

BEFORE THE
GOVERNING BOARD OF THE
SAN FRANCISCO UNIFIED SCHOOL DISTRICT
CITY AND COUNTY OF SAN FRANCISCO

In the Matter of the Non-Reemployment of
123 Full-Time Equivalent Administrative
and 210 Full-Time Equivalent Instructional
Services Certificated Employees,

Respondents.

OAH No. 2012020343

PROPOSED DECISION

Administrative Law Judge Melissa G. Crowell, State of California, Office of Administrative Hearings, heard this matter on April 4, 5, 9, 10, 12 and 13, 2012, in San Francisco, California.

John R. Yeh, Attorney at Law, Burke, Williams & Sorenson, LLP, and William Michael Quinn, Jr., Senior Deputy General Counsel, represented complainant Roger L. Buschmann, Chief Administrative Officer, Human Resources, San Francisco Unified School District.

Robert D. Links, Attorney at Law, Slote and Links, represented the respondents listed on Appendix 1, all of whom are members of the United Administrators of San Francisco (UASF).

Respondent Michael Wantorek represented himself.

Stewart Weinberg, Attorney at Law, Weinberg, Roger & Rosenfeld, represented all the remaining respondents, all of whom are members of the United Educators of San Francisco (UESF).

The record was left open until May 2, 2012, for submission of written closing briefs, which were timely filed. The district's opening brief was marked as Exhibit 41. The brief of UESF was marked as Exhibit X. The district's reply brief was marked as Exhibit 42. No brief was submitted by UASF. The record was closed and the matter was submitted for decision on May 2, 2012.

FACTUAL FINDINGS

1. Complainant Roger L. Buschmann issued the amended uniform accusation in his official capacity as Chief Administrative Officer, Human Resources, of the San Francisco Unified School District.

2. Respondents are certificated employees of the district. Respondents are identified on Appendices 1 through 4, attached hereto and incorporated by reference.

3. On February 28, 2012, the district's governing board adopted Resolution No. 122-28S01, in which it resolved to reduce or eliminate particular kinds of services for the 2012-2013 school year, and directed the superintendent to give notice to certificated employees that their services would be reduced or eliminated at the end of the 2011-2012 school year (the PKS resolution). The PKS resolution stated that a total of 123 full-time equivalent (FTE) in administrative services and 210 FTE in instructional services, as set forth in Exhibit A to the PKS resolution, were to be reduced or eliminated. Exhibit A to the PKS resolution is set forth in Appendix 6, attached hereto and incorporated by reference.

The reductions in instructional services are divided between the district's elementary, middle and high school programs. For each program, the PKS resolution specifies reductions in classroom and nonclassroom programs, with particularity as to the service to be reduced in each program.

4. On or before March 15, 2012, the district gave written notice to certificated employees, including respondents, of the recommendation that their services would be reduced or eliminated for the 2012-2013 school year. The notice set forth the reasons for the recommendation.

5. Respondents filed a timely request for hearing to determine if there is cause for terminating their services for the 2012-2013 school year. Pursuant to an agreement between the district and the two unions, a single accusation with required accompanying documents was served on each of the unions and constituted service on behalf of all the affected certificated employees. Also pursuant to agreement, the unions served on the district a uniform notice of defense and a uniform request for hearing on behalf of their affected members. All prehearing jurisdictional requirements have been met.

Overview

6. In the PKS resolution, the district established criteria for deviating from seniority and skipping junior employees. The resolution provides:

[P]ursuant to Education Code § 44955(d)(1), it will be necessary to retain the services of certificated employees in the 2012-2013 school year regardless of seniority, who possess credentials, special training, and experience, and qualifications needed for

and who are currently assigned in this 2011-2012 school year to render service in the following programs:

- All certificated employees possessing and teaching under a clear, preliminary, intern or emergency single subject mathematics credential (excluding the credential in Foundational-Level Mathematics) during the 2011-2012 school year.
- All certificated employees possessing and teaching under a clear, preliminary, intern or emergency single subject science credential during the 2011-2012 school year.
- All certificated employees possessing and teaching under a clear, preliminary, intern or emergency single subject special education credential during the 2011-2012 school year; and
- All certificated employees serving in a bilingual education classroom (in which instruction is provided in both the students' native language, and English) and possessing and teaching during the 2011-2012 school year under a clear, preliminary, intern or emergency Bilingual Cross Cultural Language and Academic Development (BLCAD) Certification;
- All certificated employees assigned and working at one of the District's Superintendent's Zone Schools during the 2011-2012 school year; including but not limited to classroom teachers, Academic Acceleration Teachers, Instructional Coaches and Equity Release Teachers.

