

BEFORE  
THE GOVERNING BOARD OF THE  
COLTON JOINT UNIFIED SCHOOL DISTRICT  
SAN BERNARDINO COUNTY, STATE OF CALIFORNIA

In the Matter of the Proposed Reduction in  
Force Proceeding Involving:

OAH No. 2013030896

Certain Certificated Employees of the Colton  
Joint Unified School District Who Have  
Received Preliminary Layoff Notices for the  
2013-2014 School Year,

Respondents.

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Colton, California, on April 22, 2013.

John W. Dietrich and William A. Diedrich, of Atkinson, Andelson, Loya, Rudd & Romo, represented the Colton Joint Unified School District.

Marianne Reinhold and Andrea Loveless, of Reich, Adell & Cvitan, represented 93 of the respondents who appeared at the layoff proceeding and who are identified in Exhibit ALJ-1.

No respondent appeared on his or her own behalf and no one other than Ms. Reinhold and Ms. Loveless represented any respondent(s).

Dan Bartlett, California Teachers Association assisted Ms. Reinhold, Ms. Loveless, various respondents and others throughout the hearing.

The matter was submitted on April 22, 2013.

FACTUAL FINDINGS

*The Colton Joint Unified School District*

1. The Colton Joint Unified School District (District) is located in San Bernardino County. The District provides educational services to approximately 22,000 students living in the communities of Colton, Bloomington, and Grand Terrace, portions of Fontana and Loma Linda, and other unincorporated areas within the District's boundaries. The District operates and maintains three comprehensive high schools, two alternative high schools, four middle schools, and 18 elementary schools.

The District employs more than 2,100 persons, about 1,150 of whom are certificated employees. Employee salaries and benefits comprise about 86 percent of the District's annual expenditures. The District anticipates there will be an approximate \$10 million deficit for the 2013-2014 school year.

2. The District is governed by an elected seven member Board of Education. Jerry Almendarez is the Board's Chief Executive Officer and the Superintendent of Schools. Ingrid Munsterman is the Assistant Superintendent of Human Resources

#### *The Fiscal Crisis*

3. Public schools rely on financing from the State of California. A school district cannot determine the level of funding it will receive from the State of California until the state budget is chaptered, an event that is supposed to occur each year in late June. Before then, a school district's governing board, which has the duty to produce and file a balanced budget with the County Office of Education, must take steps to ensure that financial ends meet if the worst-case financial scenario develops.

California's economic problems have had a significant impact on the Colton Joint Unified School District. If the District cannot meet its financial obligations, the San Bernardino County Office of Education has the authority to intervene and take over the District's operations.

#### *The District's Response*

4. In response to the anticipated budgetary shortfall for the 2013-2014 school year, District administrators reviewed expenditures, programs, services and staffing. The District embarked upon a program to reduce its budget. The District reduced expenditures for administrative and staff positions and various services. The District also concluded that it was necessary to further trim expenditures by reducing particular kinds of services being provided by credentialed employees.

5. On February 21, 2013, following a review of the District's situation and financial projections for the 2013-2014 school year, Superintendent Almendarez recommended to the Board of Education that preliminary notices be given to a number of certificated employees that their services would not be required in the 2013-2014 school year and the reason for that recommendation.

6. On February 21, 2013, the Board adopted Resolution No. 13-38, which provides:

WHEREAS, the Governing Board of the Colton Joint Unified School District has determined that it is in the best interests of the District and the welfare of the schools and the pupils thereof that the particular kinds of services set forth herein must be reduced or discontinued due to financial conditions; and

WHEREAS, it is the opinion of the Board that because of the aforementioned reason, it is in the best interest of the District that the number of certificated employees of the District must be reduced; and

WHEREAS, this Board does not desire to reduce the services of regular certificated employees based upon reduction of average daily attendance during the past two years.

