recommendation specified the PKS to be reduced or eliminated, as set forth below.

5. The Superintendent also notified the Board that a corresponding number of certificated employees of the District, employees occupying 23.30 full time equivalents (FTE) positions, would have to be laid off to effectuate the reduction or elimination of the PKS.

6. The Superintendent notified the Board that respondents had been identified as persons to whom notice should be given that their services would not be required for the ensuing school year. The recommendation that respondents' services for the District would not be required for the upcoming school year was based entirely upon the grounds set forth in Education Code sections 44949 and 44955, and in no way is related to respondents' skills, abilities or competencies as teachers.

REDUCTIONS/ELIMINATIONS OF PKS

7. The Board properly adopted two Resolutions, Nos. 03-07-24 (the PKS Resolution), regarding the PKS reductions and eliminations, and 03-07-13-25, concerning the Order of Seniority of Certificated Employees First Rendering Paid Probationary Service on the Same Date (Tie-Breaking Resolution), on March 7, 2013. In the PKS Resolution, the Board resolved to follow the Superintendent's recommendation to reduce 23.30 FTE PKS at the end of the current 2012-2013 school year, for the upcoming 2013-2014 school year. The PKS Resolution authorized and directed the Superintendent to give notice to an equivalent number of certificated employees of the District that their services would not be required for the upcoming school year in order to effectuate the reductions. The PKS Resolution authorized the reduction or elimination of the following services now offered in the District:

District-Wide

Reduce Psychologist .50 FTE

Secondary Schools-Grades 9 through 12

Reduce English	.40 FTE
Reduce Home Economics	1.00 FTE
Reduce Mathematics	1.40 FTE
Reduce Military Instructor	2.00 FTE
Reduce Physical Education	1.00 FTE
Reduce Social Science	1.00 FTE

Primary Schools -Grades K-8

Reduce Self-Contained Classes	15.00 FTE
Reduce Physical Education Prep	1.00 FTE

TOTAL	23.30 FTE
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PRELIMINARY NOTICES OF LAYOFF

8. The Superintendent, together with her Associate Superintendent, Human Resources, correctly identified certain certificated employees of the District who would be subject to receiving a Written Notice of Recommendation That Services Will Not Be Required (Preliminary Notice). The Preliminary Notices were necessary in order to carry out the instructions of the Board and make the reductions and eliminations called for by the PKS Resolution. The Superintendent, or her designee, timely and correctly served each of the certificated employees identified by the Superintendent, the Associate Superintendent and staff, with a Preliminary Notice before March 15, 2013. The written Preliminary Notices advised each recipient certificated employee that their services would not be required for the upcoming school year. The Preliminary Notices set forth the reasons for the Superintendent's recommendation, and attached copies of the Board's PKS and Tie-Breaking Resolutions.

9. The certificated employees of the District who had a right to an evidentiary hearing on whether they should be laid off, together with their respective Seniority Dates, were as follows (last name first):

Cain, Kimberly	08/07/2006
Galvin, Jennifer	08/21/2006
Garcia, Angelica	08/09/2012
Greco, Lynette	08/07/2006
Guillen, Stacy	09/24/2012
Hillel, Benjamin	08/07/2006
Jackson, Carrie	09/08/2011
Johnson, Richard	11/11/1999
Knecht, Kimberly	08/07/2006
Kurtz, Lauren	09/22/2011
Lockhart, Stephanie	08/07/2006
MacDonald, Michelle	08/07/2006

McGarvey, William	08/14/2003
Schulken, Casey	08/15/2011
Sims, Hugh	Administrator
Slaughter, Joanna	08/12/2011
Trenary, Lisa	08/09/2006
Yi, Alisa	08/31/2011

PRECAUTIONARY NOTICES OF LAYOFF TO THOSE SERVING ON TEMPORARY CONTRACTS

10. The District had a number of certificated employees teaching under temporary contracts during school year 2012-2013. Temporary contract certificated employees do not have a right to an evidentiary hearing on whether cause exists to terminate their temporary contracts. Nevertheless, in an abundance of caution, the District served each temporary contract certificated employee of the District being released, having their temporary contracts terminated at the end of the school year, with a Precautionary Notice of Layoff (Precautionary Notice). Those temporary contract employees receiving Precautionary Notices were:

Enrico, Teresa,
 Ettlin, Shelley
 Gardner-Smith, Kimberly
 James, Me`Lisa
 Kile, Christa
 Kraft, Amy
 Kuzmich, Alexandra
 Mejia, Eric
 O`Reilly, Kerry
 Paz, Adrian
 Pearce, Nicholas
 Peterson, Ryan
 Saika, Kimberly
 Smith, Juliene
 Velasco-Martinez, Melinda
 Weske, Kelly

11. It was stipulated that all the immediately above listed employees were properly classified as temporary employees of the District, and, as such, each may be released at the end of the current school year.