7. The district's governing board also adopted Resolution No. 122-28S02, which established criteria for determining the order of seniority for employees with the same first date of paid service (tie-breaking resolution). After ranking the teachers hired on the same day based on the criteria set forth in the tie-breaking resolution, a lottery was performed for any remaining ties. Lotteries associated with tie-breaking took place on March 9 and 19, 2012. Teachers assigned to the schools in the Superintendent's Zone for the 2011-2012 school year were included in the application of the tie-breaking criteria.

8. In the PKS resolution, the district established criteria for any employee that sought to move into a position requiring certification qualifications held by a less senior certificated employee, also known as bumping. The district created one bumping chart for those impacted by the reduction in administrative services. The district created two bumping

charts for those impacted by the reduction in instructional services. One of these bumping charts is premised on the skipping of certificated employees in the Superintendent's Zone schools, discussed below. (Ex. 30.) The alternate bumping chart is premised on not skipping the certificated employees in the Superintendent's Zone. (Ex. 20.)

9. The district has identified a number of administrators who will be retained based on their bumping rights. Pursuant to the stipulation of the parties, the accusation will be dismissed against the supervisory employees represented by UASF listed on Exhibit 24 with the designation of "Retain." These employees are: Susan M. Akram, Stacy Ann Afflick, Gina L. Ferrante, Alicia M. Gonzalez, Jeremy Brian Hilinski, Diana Leigh Marshall, Tracy Michele Peoples, Mark Sanchez, John R. Simard, Lance Tagomori, Lena Van Haren, Stephanie Yuke Hoong Young, Paul J. Koh, Sylvia Esther Lepe, Mary F. Elisalde, and Sheila Milosky. Pursuant to the stipulation of the parties, the accusation against these respondents will be dismissed.

10. The district has identified a number of certificated employees who will be retained by virtue of their bumping rights. These employees are: Meiquin Mellisa Low, Staci Marie Kavanaugh, Jill Dianne Milstead, Catherine T. Burke, Steven Glen Gibson, Leslie Shayna Laurence, Kristin McKinley Closek, Rena Ann Frantz, Karimah N. Adisa, Amy Brooks Gottesfeld, Amelia Rosemary Nevis Fitzgerald, Therese Michelle Neider De Folco, Rebecca Elise Dankner, Molly Ruth Rodriguez, Damian Alejandro Nunez, Wanda Kurtcu, and Dana Denise De Franco. By virtue of their seniority rights, the accusation against the respondents in this group will be dismissed.

Proposed skip of all certificated employees in the Superintendent's Zone schools

11. Pursuant to the PKS resolution, the district proposes to skip 65 certificated employees who are assigned and working at one of the Superintendent's Zone schools during the 2011-2012 school year. Although the PKS resolution is somewhat vague¹, the district's intention is to skip all certificated employees in the classroom programs as well as in the non-classroom programs of the Superintendent's Zone schools. Thus, in effectuating the PKS reductions in classroom programs such as Art, Music, Physical Education, and Spanish, to name a few, the district is proposing to skip teachers who teach in a middle or high school in the Superintendent's Zone. In effectuating the PKS reduction in the nonclassroom program of counselors, the district is proposing to skip counselors who are working this year at middle or high schools within the Superintendent's Zone.

12. The district served the 65 junior certificated employees with precautionary layoff notices, and served them with an accusation, rendering them respondents in this proceeding. The primary legal issue to be resolved in this proceeding is whether the district may, pursuant to Education Code section 44955, subdivision (d)(1), skip the junior

¹ In identifying the personnel at the Superintendent's Zone schools to be skipped, the PKS resolution states: "including but not limited to classroom teachers, Academic Acceleration Teachers, Instructional Coaches and Equity Release Teachers."

certificated employees who work in Superintendent's Zone schools, and lay off more senior certificated employee in the district who do not. As set forth more fully in the Legal Conclusions, it is concluded that the district has failed to sustain its burden of proof in order to justify the skipping of the junior certificated employees.

13. There are 14 schools within the Superintendent's Zone this school year. The schools consist of eight elementary schools, two kindergarten to eighth grade schools, one middle school, and three high schools.² The 14 schools are divided into two geographical areas, each of which is under the supervision of an assistant superintendent. Assistant Superintendent Guadalupe C. Guerrero, who testified at length at the hearing, supervises the eight elementary, middle and high schools within the Mission District of San Francisco (the Mission Zone). Assistant Superintendent Patricia Gray supervises the remaining six schools within the Bayview area of San Francisco (the Bayview Zone). Each of the two zone offices has content specialists who provide direct supports to the schools within their geographical zone.