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the Colton Unified School District as follows:

A. That the particular kinds of services set forth below shall be reduced or eliminated commencing in the 2013-2014 school year:

Elementary (Transitional K-6) Classroom Teaching Services:	70.0 F.T.E.
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<b>Total</b>	<b>70.0 F.T.E.</b>
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B. That due to the reduction or elimination of particular kinds of services, the corresponding number of certificated employees of the District shall be terminated pursuant to Education Code section 44955.

C. That the reduction of certificated staff be achieved by the termination of regular employees and not by terminating temporary and substitute employees.

D. That “competency” as described in Education Code section 44955(b) for the purposes of bumping shall necessarily include: (1) possession of a valid credential in the relevant subject matter area; (2) academic training as evidenced by “highly qualified” status under the No Child Left Behind Act; (3) an appropriate EL authorization (to the extent required by the position); and (4) one year of full-time experience in the relevant subject matter area.

E. That, as between certificated employees with the same seniority date, the order of termination shall be determined solely by Board-adopted criteria.

F. That the District Superintendent or designee is directed to initiate layoff procedures and give appropriate notice pursuant to Education Code sections 44955 and 44949.

#### *The Particular Kinds of Services*

7. The services identified in Resolution 13-38 were particular kinds of services that could be reduced under the Education Code. The Board’s enactment of Resolution No. 13-38 was neither arbitrary nor capricious and it was well within the Board’s discretion. No particular kind of service was lowered to a level below that mandated by state or federal law. Resolution No. 13-38 related solely to the economic crisis and the Board’s duty to balance the budget and its enactment was, to that extent, in the best interest of the District and the students thereof.

#### *The District’s Seniority List*

8. The District maintains a seniority list, a constantly evolving document that is updated as new certificated employees are hired and as other certificated employees retire, resign or otherwise become separated from District service. The District’s seniority list is a spreadsheet that is organized from the District’s most senior certificated employee to the most recently hired certificated employee. The list contains each employee’s seniority number, name, amount of service expressed as a Full Time Equivalent (FTE), status (permanent or probationary), seniority date (first paid date of probationary service), work site, assignment, and credential information.

9. When it became apparent that a reduction in force was necessary, the District posted the seniority list on a website that was available to all certificated employees and requested those employees to review the seniority list and make any corrections. The District sent out verification forms with a request that certificated employees review the information in the District’s file and confirm or update that information by January 20, 2013.

If an employee presented information that was not included in the seniority list, the District's staff reviewed that information and, when it was verified, included it in the seniority list. The updated seniority list was used by District's staff to determine who should and should not receive a preliminary layoff notice.

*Tie-Breaking Resolution*

10. To determine the order of termination of employees who rendered paid service to the District on the same date, the Board enacted a resolution that set forth tie-breaking criteria. That resolution provides:

WHEREAS, Education Code section 44955, subsection (b), related to certificated layoffs, provides in relevant part, "[a]s 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 need of the district and the students thereof;"

NOW, THEREFORE, BE IT RESOLVED that based upon the needs of the District and the students thereof, in the event of a certificated layoff the following criteria shall be applied in order based on information on file as of February 11th, one step at a time until the tie is broken, to resolve ties in seniority between certificated employees:

1. Highly Qualified Status under NCLB in area of assignment.
2. Possession of an authorization to teach English Language Learners in order of priority:
  - a. Bilingual Cross Cultural Language and Academic Development (BCLAD) (not including emergency or waiver BCLAD authorization)
  - b. Cross Cultural Language and Academic Development (CLAD) Certificate, SB 2042, AB 1059, Language Development Specialist Certificate, other equivalent authorizations (not including emergency authorization)
  - c. Supplementary Authorization in English as a Second Language, SB 1969, or SB 395 Certificate of Completion of Staff Development

3. Credential status in area of assignment, in order of priority:
  - a. Clear, Life, Standard Secondary, etc.
  - b. Preliminary
  - c. Internship
  - d. Provisional Internship Permit, Short Term Staffing Permit, other
4. Possession of a Clear or Preliminary Single Subject credential in the following areas, in order of priority:
  - a. Special Education
  - b. Math
  - c. Science
  - d. English
5. Possession of a subject matter authorization to teach in the following areas, in order of priority:
  - a. Math
  - b. Science
  - c. English
6. Total number of Clear or Preliminary credentials in different subject areas.
7. Total number of supplementary authorizations in different subject areas.
8. Possession of a Masters Degree, earliest date prevails.
9. Total number of post-secondary credits on file with the District by February 11th.