PROBATIONARY NONREELECTION

12. In a separate proceeding and by separate notice, the Superintendent gave one first year probationary certificated employee, Deniz Asaner, a Notice of Nonreelection, advising her that her services would not be required in the upcoming school year. Commensurate with the Education Code provisions permitting the District to make such

decisions regarding nonreelection of probationary teachers during the probationary period, the District need not prove cause for the action. “Probationary employees may be nonreelected without any showing of cause, without any statement of reasons and without any right of appeal or administrative redress.”¹ “A school district may choose not to reelect a probationary employee ‘without providing cause or other procedural protections to the terminated employee.’”²

WAIVER FOR FAILURE TO TIMELY FILE A REQUEST FOR A HEARING

13. Of the certificated employees subject to the layoff and entitled to request an evidentiary hearing on whether cause exists to lay them off, ten timely filed written requests for a hearing through counsel to determine if there was cause for not reemploying them for the ensuing year. It was stipulated that those ten certificated employees were each timely served Preliminary Notices and timely requested hearings. Those employees filing request for hearing were:

Cain, Kimberly
Galvin, Jennifer
Hillel, Benjamin
Johnson, Richard
Kurtz, Lauren
Lockhart, Stephanie
MacDonald, Michelle
Slaughter, Joanna
Trenary, Lisa
Weske, Kelly

14. The parties agreed that the certificated employees who received Preliminary Notices, but not listed just above, did not request timely hearings. The Preliminary Notices received by all certificated employees contained instructions that if the recipient of such a Preliminary Notice wanted a hearing on whether the recipient should be laid off, the recipient must timely file a Request for a Hearing with the District. The instructions advise the recipient that failure to timely file a Request for a Hearing would be deemed a waiver of the recipient’s right to a hearing. Those employees who received a Preliminary Notice but failed to timely file Requests for Hearing waived any right to a hearing, and the layoff action is affirmed by default with respect to them.

15. The District timely served Accusations on each of the certificated employees who did timely request hearings. The parties agreed that each certificated employee served

¹ Education Code section 44948.3, *Kavanaugh v. West Sonoma County Union High School District* (2003) 29 Cal.4th 911, 917, citing *Bellflower Education Association v. Bellflower Unified School District* (1991) 228 Cal.App. 3d 805, 808

² *Kavanaugh, supra*, at p. 918, fn. 4, citing *Board of Education v. Round Valley Teacher’s Association* (1996) 13 Cal.4th 269, 281.

an Accusation timely filed, through counsel, a Notice of Defense to the Accusation. The parties stipulated that all prehearing jurisdictional requirements were met with respect to the respondents timely filing Notices of Defense.

NECESSITY FOR THE REDUCTION IN PARTICULAR KINDS OF SERVICES

16. The parties stipulated that the reduction or elimination of the PKS set forth in the PKS Resolution were necessary and appropriate to enable the District to meet its budget projections for the upcoming school year, and not operate in a deficit position. The District has no option but to reduce its expenditures in order to balance its budget. The parties agreed that the reductions and eliminations of PKS as set forth in the PKS Resolution are in the best interests of the District and its students.

RESPONDENTS' STATUS AND SENIORITY, TIE BREAKING

17. The parties agreed that all respondents are entitled to the seniority dates and employment status set forth in the spreadsheet attachment to the Stipulation (Exhibit 14), and that all respondents with the same first dates of paid service to the District had seniority date ties properly broken by application of the criteria set forth in the Tie-Breaking Resolution. The parties also agreed that any rationale supporting adjustment of any employee's seniority date as a result of this lay off process is not binding upon the District, and does not establish any binding precedent for any certificated employee affected by this process, unless specifically excepted in the remainder of this Decision.