14. The Superintendent's Zone was started in the 2010-2011 school year, and during that school year was comprised of 15 district schools.³ Ten of the schools in the Superintendent's Zone were selected based on their identification by the California Department of Education as persistently underperforming schools, ranked among the five percent lowest performing schools in California. These 10 schools were also the lowest performing schools in the district at that time. The remaining five schools were selected by the district, not purely on academic proficiency, but based on a "cluster analysis" performed by Stanford University. As explained by Assistant Superintendent Guerrero:

Stanford University completed a cluster analysis that looked at not just academic performance, but concentration of English-language learners, concentration of Special Education students, and concentration of racial isolation. Teacher stability was a factor in that cluster analysis. There were six distinct factors that constituted and made up why we identified these 15 original schools in the zone

15. The 10 schools in the Superintendent's Zone that were identified by the state as within the lowest five percent of student performance were awarded a three-year, \$45

² The 14 schools are: Bret Harte Elementary; Bryant Elementary; Cesar Chavez Elementary; Charles Drew Elementary; Everett Middle School; George Washington Carver Elementary; Buena Vista Horace Mann (K-8); John Muir Elementary; John O'Connell High School; Leonard Flynn Elementary; Malcolm X Elementary; Mission High School; Paul Revere (K-8); and Thurgood Marshall Academic High School.

³ One of the original 15 schools, the Willie Brown Academy, has been closed.

million, federal School Improvement Grant (SIG) in 2010.⁴ The district is in its second year of this three-year grant. The grant will expire at the end of the 2012-2013 school year, and the district has not applied for an additional SIG grant. Kevin Rocap is the Executive Director of the School Improvement Grant, and works with the now nine schools associated with the grant. Rocap testified at length at hearing.

16. In the PKS resolution, the district board resolved that the district “has required special training and experience necessary to teach [the] course of study” at the Superintendent’s Zone schools.

The district has only two minimum requirements for certificated employment in a school within the Superintendent’s Zone: (1) that the applicant share a commitment to participate and implement Superintendent Zone goals, strategies, and professional development “within and beyond the school day/year”; and (2) that the applicant possess a valid teaching credential in the appropriate content area and an English Learner Certificate as required by district policy. The first minimum requirement is purely subjective. The second minimum element is required for any certificated employee of the district. The certificated employees who work within the Superintendent’s Zone are paid an additional sum for participating in professional development beyond the school day and the school year.

17. The district adopts a curriculum for each core subject area taught in the district which aligns with the standards set by the state of California. The core curriculum areas are: English Language Arts, mathematics, science, history, social science, visual and performing arts, physical education, world languages, and English Language Development for English learners. Although not mandated by the state, the district has also adopted curriculum for core subject areas of Spanish Language Arts, Cantonese and Mandarin. The purpose of the core curriculum is to help children learn, and to set a level of what is to be mastered at a grade level within the district. The same core curriculum is taught in every school in the district, including the schools within the Superintendent’s Zone. For example, the elementary school-level mathematics core curriculum is Everyday Math. The elementary school-level English core curriculum is a set of instructional materials published by Houghton-Mifflin. The district has set core curriculums for middle school and high school-level instruction as well.

18. Each school in the district provides supplemental materials to its teachers for teaching the core curriculum. Throughout the district the supplemental instructional materials vary.

19. Davida Desmond is the Interim Associate Superintendent of Academics and Professional Development for the district. Her office is commonly referred to as the Curriculum Office. Among other things, the Curriculum Office sponsors professional development opportunities (also called professional learning) that are posted and made

⁴ The now closed Willie Brown Academy was one of the 10 schools within the School Improvement Grant.

available to all district certificated employees in specified subject matter areas. In addition to professional development on core curriculum, the Curriculum Office also sponsors programs to enhance instruction.

Professional development and professional learning happens across the district in different ways. Desmond explained that the district has been downsizing the Curriculum Office and moving toward more site-based funding and decision-making regarding professional development. For that reason, there is a great deal of professional development taking place at the individual school sites which she does not know about.

20. The teachers in Superintendent's Zone schools are offered professional development through their central zone office and through their individual schools. (They may also attended professional development offered through the Curriculum Office.) Each school in the Superintendent's Zone varies in the professional development it offers to its teachers. There is variance in the professional development offered in the Bayview Zone and the Mission Zone. There is variance in the professional development offered at the elementary, middle and high school levels. In short, there is no uniform professional development provided to every certificated employee who is assigned to a Superintendent Zone school.