10. If ties cannot be broken by using the above criteria, then order of seniority shall be determined by a random drawing of lots among employees in the individual tie.

*The Issuance of Preliminary Layoff Notices/Jurisdictional Documents*

11. Using the updated seniority list, the resolution related to the reduction of particular kinds of services, the tie-breaking resolution, and considering all positive attrition, the District's administrative staff identified those employees who should receive preliminary layoff notices and those who should not. Whenever an employee providing the particular kind of service that was being reduced was identified as being in line to receive a preliminary layoff notice due to a lack of seniority, that employee's seniority and credentials were carefully examined to determine whether the employee possessed the seniority and credentials to "bump" a junior employee and assume the position that was being held by the more junior employee.

*Tie Breaking and Bumping*

12. The District used the tie-breaking resolution to determine the order of layoff between employees who were hired on the same day. The tie-breaking resolution was in accordance with the Education Code and was based on the needs of the District and the students thereof. The District applied tie-breaking resolution in an even handed manner and the result of the tie-breaking resolution was entered onto the seniority list.

13. The District prepared a "bump analysis" to determine whether an employee whose seniority date made that employee subject to receipt of a preliminary layoff notice could bump a more junior employee and retain his or her employment. Whenever it was determined that an employee held the seniority, credential and competency to bump into a position being held by a more junior employee, that employee "bumped" the more junior employee. Thereafter, the more junior employee's seniority, credential and competency were evaluated to determine whether that employee could, in the same fashion, "bump" into a position that was being held by an employee who was even less senior. The results of this process were reflected in the District's bumping analysis.

*Service of Preliminary Layoff Notices and Notices of Hearing*

14. The District timely served preliminary layoff notices on 70 certificated employees and precautionary layoff notices on 40 other certificated employees, each of whom was served with other required documents. Thereafter, the District timely served all respondents with a Notice of Hearing, setting the hearing in the reduction in force proceeding for April 22, 2013, to commence at 9:00 a.m., at the Student Services Center at 851 South Mount Vernon Avenue, Colton, CA 92324.

*The Administrative Hearing*

15. On April 22, 2013, the record in the reduction in force proceeding was opened. Jurisdictional documents were introduced; the caption was amended to delete any reference to an accusation; opening comments were given on behalf of the District; a written stipulation concerning jurisdictional facts was received; sworn testimony was taken; documentary evidence was provided; Assistant Superintendent Munsterman testified about the budgetary crisis, the impact of that crisis on the District's operations, the layoff process, the seniority list, and the bumping of senior employees into positions held by more junior employees.

16. Angela Dischinger, the Principal of Grand Terrace High School, testified about the nature of the students who attended Washing Alternative High School and the education services that are provided there. Principal Dischinger testified about the teachers who provided services under an S-3 Grant at Bloomington and Colton High Schools, and the operation of Study Hall.

17. Susan Reed, a certificated human resources coordinator, testified about the District's decision to send out precautionary notices because of uncertainty related to the layoff process. Ms. Reed testified that the District employed temporary employees as "placeholders" and they were not a part of the layoff process.

Ms. Reed testified about the need for a senior certificated employee to have one year of full-time experience in the relevant subject matter area to establish the "competency" required to bump into a position being held by a more junior employee under the Board's resolution. Ms. Reed testified that the certificated employee's year of full-time experience could be measured by including all the experience obtained during the 2012-2013 school year. She distinguished that method of measuring experience from the need to hold a single subject credential on or before March 15, 2013, to qualify under the "competence" criteria. It was not established that this interpretation impacted anyone involved in the layoff process.