18. Consistent with the request of Folsom-Cordova Employees Association (FCEA)/CTA, if a change in an employee's seniority date resulted in a same date of hire tie with one or more other employees, all employees involved in that tie were re-ranked and re-lotted in accordance with the Tie-Breaking Resolution criteria. The parties agreed that all same date of hire ties were properly broken and the Tie-Breaking Resolution criteria were correctly applied, as reflected in the spreadsheet attachment to the stipulation.

SPECIAL SKILLS OR QUALIFICATIONS WARRANTING SKIPPING

19. The parties agreed that special skills and qualifications are necessary for assignment to the FLES educational program and course work.

MS. KURTZ

20. The parties agreed certificated employee Lauren Kurtz will be classified as holding Probationary Zero status for .80 FTE. The .80 FTE shall be counted against the 23.3 FTE reduction set forth in the PKS Resolution.

MS. TRENARY AND MS. LEE

21. The parties agreed Lisa Trenary (seniority date August 9, 2006) is credentialed and competent to serve in the position currently held by a less senior employee, Nancy Lee

(seniority date August 10, 2006). Both are currently self-contained classroom elementary school teachers. The District inadvertently did not give certificated employee Nancy Lee a Preliminary Notice of Layoff.

22. The consequences of the District's inadvertent failure to give Ms. Lee a Preliminary Notice, and laying off Ms. Trenary, is an agreed legal error stemming from the fact that the District, would, if the error is not remedied, retain a less senior employee (Ms. Lee) to staff a position that a more senior employee (Ms. Trenary) being laid off is certificated and competent to teach.

23. The District agreed that a mistake was made with respect to Ms. Trenary and Ms. Lee. Counsel for Ms. Trenary seeks an Order here rescinding Ms. Trenary's Preliminary Notice. The District contends otherwise (below). The parties agreed that the only issue that remains with respect to Ms. Trenary and Ms. Lee is the appropriate remedy to be imposed as a result of the mistake.

THE FIVE CONDITIONAL RESCISSIONS

24. The District conditionally intends to rescind five layoff notices issued to the most senior employees who received Preliminary Notices due to the PKS reductions/eliminations. Each of the five senior employees are so designated in the spreadsheet attachment to the Stipulation (Exhibit 14), and are identified in color in the District's Seniority List (Exhibit 12). The five rescissions are subject to conditions precedent set forth in the Stipulation, one of which is the ALJ sustaining in this Decision that the Preliminary Notice given to Ms. Trenary is lawful, permitting Ms. Trenary to be laid off. However, as set forth below, only four least senior teachers of these five proposed rescissions can actually be subject to the stipulation, because if it is lawful to layoff Ms. Trenary as set forth below in detail, the layoff notice given to the most senior of the five must be rescinded, regardless of the terms of the Stipulation. Since all five teachers have the same seniority date, the District would have to apply the criteria in the Tie-Breaking Resolution in order to determine which teacher is the most senior among the five. The Stipulation eliminates the need to break the tie for the purposes of these proceedings.

25. The District contends that because it intends to rescind the Preliminary Notices to the five most senior employees receiving Preliminary Notices, all of whom are more senior than Ms. Trenary, that these rescissions cure the errors made by failing to notice Ms. Lee for layoff, and laying off a more senior employee to Ms. Lee, Ms. Trenary.

26. The five most senior employees who received Preliminary Notices the District intends to rescind, assuming the layoff at Ms. Trenary is upheld, are (with their seniority dates) as follows:

Kimberly Cain	08/07 2006
Lynette Greco	08/07/2006
Stephanie Lockhart	08/07/2006

Michelle MacDonald 08/07/2006

Benjamin Hillel 08/07/2006

27. Each of the five teachers listed have two days more seniority than Ms. Trenary. Although the Stipulation does not address whether any or all of these five teachers are certificated and competent to bump Ms. Lee out of her assignment, reference to the District Seniority List (Exhibit 12), which also contains a list of each teacher's credentials, certifications and current assignments, confirms that each of the five hold multiple subjects credentials and are currently teaching elementary school assignments. Ms. Lee has a multiple subjects credential and is an elementary teacher, teaching sixth grade. Ms. Trenary has a multiple subjects credential, and is an elementary teacher, teaching fifth-grade. The PKF's reduction necessitating this analysis focuses directly upon a reduction of elementary self-contained classroom teaching. All of the five employees listed above are certificated and competent to teach Ms. Lee's self-contained elementary school teaching assignment, and are more senior to Ms. Trenary.