21. The professional development that is offered takes place in many different ways. For example, there is development through workshops, grade level meetings/collaboration, school level meetings, team level collaboration, coaching by other teachers, and monitoring by principals.

22. The district established that it has purchased materials to supplement or enhance core curriculum in identified areas of Mathematics, English Language Development, and Balanced Literacy (listening, speaking, reading, and writing). It has purchased materials and provided trainings which focus on instructional strategies in these subject matter areas. Other professional development areas focus on collaboration models, and data driven instructional reforms. Other aspects of professional development focus on parent engagement, so as to promote full-service community schools.

The main focus of the professional development provided in the Superintendent's Zone is instructional support for teachers. As explained by Assistant Superintendent Guerrero:

A big part of our reform blueprint in raising these schools' instructional capacity is to ensure that we're not just providing direct intervention to students, but that we're also providing direct support to teachers.

Part of the vehicle for supporting teachers and enhancing their knowledge base, their pedagogical practices, is that we afford them opportunities to work with instructional coaches.

There are another set of identified teachers with specific skill sets of working with adult professionals, looking at specific content areas, observing their practice, providing feedback to their practice in an informal way, demonstrating lessons, working with groups of teachers at investigating a problem of practice.

Coaching is provided not just at the site level by identifying instructional coaches in a variety of content areas, but also by content specialists that exist on each of the Superintendent Zone area teams.

And so each of the Superintendent Zone teams also have on their staff a small number of content specialists that work with instructional coaches within the schools to provide direct support.

23. The evidence establishes that five of the most improved schools within the district were in the Superintendent's Zone. Superintendent Guerrero expects that scores this spring will show "dynamic improvement for our school – elementary, middle, and high school—across the zone."

24. The district has not evaluated whether teachers in district schools outside of the Superintendent's Zone have comparable training or experience to the certificated employees in the Superintendent's Zone. Assistant Superintendent Guerrero was asked:

Q. And have you undertaken at all any kind of analysis to determine if there are teachers in those non-superintendent-zone schools who have comparable skills to the teachers that you proposed to skip in this proceeding because they're implementing some of these strategies in their non-superintendent zone schools?

A. I haven't conducted that kind of analysis.

Q. Do you know if the district has in any way?

A. I'm not aware of that.

The evidence further established that there are senior teachers who worked in schools within the Superintendent's Zone last school year who have transferred to other schools in the district for the current school year.

25. The district has not identified the training and experience it has provided to counselors within the Superintendent's Zone. The district has not evaluated whether the

senior certificated employees it proposes to lay off in counseling have equivalent training and experience to that of junior counselors who work within the Superintendent's Zone.

Temporary employees

26. The district has classified the respondents listed on Appendix 5 as temporary employees. Unlike permanent and probationary employees, temporary employees are not entitled to the procedural protections granted by Education Code section 44949 and 44955. (See Ed. Code, §§ 44954, & 44955, subd. (a); *Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist.* (2006) 145 Cal.App.4th 1260, 1273; accord *California Teachers Assn. v. Vallejo City Unified School Dist.* (2007) 149 Cal.App.4th 135, 145-146.) The district sent these employees layoff notices as a precaution, and served on them the accusation, thereby allowing them to challenge their classification as temporary employees in this proceeding.

27. Barbara A. Brewer is teaching English at Washington High School this school year. The district has classified her as a temporary employee, and it sent her a notice of termination of her temporary employment pursuant to Education Code section 44954.

Ms. Brewer challenges her classification as a temporary employee. Ms. Brewer testified that she "has been told" by an unnamed person that she is replacing a teacher, Rosemarie Jacobs, who retired from the high school at the end of the 2010-2011 school year. Ms. Brewer therefore argues, pursuant to Education Code section 44920, that the district may not classify her as a temporary employee, but rather, must classify her as a probationary employee. The contention is unpersuasive.

The general rule is that unless a statutory mandate compels otherwise, the position of the teacher is created and fixed by the terms of the contract of employment. (*Paulus v. Board of Trustees* (1976) 64 Cal.App.3d 59.) Ms. Brewer's attempt to circumvent the temporary employment contract she signed is based on a hearsay statement of an unknown person. Such is not competent evidence to establish that she is in fact replacing a teacher who retired. (Gov. Code, § 11513.) That Ms. Brewer is teaching classes which formerly were taught by Ms. Jacobs is not sufficient to show that she was hired to replace the retired teacher. "[T]he assignment of teachers to classes for which a teacher is certificated is entirely within the discretion of the governing board of the school district and by his assignment a teacher does not acquire tenure in a particular class or room." (*Paulus v. Board of Trustees, supra*, 64 Cal.App.3d at p. 63.) Ms. Brewer has failed to demonstrate that the district is compelled to classify her as a probationary employee of the district.