Ms. Reed testified that fractional bumping was not allowed because of negative impact that would have on the District's scheduling and provision of services. It was not established that the District's prohibition against fractional bumping was not in the best interest of the District or the students thereof, and it was not established that any senior employee was displaced as a result of this prohibition.

Ms. Reed testified that no senior certificated employee could bump into an "Opportunity" assignment because no senior employee held a single subject credential and possessed one year of full time teaching experience at the high school level, where the Opportunity program exists. It was not established that any senior employee possessed the credential and competence to bump into an Opportunity assignment that was held by a more junior employee.



Ms. Reed testified that no senior certificated employee was allowed to bump into a “Study Hall” assignment other than Holli Herrera, because no other senior employee held a single subject credential and possessed one year of full time teaching experience at the high school level, where the Study Hall program exists. It was not established that any senior employee possessed the credential and competence to bump into a Study Hall assignment that was held by a more junior employee.

Ms. Reed testified that no more senior employee was permitted to bump into the Teacher on Special Assignment position held by Ajoke Adefeso, seniority number 910, because no senior employee possessed or would possess one year of full time teaching experience in the EL program to which Mr. Adefeso was assigned. It was not established that any senior employee possessed the credential and competence to bump into the TOSA assignment that Mr. Adefeso held.

Ms. Reed testified that no more senior employee was permitted to bump into a position held by Matthew Southerland, seniority number 1025, because no senior employee possessed or would possess one year of full time teaching experience in the S-3 grant program to which Mr. Southerland was assigned on a part-time basis. It was not established that any senior employee possessed the credential and competence to bump into the assignment held by Mr. Southerland, even though that assignment did not require subject matter authorization or experience.

Ms. Reed testified that there was only one bump in this layoff proceeding, and that involved Holli Herrera, an elementary school teacher holding seniority number 870, who bumped into an Independent Study assignment held by Sharon Yang, seniority number 964, as a result of Ms. Herrera’s seniority, credentials and competence.

Cross-examination established that a supplementary authorization<sup>1</sup> in a subject matter did not permit the holder of that authorization to teach the subject above the 9<sup>th</sup> grade level. On that basis, Ms. Reed defended the District’s determination to not permit several holders of supplementary authorizations to bump into positions for which instruction in a single subject teaching credential was required.

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<sup>1</sup> Supplementary authorizations added to a Multiple Subject Teaching Credential authorize the holder to teach departmentalized classes related to the supplementary authorization listed on their credential only in grades 9 and below. Introductory subject matter authorizations authorize the holder to teach the subject matter content typically included in curriculum guidelines and textbooks approved for study in grades 9 and below. This allows an employer to assign a teacher with an introductory authorization to teach a class in which the curriculum is for grades 9 and below even though the students in the class may be in grades K through 12. Specific subject matter authorizations authorize the holder to teach the specific subject in grades preschool, kindergarten through 12, and classes organized primarily for adults.

18. Ms. Reed's testimony, coupled with the testimony of Principal Dischinger, demonstrated the District's specific need for experienced personnel to provide certain services in specific assignments. This expert testimony supported the argument that junior certificated employees with experience in a particular assignment were needed to fill that assignment, and that more senior certificated employee who did not possess the necessary experience were not capable of fulfilling the assignment. While there were no formal, written policies, job descriptions or program requirements that supported this testimony - other than the "competency" requirements - formal documentation was not necessary to retain the services of these individuals under the circumstances.

*Stipulation to Amend the Seniority List*

19. The parties stipulated to amend the seniority list to change the seniority date of Julie Kappmeyer, who held seniority number 1101 at the time of the hearing, from November 10, 2011, to July 27, 2010, and to change the seniority date of Alycia Minjares, who held seniority number 1100 at the time of the hearing, from November 25, 2011, to July 27, 2010.

The amendments did not have an impact on the validity of the preliminary notices that were issued to these employees.

*Resident Substitutes and Tacking of Substitute Teaching Experience*

20. Three certificated employees who received preliminary layoff notices testified that they were "resident substitutes" at a particular school site where they provided substitute teaching services for extended periods of time; on that basis, these three employees claimed an earlier seniority date than was set forth in the District's seniority list.