28. The District points to previous decisions by Office of Administrative Hearings (OAH) ALJs in previous layoff cases that the District contends support its proposed remedy. In particular, the District points to decisions of OAH ALJ's in in layoff matters regarding Coachella Valley Unified School District, Patterson Unified School District, Mountain View Unified School District and particularly, the 2012 Los Angeles Unified School District (LAUSD) layoff. The District contends that these decisions stands for the proposition that an inadvertent mistake in failing to give a Preliminary Notice to the teacher that, upon closer analysis, should have received one, such as occurred in this matter, is cured through an equivalency between errors and rescissions, accomplished by rescinding the Preliminary Notice given to the most senior teacher still subject to layoff, such as the District has attempted to do here.

29. Counsel for Ms. Trenary contends that the District's proposed remedy violates Education Code section 44955, and is thus unlawful. Counsel contends that section 44955 creates a personal and individual right in each certificated teacher that is not subject to an equivalency test such as proposed by the District. Counsel also points out that the previous decisions of OAH ALJs relied upon by the District are Proposed Decisions, are not binding and perhaps not even persuasive, depending on the facts. Counsel also correctly pointed out that there is no evidence in this record to indicate that any of the districts for whom these Proposed Decisions were written adopted those Proposed Decisions and made them final. Counsel points out that if the District's proposed remedy is adopted and sustained in this Decision, the District will violate Ms. Trenary's personal section 44955 rights by retaining a less senior employee (Ms. Lee) to serve in a position in the upcoming school year for which Ms. Trenary, a more senior teacher, is certificated and competent to teach, but has been laid off, and rescinding a notice to a different employee more senior to Ms. Trenary does not cure the violation of Ms. Trenary's section 44955 rights. Counsel contends the plain meaning of the requirements of section 44955 requires the outcome she advocates.

30. Both contentions make excellent points and each have merit, but it is the District's contention that must prevail in this instance. Education Code section 44955, subdivision (b), provides, in pertinent part, as follows:

[¶] ... [¶]

Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while ... any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.

[¶] ... [¶]

31. In isolation, it does not appear to be legally possible to lay off Ms. Trenary and retain Ms. Lee without violating Ms. Trenary's rights within the plain meaning of the portion of section 44955, subdivision (b) cited above. Retaining Ms. Lee, indisputably an "employee with less seniority," to render a service which a more senior employee, Ms. Trenary, is indisputably certificated and competent to render, cannot occur consonant with the clear meaning of the requirements of section 44955, subdivision (b).

32. But the contention fails when a more comprehensive analysis of Ms. Trenary's seniority, certifications and competence and current assignment is made against the five more senior employees listed above that the District intends to rescind, if Ms. Trenary's layoff is found to be appropriate. A careful review of the Proposed Decisions of the ALJs cited by the District, including the lengthy 2012 LAUSD decision (lengthy to deal with more than 2500 contested notices of layoff), provides some oblique support for the District's position. In none of those Proposed Decisions was the specific question raised here addressed. In none of those Proposed Decisions was the issue of whether the more senior teacher(s) who were rescinded, as a remedy for the inadvertent failure to give a layoff notice to a more junior person, certificated and competent to bump the more junior teacher inadvertently retained. Nor was the issue directly addressed as to whether the more senior teachers were certificated and competent to bump the employee alleged to be disadvantaged by the inadvertent failure to give notice. The 2011 Coachella Valley and Mountain View decisions come closest, and confirm the general principle that the mistake that results when there exists inadvertent failure to give notice to a less senior teacher, when there are more senior teachers being laid off, and there exists one or more junior teachers inadvertently skipped, the general remedy is to rescind an equivalent number of those most senior teachers still subject to layoff. These Proposed Decisions generally confirm, without analysis of specific certifications and competence, that the more senior teachers must be rescinded before the less senior teacher who raised and contested the inadvertent skip of a teacher junior to herself can be retained. The LAUSD decision approaches the issue from a different direction, but does provide some tangential guidance as well.

33. The ALJ in the LAUSD Proposed Decision cited language from *Alexander v. Board of Trustees of the Delano Unified School District*³ for support for the particular portion of the Proposed Decision applicable to the facts under review here.