28. Stephanie Allenbaugh is teaching at the Dianne Feinstein School pursuant to an emergency permit in special education. (See Ed. Code, § 44300.) The district has classified her as a temporary employee, and it sent her a notice of termination of her temporary employment pursuant to Education Code section 44954.

Ms. Allenbaugh testified that she is enrolling in a credential program at San Francisco State University in August 2012. She further testified that she has been asked by her principal “to permanently fill the position that I am currently in right now . . . [a]s an intern.”

Notwithstanding her testimony at hearing that she is currently teaching pursuant to an emergency permit, Ms. Allenbaugh argues that she has an intern credential, and that by virtue of that credential she is entitled to be classified as a probationary employee, citing *Bakersfield Elementary Teachers Association v. Bakersfield City School Dist.*, *supra*, 145 Cal.App.4th 1260. The contention is without merit. Ms. Allenbaugh does not hold an intern credential; she is teaching pursuant to an emergency permit. The district is only required to consider those credentials an employee has on file at the time the preliminary notices are issued. (*Degener v. Governing Board* (1977) 67 Cal.App.3d 689.) Ms. Allenbaugh has failed to demonstrate that she has been misclassified by the district as a temporary employee.

29. No errors have been demonstrated in the classification of the temporary employees listed in Appendix 5. The accusation against these respondents will be dismissed.

Non-reelected probationary employees

30. On March 6, 2012, the district served notices of non-reelection pursuant to Education Code section 44929.21 on a number of probationary employees listed in Attachment 4, including respondents Cloritina Cocina, Laurel Patton, Nefertari Royston, and Bonnie Taylor.

Upon proper notification to the probationary employee, section 44929.21 authorizes a school district to non-reelect the employee for the ensuing school year, and it need not assert a reason for the termination. (*Board of Education v. Round Valley Teachers Assn.* (1996) 13 Cal.4th 269, 281; *California Teachers Assn. v. Vallejo City Unified School Dist.*, *supra*, 149 Cal.App.3d at p. 144, fn. 3.) As a result of the district’s issuing of section 44929.21 notices to these probationary teachers, they will not be employed with the district for the next school year. The validity of the district’s determination to non-reelect these probationary employees is not a matter within the purview of a layoff proceeding pursuant to Education Code section 44949 and 44955.

31. The district also served these employees with layoff notices as a precaution. Because they have received layoff notices, some of the nonreelected probationary teachers seek to assert issues associated with their status in the layoff proceeding. For example, Ms. Taylor has a special education intern credential. She argues she should not receive a final notice because the board resolved in the PKS resolution to skip all certificated employees possessing and teaching under an intern single subject special education credential during the 2011-2012 school year.

32. Notwithstanding the fact that the district has provided them with a precautionary notice, it is concluded that these employees are not entitled to a hearing to determine whether there is cause to lay them off.

In *Cousins v. Weaverville Elementary School Dist.* (1994) 24 Cal.App.4th 1846, the Court of Appeal held that if a district is prompted to not reelect a probationary employee because of an economic reason or other reason encompassed by Education Code sections 44949 and 44955, the district may not utilize the section 44929.21 statutory scheme to terminate the probationary employee. Instead, the district must follow the statutory layoff scheme and provide the probationary teacher with a notice and right to a hearing as prescribed in section 44949. (*Id.* at pp. 1854-1855.)

In the *Cousins* case, it was undisputed that the probationary teacher was being non-re-elected based on economic considerations. *Cousins* did not hold, and no case has held, that every non-re-elected probationary employee is entitled to the protections of section 44949 and 44955. While it is acknowledged that the district served the non-re-elected probationary employees with a layoff notice, the district's actions cannot expand the scope of the employees to which the Legislature has provided the protections of Education Code sections 44949 and 44955. For these reasons, it is concluded that the respondents listed in Appendix 4 are not proper parties to this proceeding. The accusation against them will be dismissed.

Seniority issues

33. Pursuant to the stipulation of the parties, the district will change its records to reflect that the seniority date of respondent Charity Lynn Ramilo is September 10, 2009, not September 13, 2010, as currently reflected on the seniority list.