A. Idalia Smith (seniority number 930) worked for the District as a long term substitute at two school sites in 2005-2006. At the first site, Ms. Smith filled in for a resource specialist. She first worked as an instructional assistant, after which she worked as a resident substitute. Ms. Smith did not issue grades to students and she did not prepare lessons plans at that school site. At the second site, Ms. Smith "did daily subbing." The District credited Ms. Smith with 118 days of service as a certificated substitute before the District hired her in a probationary position.

Ms. Smith sought a seniority date based on her first day of employment as a resident substitute.

B. Sherwin Junio (seniority number 878) was a resident substitute at Grand Terrance Elementary School in the 2005-2006 school year. Most of the time he was assigned to an ELD pull out program, although he provided some substitute teaching services for teachers who were absent as a result of illnesses. Mr. Junio used the "English At Your Command" text and taught Level I and Level II students. He devised lesson plans and graded papers, but he did not issue grades to students. At the end of the school year, Mr.

Junio began substituting for a 4<sup>th</sup> grade teacher who was absent from employment as a result of a long term absence. Mr. Junio worked under a 30-day substitute teaching permit until he received his multiple subject teaching credential in June 2006, and after that he filled only one assignment that lasted 40 or more days.

Mr. Junio sought a seniority date of August 19, 2005.

C. Christine Benavente-Barrera (seniority date 882) worked as a resident substitute at Gerald Smith Elementary School in the 2004-2005 school year following the award of her multiple subject teaching credential in May 2004. She provided substitute teaching services for teachers who were ill and pull out services as assigned. She came to work every day during the school year at the request of the Gerald Smith Elementary School Principal. She did not provide services as a long-term substitute for any particular teacher.

Ms. Benavente-Barrera sought a seniority date of July 1, 2005.

21. Mr. Smith, Mr. Junio and Ms. Benavente-Barrera were employed to serve in an on-call status to replace absent regular employees on a day-to-day basis. They were not employed in a long term substitute teacher position in which they served 75 percent of the number of days the regular schools of the District were maintained in that school year performing the duties normally required of a certificated employee.

A preponderance of the evidence does not support a change in their seniority dates.

22. Krissee Rodriguez (seniority number 955) holds a multiple subject teaching credential that was issued in June 2006. In July 2006, she began working as a resident substitute at Alice Birney Elementary School over the summer semester, employment that lasted two months. After the summer employment, Ms. Rodriguez, taught 2<sup>nd</sup> grade for two trimesters at Woodrow Wilson Elementary School in one teaching assignment, commencing in October 2007. Ms. Rodriguez then worked as a resident substitute teacher at Grant Elementary School, commencing June 2007. Ms. Rodriguez testified that she worked more than 75 percent of the days that school was in session on a long term temporary contract. Ms. Rodriguez testified that she prepared lesson plans, issued grades, and met with parents and guardians in conferences. No evidence, either by way of testimony or documentation, was produced to corroborate Ms. Rodriguez's testimony.

Ms. Rodriguez believed her seniority date should be July 1, 2005.

A preponderance of the evidence did not establish that Ms. Rodriguez was employed in a long term substitute teacher position in which she served 75 percent of the number of days the regular schools of the District were maintained in the same classroom. Her testimony established that she served as a long term substitute for one teacher for two-thirds of a school year, not the required 75 percent. Her testimony established, however, that she performed the duties required of a teacher in that she prepared lesson plans, issued grades, and met with parents and guardians.

### *Other Issues*

23. Sharon Yang (seniority number 965) testified about her valuable service as an Independent Studies teacher, the students to whom she provided services, the subjects she had taught under her multiple subject teaching credential, and other matters. Ms. Yang testified that Independent Studies “feels like a calling.” Ms. Yang believed that she should not be bumped from the Independent Studies position she holds because of her unique education, training and experience. Ms. Yang sought to preclude the District from bumping her from her Independent Studies assignment for the reasons that the District retained the services of junior credentialed employees holding Opportunity, Study Hall and TOSA assignments. In essence, Ms. Yang argued that she was entitled to be “skipped” because of her special training and experience necessary to teach, training and experience that the senior certificated employee bumping her did not possess.