Because at least some of the persons skipped should have received the notices, a corresponding number of the most senior of the employees who were not reemployed must have been improperly given notices. The trial court must determine which of the Teachers suffered prejudicial error in this case.⁴

34. The ALJ's concern in the LAUSD Proposed Decision with respect to inappropriately skipped employees was similar to that addressed in the *Alexander* case. In each case, the evidence did not reveal whether the more senior teachers being laid off were certificated and competent to bump any of their more junior counterparts who were inadvertently or, in the case of the *Alexander* case, inappropriately skipped. In *Alexander*, the appellate court remanded the matter to the trial court to undertake precisely the analysis that is required here. In the LAUSD matter, the same evidentiary deficit existed, but the ALJ was primarily concerned with curtailing the application of the "domino theory" as a remedy for the inadvertent legal error. The domino theory contends that in the event of an inadvertent failure to give notice, resulting in an unintentional skip, that all persons being laid off with more seniority than the person inadvertently skipped must be rescinded in order to avoid violating section 44955, subdivision (b)'s prohibition against retention of any junior teachers when more senior persons are being laid off. The LAUSD ALJ refuses to adopt the domino theory remedy as legally unfounded, but does not analyze whether any of the more senior teachers getting laid off were actually certificated and competent to staff the position of the junior teacher(s) inadvertently skipped, and thus could bump. Only with such an analysis can it be ascertained with certainty that 44955, subdivision (b)'s requirements are met here.

35. As it turns out, all five of the more senior teachers proposed to be rescinded are senior to Ms. Trenary and Ms. Lee, and all five are certificated and competent to teach the elementary self-contained classroom assignments both Ms. Trenary and Ms. Lee currently occupy. If Ms. Trenary were to be retained, and the conditional rescissions issued to the five more senior teachers did not occur, any one of these five more senior teachers could claim that their section 44955, subdivision (b) rights were violated, because the District would be retaining Ms. Trenary, a person's with less seniority than any one or all of the five, to perform a service in the upcoming year any one of the five is certificated and competent to provide.

36. As a result, rescission of the Preliminary Notice issued to the most senior of the five teachers set forth above does cure and satisfactorily remedies the inadvertent failure to issue a Preliminary Notice to Ms. Lee. Choosing among five, all of whom have the same seniority date, would require application of the criteria set forth in the Board's Tie-Breaking

³ (1983) 139 Cal. App. 3d 567, 576.

⁴ *Id.*

Resolution. Since all five have identical seniority dates, as set forth in the Stipulation, the District has agreed with the FCEA to rescind the Preliminary Notices to all five instead of going through the tie-breaking process. This is certainly within the District's discretion and clearly in the best interests of all five of the effected teachers.

MR. JOHNSON AND MR. SIMS (1.0 FTE MILITARY INSTRUCTOR/TEACHING VP)

37. Richard Johnson has a seniority date of January 11, 1999. Due to the potential for conflict with the other respondents, for the purposes of his testimony alone, Mr. Johnson represented himself. In all other respects, Mr. Johnson was represented by counsel as set forth above. Mr. Johnson has a Designated Subjects/Special Subjects credential in Reserve Officer Training (ROTC). Mr. Johnson teaches 1.00 FTE military drill/instruction at Kitty Hawk School. Mr. Johnson is directly effected by the specific PKS elimination of the 2.00 FTE military instructor portion of the PKS Resolution.

38. During the current school year, certificated staff at Kitty Hawk School included three military/drill instructors, including Mr. Johnson, and a Teaching Vice Principal, Mr. Sims. Mr. Johnson is the most senior certificated employee of the four. Mr. Johnson contends he "can and has been doing the job" of the Teaching Vice Principal, and since he is more senior than Mr. Sims, who did not receive a Preliminary Notice, he should be able to bump Mr. Sims and be retained.

39. Mr. Sims has the same credential as does Mr. Johnson, Special Subjects ROTC. Mr. Sims also obtained an Administrative credential sometime in 2010. Mr. Sims was made the Teaching Vice Principal at Kitty Hawk for the 2011-2012 school year. Mr. Sims's seniority date is August 13, 2007.