34. Colleen Tate has a multiple subject credential and is currently teaching at Claire Lilienthal Elementary School. She has a seniority date with the district of August 10, 2011. Ms. Tate was employed as a teacher at the Edison Charter Academy, a charter school in San Francisco, from August 2007 to May 2011. Ms. Tate was employed by, and received her payroll checks from, Edison Charter Academy. In order to become an employee of the district, Ms. Tate resigned from the charter school, applied to the district for a position, and signed an employment contract with the district as a probationary employee.

Ms. Tate seeks to have her seniority date with the district changed to reflect her prior employment with the charter school. The Education Code provides that seniority is measured from the date on which the employee first rendered paid service to the district in a probationary position. (Ed. Code, § 44845.) The date on which Ms. Tate first rendered paid service to the district was August 10, 2011. There is no provision which would allow Ms. Tate to tack her prior service at the charter school in order to establish an earlier seniority date with the district.

35. Phyllis Ciment holds a single subject credential in Art and has a seniority date with the district of August 22, 2003. Notwithstanding that Ms. Ciment has been associated with the district since 1988, August 22, 2003, was her first date of paid service as a probationary employee with the district.

Ms. Ciment seeks to have her seniority date with the district changed to reflect time she spent as an artist in residence. The district has no evidence that Ms. Ciment was its employee during the time she was an artist in residence. Ms. Ciment has provided no evidence to rebut that showing. Ms. Ciment has failed to establish that she is entitled to an earlier seniority date.

Classification issues

36. Wanda Kurtcu is a Teacher on Special Assignment with a seniority date of August 11, 2010. The district has determined that she is entitled to bump a junior employee and she will be retained for the next school year. (Factual Finding 10, ante.) Ms. Kurtcu was given, however, a precautionary layoff notice. Ms. Kurtcu is unclear on her classification; she has been a Technology Coordinator at Carver Elementary, and this year she is a CTIS Curriculum Teacher. The evidence does not establish her classification. Because Ms. Kurtcu is not being laid off, her classification status is not a matter which must be resolved in this proceeding.

37. Gabriella Curbelo (Zeidman) has a seniority date of August 10, 2011. She has an intern credential and teaches Spanish at Mission High School. The district has classified her as a probationary employee. It has not been demonstrated that the district has erred in making this classification.

Reduction of Hospitality, Tourism and Recreation

38. The PKS resolution provides for the reduction of 1 FTE of the service of Hospitality, Tourism, and Recreation at the secondary level. To effectuate that reduction, the district issued a preliminary layoff notice to Alice M. Cravens.

Ms. Cravens is a permanent employee of the district and has a seniority date of August 19, 2009. She has a Career Technical Education credential in Hospitality and Tourism, and teaches at Ida B. Wells, a continuation high school. Ms. Cravens teaches, among other things, a working simulation culinary arts class as a means to practice working skills.

Ms. Cravens testified that the program at the school has been supported by a three-year grant from the Department of Children, Youth, and Family. The grant was awarded in April 2010, and has one remaining year of funding. Ms. Craven also testified that the grant was premised on the district providing funding of “1.0 FTE,” meaning paying for the cost of the teacher.

Ms. Cravens argues that the grant money is “earmarked” and that the district has not shown that it intends “to give back any grant money.” This argument does not raise a valid challenge to her layoff. The board has determined to reduce the service that Ms. Cravens provides. There is no permanent or probationary employee junior to Ms. Cravens who is

being retained to render a service that she is credentialed and competent to teach. (Ed. Code, § 44955, subd. (b).) She may properly be given a final notice.

Bumping

39. The only certificated employee to raise a bumping challenge is Sandeep Kumar. Mr. Kumar holds a Pupil Personnel Credential, and is a permanent employee of the district with a seniority date of August 19, 2009. Mr. Kumar has received a layoff notice by virtue of the reduction in counseling services. This year he is assigned to Sunnyside and Redding Elementary Schools as a learning support professional. He raises a bumping issue based on the proposed skip of Superintendent's Zone employees. In light of the determination that the skip is invalid, there is no bumping issue associated with Mr. Kumar left to resolve.

Other Matters

40. The determination to reduce particular kinds of services was based on the financial circumstances of the district. These circumstances include \$110 million in funding cuts over the past three years, and an anticipated additional cut in state funding of \$35 million to \$53 million for the 2012-2013 school year. The reduction or discontinuation of particular kinds of services is therefore related to the welfare of the district and of its pupils.

41. Except as set forth above, no permanent or probationary certificated employee with less seniority than a respondent is being retained to provide a service for which a respondent is credentialed and competent to render.