Ms. Yang’s argument fails because Education Code section 44955, subdivision (d)(1), authorizes a school district to “skip” and retain the services of a junior employee where the district demonstrates a specific need for personnel to teach a specific course of study that the senior certificated employee does not possess; however, the statute does not permit an employee to exercise the right of “skipping.”

24. Sandra Rodriguez (seniority number 871) was the most senior employee scheduled to receive a final layoff notice. She heard Ms. Yang’s testimony and concluded that if it were determined that Ms. Yang could not be bumped, she should not be bumped. She described in detail her employment experience with the District, the valuable services she provided, the variety of tasks she performed, and her multiple subject credentialed status and her supplementary authorization in English.

Ms. Rodriguez’s argument fails because Education Code section 44955, subdivision (d)(1), authorizes a school district to “skip” and retain the services of a junior employee, but it does not permit an employee to exercise the right of “skipping.” Further, Ms. Rodriguez’s credential and authorization do not permit her to bump a more junior employee who teaches English.

25. Robin Urquhart, seniority number 837, was issued a precautionary layoff notice. Ms. Urquhart argued that she held a supplementary authorization in Math in addition to a multiple subject teaching credential, and with that authorization and credential she had taught 6<sup>th</sup> grade Math for more than seven years. She was concerned that she might be displaced by several junior employees who held single subject teaching credentials in Math. Ms. Urquhart’s concerns were understandable, but she is not being issued a final layoff notice in this proceeding, so the issue she raised is moot.

26. The employees who testified were articulate and passionate about teaching. As with every other respondent, they are not being released from their employment for any reason related to their competence

### *The Reduction in Force Proceeding*

27. The enactment of Resolution No. 13-38 was the result of budgetary issues; it was enacted in good faith. The tie-breaking criteria set forth in a separate resolution were reasonable and were applied in an evenhanded manner. A preponderance of the evidence established that the resolutions enacted by the Board were in the best interest of the District and its students under all the circumstances, even though the District would like to retain the services of all employees who will be served with a final layoff notice.

A preponderance of the evidence established that the District used seniority, credentials and certain objective criteria (the possession of a valid credential in a relevant subject matter area; academic training as evidenced by “highly qualified” status under the No Child Left Behind Act; an appropriate EL authorization; and one year of full-time experience in a relevant subject matter area or assignment) as the basis for “bumping” and retaining the services of the most senior qualified employees. The District did not consider an employee’s on-the-job performance in reaching a decision related to the retention or termination of any employee’s service in this layoff proceeding.

A preponderance of the evidence established that it was within the District’s broad discretion to retain the services of junior employees who possessed experience in S-3 Grant assignments, Study Hall assignments, Opportunity assignments, and TOSA assignments, and that the exercise of that discretion was neither arbitrary nor capricious. A preponderance of the evidence established that there was a specific need for experienced credentialed employees to continue to hold those assignments, and that more senior employees lacked the experience required to provide the most appropriate service in those assignments. Similarly, it was within the District’s broad discretion to prohibit fractional bumping due to the disruption that fractional bumping would cause.

The identification of those certificated employees who should receive a final layoff notice in this proceeding was not the result of favoritism or any effort by the District to manipulate the system. No junior employee was retained to provide services that a more senior, competent employee could provide. The District complied with all jurisdictional requirements.

### LEGAL CONCLUSIONS

#### *Statutory Authority - Reduction in Force Proceedings*

1. Education Code section 44949 provides in part:
  - (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 . . . that it has been recommended that the notice be given to the employee, and stating the reasons therefor.

[¶] . . . [¶]

(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 . . .

(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 . . .

(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.

2. Education Code section 44955 provides in part:

(a) No permanent employee shall be deprived of his or her position for causes other than those specified . . . and no probationary employee shall be deprived of his or her position for cause other than as specified . . .