40. Kitty Hawk School is where the District places students with serious disciplinary problems/histories. Students are assigned to Kitty Hawk School as a last chance to stay in school. Kitty Hawk School has a site Principal responsible for the school. The Principal is a full-time administrator, and a management employee of the District. Only the Principal has the authority to act on behalf of the District to suspend a student for a period in excess of five days, and to evaluate and discipline certificated and classified employees assigned to the Kitty Hawk School site.

41. Mr. Johnson testified without dispute that he not only teaches at Kitty Hawk School, but is also a "Principal's Designee." It is in his capacity as serving as a Principal's Designee, while also teaching, that Mr. Johnson contends that he has been doing the job of the Teaching Vice Principal. Mr. Johnson has been acting as a Principal's Designee, along with his teaching assignment, at the Kitty Hawk School for the last several school years, including the current year.

42. Education Code section 48911, subdivision (i) defines a “Principal’s Designee” as:

...any one or more administrators at the school site specifically designated by the principal in writing to assist with disciplinary procedures. In the event that there is not an administrator in addition to the principal at the school site, a certificated person at the school site may be specifically designated by the principal, in writing, as a ‘principal’s designee’ to assist with disciplinary procedures.

43. Mr. Johnson introduced documents that corroborate his claim. In Exhibit A, which the parties agreed is a portion of Appendix B to the current year contractual agreement between the District and FCEA, under the heading, “Official Work Year and Ratio Factors for Certificated Personnel,” under the sub-heading “Nonmanagement Positions,” there are entries for “Teaching Vice Principal (Without Administrative Credential)” and “Teaching Vice Principal (With Administrative Credential).” Whether with or without administrative credential, the Teaching Vice Principal position reflects an identical enhanced obligation under the contract for five extra teaching days (189) per contract year. Both positions require an identical work obligation. However, there is an additional .02 FTE compensation augmentation for the possession of the administrative credential.

44. Appendix B to the current year’s contract thus confirms Mr. Johnson’s claim that it is not mandatory to possess an administrative credential to perform the duties of Teaching Vice Principal at Kitty Hawk School. The document confirms that whether possessed of an administrative credential or not, the Teaching Vice Principal position is non-management and has identical work year requirements.

45. Exhibit B consists of four annual “Principal Designee” authorizations, signed by the Kitty Hawk School site Principal and forwarded to the Assistant Superintendent. These documents confirm that a Teaching Vice Principal with an administrative credential, a Teaching Vice Principal without an administrative credential and a certificated teacher all stand in the same stead as needing an Education Code section 48911, subdivision (i) “Principal’s Designee,” authorization to act for the site Principal, and, if so authorized, have the same duties and exercise the same level of authority and responsibility at the Kitty Hawk School.

46. The Exhibit B documents demonstrate that the District has made liberal use of the “Principal’s Designee” provision of section 48911, subdivision (i) to formally authorize certain certificated employees, particularly Mr. Johnson, as well as the teaching Vice Principal, to stand in the principal’s stead when the Principal is unavailable.

47. The Exhibit B documents confirm that the District has formally authorized Mr. Johnson in writing as a “Principal’s Designee,” in conformity with Education Code section 48911, subdivision (i), in school years 2009-2010, 2010-2011, 2011-2012 and through the

current school year. Mr. Johnson was designated a Principal's Designee at Kitty Hawk School for several years before the time reflected in the documents.

48. The written authorizations for 2009-2010 and 2010-2011 school years show Mr. Johnson as "Designee #2." In each of school years 2009-2010 and 2010-2011, the primary designee, "Designee #1," did not hold an administrative credential. In school year 2010-2011, "Designee #4" was Mr. Sims. The authorization for school year 2011- 2012, shows the principal's primary designee as Mr. Sims, now noted to be the Teaching Vice Principal. Mr. Johnson remained Designee #2, pursuant to language in the designation as follows, "Furthermore, I have designated the following certificated staff member as the "Principal's Designee" at Kitty Hawk School (Site) in the event that both the Principal and the Principal's primary designee are absent." This written designation, like the others, cites section 48911, subdivision (i), as authority for the Principal's action. The Principal's Designee authorizing document for the current school year is the same.