42. Any contentions raised by respondents and not discussed above are found to be without merit.

LEGAL CONCLUSIONS

1. The fundamental principle of a PKS layoff is that permanent teachers must be laid off in inverse of their seniority. (Educ. Code, § 44955, subds. (b) & (c).) As set forth in subdivision (b) of Education Code section 44955:

Except as otherwise provided by statute, the services of no permanent employee may be terminated . . . 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.

A teacher's seniority is measured from the first date he or she renders paid service to the district in a probationary position. (Ed. Code, § 44845.)

Skip of certificated employees in the Superintendent's Zone schools

2. Pursuant to Education Code section 44955, subdivision (b), a district may deviate from seniority and retain junior employees only when authorized by statute to do so. In Education Code section 44955, subdivision (d), the Legislature has authorized school districts to deviate from terminating in order of seniority under two very limited and specified circumstances, the first of which, subdivision (d)(1), is relied upon by the district to justify its proposed retention of junior personnel at the schools in the Superintendent's Zone.

Under subdivision (d)(1), the district may deviate from seniority if

the district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a service credential with a specialization in either pupil personnel services or health for a school nurse, and that the certificated employee has special training and experience necessary to teach that course of study or to provide those services, which others with more seniority do not possess.

A district may not create skipping justifications other than those authorized by statute in order to avoid the seniority protection afforded to certificated employees with earlier dates of hire. This is true even if the district believes that skipping junior certificated employees is in the best interests of the district and of its students. (*Alexander v. Board of Trustees* (1983) 139 Cal.App.3d 567, 573-576 [invalidating school district's skipping of junior teachers based solely on language skills].) "A contrary construction would place all teachers in a single group measured by the sometimes vague needs of the district and pupils, as determined by the school board." (*Id.* at p. 574.)

3. In order to fall within subdivision (d)(1) with respect to junior teachers, the district must demonstrate three elements: (1) a "specific need for personnel to teach a specific course or course of study"; (2) that junior personnel have "special training and experience necessary to teach" that course or course of study; and, (3) that its senior teachers do not possess that special training and experience. In *Bledsoe v. Biggs Unified School Dist.* (2008) 170 Cal.App.4th 127, the California Court of Appeal made clear that the school district bears the burden of proving each of these three elements in order to justify a proposed skip. (*Id.* at pp. 138-144.)

The Superintendent's Zone consists of elementary, middle and high schools. By virtue of its skip of all personnel associated with these schools, the district has effectively designated the entire classroom program of these schools as a "course" or a "course of study." In so doing, the district has exceeded the definition of these terms given by the Legislature in Education Code sections 51014 and 51015.

Education Code section 51015 defines a "course" as: "an instructional unit of an area or field of organized knowledge, usually provided on a semester, year, or prescribed length of time basis." Education Code section 51014 defines "course of study" as: "the planned

content of a series of classes, courses, subjects, studies or related activities.” These definitions were in place when the Legislature amended section 44955 by adding subdivision (d)(1). It must be presumed that the Legislature knew it had defined the terms “course” and “course of study,” and intended that they be used when interpreting 44955, subdivision (d)(1). It is well settled that words or phrases common to two statutes dealing with the same subject must be construed in *pari materia* to have the same meaning. (*Isobe v. Unemployment Ins. Appeals Bd.* (1974) 12 Cal.3d 584, 590-591.) Based on these statutory definitions, a “course” or a “course of study” cannot be read as broadly as the district has interpreted it so as to include entire elementary, middle, and high school programs. Such a reading would eviscerate the seniority protections the Legislature has established in Education Code section 44955, subdivision (b). It is thus concluded that the district has failed to establish the first element, namely a “specific need for personnel to teach a specific course or course of study.”

Next, it is concluded that the district has failed to show that that is junior personnel have received special training and experience necessary to teach a course or course of study. The evidence establishes that the courses and courses of study taught in the district are set by district policy, not by individual schools. The courses and the courses of study are uniform among the district’s schools, and are not unique to schools in the Superintendent’s Zone. Some of the professional development provided to Superintendent Zone teachers is focused on areas that unquestionably improve the ability of some of its teachers to teach students with academic/learning challenges. Some of the professional development is content-based, such as supplemental instructional materials in mathematics and English Language Development. But not all of the classroom teachers within the Superintendent’s Zone receive professional development associated with the course or course of study they teach, which is particularly true with the teachers of middle and high school single subject curriculum. And what cannot be ignored is that the great majority of the professional development provided across the board is not content-based, but rather instructional-based.