(b) Whenever . . . a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year . . . 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 . . .

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.

(c) Notice of such termination of services shall be given before the 15th of May in the manner prescribed in Section 44949, and services of such employees shall be terminated in the inverse of the order in which they were employed, as determined by the board in accordance with the provisions of Sections 44844 and 44845. In the event that a permanent or probationary employee is not given the notices and a right to a hearing as provided for in Section 44949, he or she shall be deemed reemployed for the ensuing school year.

The governing board shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render. However, prior to assigning or reassigning any certificated employee to teach a subject which he or she has not previously taught, and for which he or she does not have a teaching credential or which is not within the employee's major area of postsecondary study or the equivalent thereof, the governing board shall require the employee to pass a subject matter competency test in the appropriate subject.

(d) Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons:



(1) The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services 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 or course of study or to provide those services, which others with more seniority do not possess.

(2) For purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws.

### *Jurisdiction*

3. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied as to all respondents.

### *The Reduction of Particular Kinds of Services*

4. A school board may determine whether a particular kind of service should be reduced or discontinued, and it cannot be concluded that the governing board acted unfairly or improperly simply because it made a decision it was empowered to make. (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 174.) A school board's decision to reduce or discontinue a particular kind of service need not be tied in with any statistical computation. It is within the discretion of a school board to determine the amount by which it will reduce or discontinue a particular kind of service as long as the school district does not reduce a service below the level required by law. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 635-636.)

5. A preliminary notice that provides designations of categories of services that are to be reduced or eliminated but does not identify the specific positions subject to the notice is sufficient if it specifies the statutory grounds. The failure to identify specific positions subject to reduction or elimination is not fatal. Since the March 15 notice is only the initial step in the termination process, it is not required that it specify the precise number of teachers to be terminated or the specific positions to be eliminated. (*San Jose Teachers Assn. v. Allen, supra*, at p. 632.)

### *Seniority, Bumping, Skipping*

6. Seniority: Under Education Code section 44845, seniority is determined by the date a certificated employee "first rendered paid service in a probationary position."

7. Education Code section 44846 provides in part: “The governing board shall have power and it shall be its duty to correct any errors discovered from time to time in its records showing the order of employment.”

8. The Statutory Scheme: Education Code section 44955, the economic layoff statute, provides in subdivision (b) in part:

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.

Essentially this statutory language provides “bumping” rights for senior certificated and competent employees, and “skipping” authority that allows a school district to retain junior employees who are certificated and competent to render services which more senior employees are not.

9. Bumping: A district has an obligation under Section 44955, subdivision (b), to determine whether any permanent employee whose employment is to be terminated in an economic layoff possesses the seniority and qualifications which would entitle him/her to be assigned to another position. (*Bledsoe v. Biggs Unified School Dist.* (2008) 170 Cal.App.4th 127, 136-137.)

10. Skipping: Subdivision (d)(1) of Section 44955 provides an exception to subdivision (b) where a district demonstrates specific need for personnel to teach a specific course of study and establishes that a junior certificated employee has special training and experience necessary to teach that course that the senior certificated employee does not possess. (*Bledsoe v. Biggs Unified School Dist.*, *supra*, at pp. 134-135.) There is nothing in the statute that requires such special needs be evidenced by formal, written policies, course or job descriptions, or program requirements. (*Id.*, at p. 138.)

School districts have broad discretion in defining positions within the district and establishing requirements for employment. This discretion encompasses determining the training and experience necessary for particular positions. (*Hildebrandt v. St. Helena Unified School Dist.* (2009) 172 Cal.App.4th 334, 343.)

It is significant that the statute and decisional law provide a district with this authority, and do not mention specifically a district’s governing board.

### *Competence*

11. The Education Code leaves to a school board’s discretion the determination of whether an employee must also be competent to be employed in a vacant position in addition to possessing seniority. The term “competent” relates to an individual’s specific skills or

qualifications, including academic background, training, credentials, and experience, but it does not include evidence related to on-the-job performance. (*Forker v. Board of Trustees* (1984) 160 Cal.App.3d 13, 18-19.)