49. The distinction between the Teaching Vice Principal and the certificated Principal's Designee is a matter of delegation sequence only, and not dependent upon possession or lack of possession of an administrative credential. The order of priority of the delegation is set forth in the Principal's Designee document for the school year in question, and a Teaching Vice Principal, whether possessed of an administrative credential or not, still must be designated in a document conforming to section 48911, subdivision (i), as must a certificated staff person being designated. Whether any one of the several designees actually exercises the limited authority set forth in section 48911 is thus only a matter of availability of the next Principal's designee in line at the time the Principal or other designees are not available to handle a problem that would ordinarily require the Principal's attention.

50. A Principal's Designee's authority is specifically limited by Education Code section 48911. Section 48911, subdivision (i) permits either any administrator, or any certificated employee, as long as designated by the site Principal, to exercise the authority defined by section 48911 in the absence of the Principal. That limitation of authority is neither expanded nor contracted by the possession or lack of an administrative credential or occupying the position of Teaching Vice Principal. Over the past several school years, Mr. Johnson has been given, and has repeatedly exercised, the limited authority provided by section 48911 to stand in the stead of the Principal and exercise the authority to counsel, attend and participate in disciplinary hearings, conduct parent-student conferences, address disciplinary issues and fashion appropriate remedies, and to suspend a student for up to and including five days.

51. Statutorily, as well as by actual practice in the District, the possession or lack of possession of an administrative credential, and holding a position as a Teaching Vice Principal, or lack of that position, has had no impact, other than order of priority for filling in for the Principal. In two of the four most recent school years, the District operated without a Teaching Vice Principal, and when the Principal was absent or unavailable, as the primary designee, Mr. Johnson, performed the duties of the Teaching Vice Principal. Since the Teaching Vice Principal, with or without an administrative credential, may not exercise the

authority of section 48911 absent the same section 48911, subdivision (i) written authorization as is required for a certificated non-administrative credential holder, in actual practice, the positions are coextensive, with the exception of a small pay boost for possession of the credential. Possession or lack of possession of an administrative credential is not essential for a certificated “Principal’s Designee” to perform the same duties and exercise the same responsibilities as the half time portion of the Teaching Vice Principal position held by Mr. Sims. A certificated teacher lacking an administrative credential designated a “Principal’s Designee” is thus factually and legally competent serve as a Teaching Vice Principal.

52. The District expressed its “preference” to have a person who has an administrative credential serve in the Teaching Vice Principal position. Other than this expressed “preference,” the District did not point out any authority requiring Mr. Sims to be retained in the Teaching Vice Principal position and the more senior Mr. Johnson be laid off. As set forth above, an administrative credential, although preferable to the District, is not legally required to discharge the duties of the Teaching Vice Principal portion of the job.

53. The District is entitled to great latitude and deference toward the District’s expressed preferences in the exercise of its discretion regarding the assignments and reassignments of certificated staff. However, that deference and discretion is limited by section 44955, subdivision (b)’s prohibition against retaining a less senior person to perform a service a more senior person being laid off is certificated and competent to provide. The evidence reveals that Mr. Johnson is certificated and competent to perform the service Mr. Sims is being retained to provide, and is considerably more senior than Mr. Sims. In the unusual teaching Vice Principal assignment at the Kitty Hawk School, possession of an administrative credential, although preferred and desired by the District, is not essential, and Mr. Johnson may not be laid off simply because he does not possess that credential.

54. The Superintendent, on behalf of the District, considered all known attrition, resignations, retirements and requests for transfer in determining the actual number of necessary layoff notices to be delivered to its employees.

55. There was no evidence that the District proposes to eliminate any services that are State or federally mandated.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. The parties stipulated that all notices and jurisdictional requirements contained in those sections were satisfied. The District has the burden of proving by a preponderance of the evidence that the proposed reduction or elimination of particular kinds of services and the preliminary notice of layoff served on respondents is factually and legally appropriate.⁵

⁵ Education Code section 44949.

2. The services the District seeks to eliminate in this matter are “particular kinds of services” that may be reduced or discontinued within the meaning of Education Code section 44955. The Board’s decision to reduce or discontinue these particular kinds of services was not demonstrated to be arbitrary or capricious, but constituted a proper exercise of discretion.

3. The reduction or discontinuation of particular kinds of services related to the welfare of the District and its pupils. The District is facing a significant deficit for the upcoming school year and has no choice but to reduce expenditures. The reduction in particular kinds of services proposed is necessary to avert the District operating in a deficit in the upcoming school year.