Finally, it must be noted that the district did not assess whether any of the more senior teachers it proposed to lay off possessed equivalent “special training and experience” as the junior employees. As stated by the court in *Bledsoe v. Biggs Unified School District, supra*, this assessment should be made by the district before the March 15 layoff notices are issued. (*Id.*, 170 Cal.App.4th at p. 143.) On this record, the district has not sustained its burden of proving that each of the senior teachers it proposes to lay off lacks the special training and experience of the junior teachers it proposes to retain.

For these reasons, it is concluded that the district has failed to establish all of the necessary elements set forth in Education Code section 44955, subdivision (d)(1), in order to justify deviating from seniority with respect to the junior certificated employees in the Superintendant’s Zone schools.

4. In order to fall within subdivision (d)(1), with respect to counselors, the district must demonstrate these three elements: (1) a “specific need for personnel . . . to provide services authorized by a services credential with a specialization in either pupil

personnel services or health for a school nurse”; (2) that junior personnel have “special training and experience necessary . . . to provide those services”; and, (3) that the senior personnel do not possess that special training and experience.

With respect to this group of employees, the district has not demonstrated that the junior counselors have special training and experience necessary to provide the services authorized by their credential. In addition, the district has not demonstrated that the senior personnel do not possess the same special training and experience as the junior counselors. The district has therefore failed to establish all of the necessary elements set forth in Education Code section 44955, subdivision (d)(1), in order to justify deviating from seniority with respect to the counselors in the Superintendant’s Zone schools.

5. By reason of the matter sets forth in Factual Findings 11 through 25, and Legal Conclusions 2 through 4, cause pursuant to Education Code section 44955, subdivision (d)(1), to skip the certificated employees in the Superintendent’s Zone has not been established. Because the district has given layoff notices to the junior certificated employees, the appropriate remedy is to include them in the group of certificated employees from which the district implements the PKS reductions by way of final notices.

Other Matters

6. By reason of the matters set forth in Factual Finding 9, there is no cause to issue a final layoff notice to the respondent administrators identified therein. The accusation against these respondents must be dismissed.

7. By reason of the matters set forth in Factual Finding 10, there is no cause to issue a final layoff notice to the certificated employees listed there who are respondents in this proceeding. The accusation against these respondents must be dismissed.

8. By reason of the matters set forth in Factual Findings 26 through 29, the temporary employees listed in Appendix 6 are not entitled to the protections of Education Code sections 44949 and 44945. The accusation against these respondents must be dismissed.

9. By reason of the matters set forth in Factual Findings 30 through 32, the non-reelected probationary employees listed in Appendix 4 are not entitled to the protections of Education Code sections 44949 and 44945. The accusation against these respondents must be dismissed.

10. By reason of the matters set forth in Factual Finding 33, the district shall change the seniority date of respondent Charity Lynn Ramilo to September 10, 2009.

11. Because of the reduction or elimination of particular kinds of services set forth in Finding 3, cause exists pursuant to Education Code sections 44949 and 44955 to give notice to the respondents up to the number of the FTE reductions set forth in the PKS

resolution that their services will not be required or will be reduced for the 2012-2013 school year. This cause solely relates to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949.

RECOMMENDATION

1. The district shall dismiss the accusation against: Susan M. Akram, Stacy Ann Afflick, Gina L. Ferrante, Alicia M. Gonzalez, Jeremy Brian Hilinski, Diana Leigh Marshall, Tracy Michele Peoples, Mark Sanchez, John R. Simard, Lance Tagomori, Lena Van Haren, Stephanie Yuke Hoong Young, Paul J. Koh, Sylvia Esther Lepe, Mary F. Elisalde, and Sheila Milosky. Final notice may not be provided to these employees.

2. The district shall identify the respondents among the list of certificated employees to be retained set forth in Factual Finding 10, and shall dismiss the accusation against them. Final notice may not be provided to these employees.

3. The district shall dismiss the accusation against the temporary employees listed in Appendix 5. Final notice need not be provided to these employees.

4. The district shall dismiss the accusation against the non-reelected probationary employees listed in Appendix 4. Final notice need not be provided to these employees.

5. The district shall change the seniority date of respondent Charity Lynn Ramilo to September 10, 2009, and reconsider her seniority based on that date.

6. Except as set forth above, notice may be given to certificated employees in 123 FTE positions in administrative services and 210 FTE in instructional services that their services will not be required or will be reduced for the 2012-2013 school year because of the reduction or elimination of particular kinds of services. In issuing its final notices, the district shall follow the seniority requirements of Education Code section 44955, subdivision (b), to effectuate all reductions in services.

DATED: May 7, 2012

MELISSA G. CROWELL
Administrative Law Judge
Office of Administrative Hearings