*Credit for Temporary or Substitute Services*

12. Education Code section 44918 provides in part:

(a) Any employee classified as a substitute or temporary employee, who serves during one school year for at least 75 percent of the number of days the regular schools of the district were maintained in that school year and has performed the duties normally required of a certificated employee of the school district, shall be deemed to have served a complete school year as a probationary employee if employed as a probationary employee for the following school year.

[¶] . . . [¶]

(d) Those employees classified as substitutes, and who are employed to serve in an on-call status to replace absent regular employees on a day-to-day basis shall not be entitled to the benefits of this section . . . .

13. An individual seeking to avail himself or herself of the provisions of a statute which changes a substitute teacher into a probationary teacher by operation of law has the burden of proof. (*Centinela Valley Secondary Teachers Assn. v. Centinela Valley Union High Sch. Dist.* (1974) 37 Cal.App.3d 35, 41.)

14. Section 44918 does not make reemployment rights dependent upon one's formal classification as a "day-to-day" or "long-term" substitute. The statute states only two classifications, "temporary" employees and "substitute" employees. Employees classified as "substitute" are excluded from statutory reemployment benefits if they "are employed to serve in an on-call status to replace absent regular employees on a day-to-day basis." *Eureka Teacher's Assn. v. Board of Education* (1988) 202 Cal.App.3d 469, 473.)

*Cause Exists to Give Notice to Certain Employees*

15. As a result of the Governing Board's lawful reduction of particular kinds of service, cause exists under the Education Code to authorize the District to give final notice to those respondents who are identified hereafter that their employment will be terminated at the close of the current school year and that their services will not be needed by the District for the 2013-2014 school year.

### *Determination*

16. The charges alleged in this reduction in force proceeding were sustained by a preponderance of the evidence. The Board's enactment of the resolutions applicable in this reduction in force proceeding was related to the welfare of the District and its pupils. The District made necessary assignments and reassignments in such a manner that only the most senior credentialed employees were retained to render services that their seniority qualifications and other objective criteria entitled them to provide.

### RECOMMENDATION

It is recommended that the Board of Trustees of the Colton Joint Unified School District issue final layoff notices to the following certificated employees:

The following certificated personnel will receive a layoff notice:

Maria de Avila; Arlina Baeza; Melissa Barrera; Jennifer Bautista; Christine Benavente Barrera; Stacey Berger; Sharon Bihlmeier; Miriam Borja; Katherine Brinton; Cathy Cervantes; Jessica Cervantes; Eunice Cortez; Joel Crow; Yvonne DeJongh; Naomi D'Silva; Patricia Dumke; Laura Harper; Sandra Harworth; Robyne Heusterberg; John Hoang; Amber Johnston; Alisha Jones; Sherwin Junio; Amy Kahler; Julie Kappmeyer; Sarah Ladd; G. Jeanette Leach; Erin Linek; Heather Love; Eduardo Martinez; Mark Martinez; Gerald Matthews; Yvette Mezzanatto; Alycia Minjares; Gretzeel Mojica; Liza Morales; Maria Murillo; Azucena Paez-Herrera; Lucy Portillo; Holly Preston; Amanda Ramirez; Xochitl Ramirez; Michelle Ramos; Ronald Richardson; Sara Rivera; Krissee Rodriguez; Sandra Rodriguez; Art Rungo; Celia Salazar; Yesenia Salehpour; M. Guadalupe Sanchez; Hillary Schmitt; Victoria Sexton; Shannon Sharp Heather Sieger; Idalia Smith; Tracey Smith; Seth Sutherland; Diana Sutton; Janice Swanson; Jannet Torres; Star Treff; Lucy Unda; Lisa Urea; Sandra Vasquez; Jeanne Vizcaino; David Wang; Wendy Ward; Celine Workman; and Sharon Yang.

Dated: May 1, 2013

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JAMES AHLER  
Administrative Law Judge  
Office of Administrative Hearings