4. Education Code section 44955 requires layoffs to take place in inverse order of seniority, with some notable exceptions. “Thus, the statute provides that seniority determines the order of dismissals, and that as between employees with the same first date of paid service, the order of termination is determined on the basis of the needs of the district and its students. 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. Conversely, a district may move upward from the bottom of the seniority list, “skipping” over and retaining junior employees who are certificated and competent to render services which more senior employees are not.”⁶

5. As set forth above in the Factual Findings, there was persuasive evidence that two certificated employees of the District, Mr. Johnson and Ms. Trenary, who received Preliminary Notices, are being laid off in favor of junior employees being skipped, in the case of Mr. Sims, by design and District preference, and in the case of Ms. Lee, by mistake.

6. As set forth in the Factual Findings and for the reasons set forth there, the Preliminary Notices issued to Mr. Johnson must be rescinded, because the District intends to retain a less senior employee to perform services Mr. Johnson is certificated and competent to provide; services that Mr. Johnson has actually been providing over the past several years and for which an administrative credential is not required, according to the District’s own documentation and practice.

7. Also as set forth in the Factual Findings, the Preliminary Notice issued to Ms. Trenary must be sustained, and her layoff must be confirmed. As identified in the Factual Findings and pointed out in the Stipulation, there are five employees more senior to Ms. Trenary who also received Preliminary Notices and who are certificated and competent to provide the services either Ms. Trenary or Ms. Lee would perform in the upcoming school year. The fact that Ms. Trenary is clearly able to bump Ms. Lee settles the issue only with

⁶ *Alexander v. Board of Trustees of the Delano Unified School District* (1983) 139 Cal. App. 3d 567, 571-2, *Moreland Teacher’s Association v. Kurze* (1980) 109 Cal.App.3d 648, 655.

respect to those two teachers, but fails to address the seniority claims of the five more senior teachers still subject to layoff if Ms. Trenary were retained. All five of the more senior teachers still subject to layoff are certificated and competent to perform the services that both Ms. Lee and Ms. Trenary are providing. Ms. Trenary cannot be retained if the other five more senior teachers are laid off, consistent with the requirements of section 44955, subdivision (b).

8. In all other respects, and regarding to all other certificated employees subject to these action who received Preliminary Notices, there was no evidence that any certificated employee of the District is being retained to provide a service any of the respondents, other than Mr. Johnson, who received Preliminary Notices are certificated and competent to render.

9. Legal cause exists pursuant to Education Code sections 44949 and 44955 for the Folsom-Cordova Unified School District to reduce or discontinue the 22.30 FTE of PKS identified in the District's PKS Resolution. The cause for the reduction or discontinuation of particular kinds of services relates solely to the welfare of the schools and the pupils thereof. Legal cause therefore exists to sustain the Accusations. The Board may give respondents, except Mr. Johnson, Final Notices that their services will not be required by the District in the upcoming school year, in inverse order of seniority.

ORDER

The action of the Board of Education of the Folsom-Cordova Unified School District action to reduce or eliminate 22.30 FTE of particular kinds of services for the 2013-2014 school year is AFFIRMED.

The Accusation against District certificated employee Richard Johnson is DISMISSED. The Preliminary Notices of Layoff issued by the Folsom-Cordova Unified School District to Richard Johnson shall be RESCINDED.

As a result of the confirmation in this decision that the Preliminary Notice and Accusation issued to Lisa Trenary are sustained, and pursuant to the terms of the Stipulation, the District shall rescind the Preliminary Notices and dismiss the Accusations issued to teachers Kimberly Cain, Lynette Greco, Michelle MacDonald, Stephanie Lockhart, and Benjamin Hillel.

The Accusations are SUSTAINED with respect to all other respondents receiving Preliminary Notices of Layoff, except as provided in the provisions of the Stipulation still in effect as a result of this Order and the Findings and Legal Conclusions in this decision.

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Final Notices may be given to all respondents by the District, except Richard Johnson, Kimberly Cain, Lynette Greco, Michelle MacDonald, Stephanie Lockhart, and Benjamin Hillel, that their services will not be required for the upcoming school year. Final Notices shall be given in inverse order of seniority.

DATED: April 30, 2013

STEPHEN J. SMITH
Administrative Law Judge
Office of Administrative Hearings