

BEFORE THE  
GOVERNING BOARD  
GRANT JOINT UNION HIGH SCHOOL DISTRICT  
STATE OF CALIFORNIA

In the Matter of the Accusation (Layoff):

PROPOSED REDUCTION OR  
DISCONTINUATION OF PARTICULAR  
KINDS OF SERVICES BY 8.6 FULL TIME  
EQUIVALENT CERTIFICATED  
EMPLOYEES

OAH No. N2006030590

Respondents.

**PROPOSED DECISION**

On April 26, 2006, in Sacramento, California, Leonard L. Scott, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Adam J. Fiss, Attorney at Law, represented the Grant Joint Union High School District (School District).

Jason Rabinowitz, Attorney at Law, represented all of the remaining respondents.

Evidence was received, the record was closed and the matter was submitted.

## FACTUAL FINDINGS

1. On or before March 1, 2006, Larry M. Buchanan, Ed.D. (Buchanan) Superintendent of the School District, sent a written recommendation to the Governing Board of the School District for the reduction or discontinuation of particular kinds of services and for the resultant reduction in certificated employees.

2. On or about March 1, 2006, the Governing Board adopted Resolution No. 7-06 to reduce or discontinue particular kinds of services and eliminate 8.6 full time equivalent (FTE) certificated positions at the end of the 2005-2006 school year. The Governing Board acted due to the needs of the School District.

The Resolution provided for the reduction or discontinuation of the following particular kinds of services:

- a. 3.8 FTE Social Sciences
- b. 1.2 FTE Business
- c. 1.0 FTE Customer Service
- d. 0.6 FTE 7th/8th grade reading
- e. 1.0 FTE Art
- f. 1.0 FTE SDFSC/TUPE Specialist

Total 8.6 FTE

3. On or before March 15, 2006, the School District gave written notice to respondents that their services would not be required for the ensuing school year and stating the reasons therefor. The basis for the notice was Resolution No. 7-06, the reduction or discontinuation of particular kinds of services. The notices set forth the reasons for the recommendation, as required by Education Code sections 44949 and 44955.

Attached to the notices were copies of Resolution 7-06, blank Request for Hearing forms, and relevant sections of the Education Code.

4. Respondents timely filed Requests for Hearing to determine whether there is cause for not re-employing them for the ensuing school year pursuant to Education Code section 44949, subdivision (b).

5. On or about April 3, 2006, pursuant to Resolution No.7-06, Superintendent Buchanan made, signed and had timely served upon respondents an Accusation. Superintendent Buchanan acted in his official capacity. With the Accusation was a cover letter, which explained respondents' appeal rights, a blank Notice of Defense form, a Notice of Hearing, and copies of relevant Education Code and Government Code sections.

6. Respondents timely signed and served Notices of Defense pursuant to Education Code section 44949(c)(1) and Government Code section 11506.

7. Respondents are certificated employees of the School District.

8. The court in *San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627, dealt with the question of when a school district must consider positively assured attrition in a layoff, and when it need not.

At page 635, the court held that a school district must consider positively assured attrition where a layoff is due to a decline in average daily attendance (ADA):

Courts have previously held that in terminating certificated employees because of a decline in ADA a district must consider all positively assured attrition. (*Moreland Teachers Assn. v. Kurze, supra*, 109 Cal.App.3d 648; *Degener v. Governing Board* (1977) 67 Cal.App.3d 689 [136 Cal.Rptr. 801]; *Lewin v. Board of Trustees* (1976) 62 Cal.App.3d 977 [133 Cal.Rptr. 385]; *Burgess v. Board of Education* (1974) 41 Cal.App.3d 571 [116 Cal.Rptr. 183].)

"Positively assured attrition" is attrition which has actually occurred and is to be distinguished from "potential attrition" which may be anticipated but is still unknown.

At pages 635-636, the court held that a school district need not consider positively assured attrition where a layoff is due to discontinuation or reduction of particular kinds of services (PKS), and contrasted it with a layoff due to a decline in average daily attendance (ADA):

A board's decision as to reduction or discontinuation of a particular kind of service is not tied in with any statistical computation, such as reduction in the number of students. The number of terminations made necessary by PKS reductions depends totally upon the district's decision as to how many services to reduce. Put another way, the language of section 44955 that the governing board of a school district "may terminate the services of not more than a corresponding percentage of the certificated employees of said district" is only applicable to ADA terminations based upon an actual reduction in attendance.

Where the governing board determines to discontinue or reduce a particular kind of service, there is no way to calculate a "corresponding percentage," hence it is within the discretion of the board to determine the amount by which it will reduce a particular service.

Pursuant to *San Jose*, supra, the School District is not legally required to consider positively assured attrition when reducing or discontinuing particular kinds of services. Conversely, positively assured attrition must be considered if a layoff is due to a decline in average daily attendance.

Because this layoff is due to a reduction or discontinuation of particular kinds of services, the School District was not required to consider positively assured attrition before determining which teachers would be laid off. However, although not required to consider it, the School District considered the positively assured attrition that occurred prior to the sending of the March 15 notices.

9. Tenure is the relationship between a teacher and the School District which gives the teacher greater job security.

Seniority is the relationship between the teachers within a School District. Among the teachers credentialed to provide a given service, greater seniority in the School District gives a greater legal entitlement to a position. (*Ferner v. Harris* (1975) 45 Cal.App.3d 363.)

The School District maintains a list of employees' seniority dates (first date of paid service), degrees, credentials, and authorizations. The District used the Seniority List to develop the proposed layoff list of the least senior employees.

10. The three respondents still subject to the layoff are George Brown, Jr., Kristen Swain and Lynn Reed, Jr.

George Brown, Jr., seniority date August 19, 2004, teaches business customer service for 1.0 FTE. He has a designated subject, vocational customer service credential. He is a second year probationary employee.

Kristen Swain, seniority date November 3, 2005, teaches social science and history for 1.0 FTE. She has a single subject, social science credential, with a CLAD. She is a first year probationary employee.

Lynn Reed, Jr., hire date August 19, 2005, teaches business computers for 1.0 FTE. He is a district intern working toward a business credential.

11. Respondents Brown and Swain argued that the provisions of Education Code section 44955, subdivision (c), in conjunction with the provisions of California Code of Regulations, title 5, section 80024.3.2, require the School District to bump them into the position teaching special education now occupied by Johnny Guest (Guest). Guest, hire date August 19, 2004, was retained to teach special education, and does so under an intern permit while working toward a special education credential. Respondents argued that the School District must retain them, help them secure emergency permits, and assign them to teach the special education class.

Neither Brown, nor Swain, nor the other remaining respondent is credentialed or competent, or has any special training or experience to make them competent, to teach in the special education program.

As the legal basis for their argument, respondents cited the second paragraph of Education Code section 44955, subdivision (c), which requires governing boards to bump more junior certificated employees and retain more senior certificated employees to provide any service they are certificated and competent to render. Subdivision (c) goes on to state: "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."

Respondents also cited California Code of Regulations, title 5, section 80024.3.2 as the basis for the emergency permits required for them to teach special education. The authority to promulgate section 80024.3.2, and other relevant regulation sections, was granted to the Commission on Teacher Credentialing by Education Code sections 44225, subdivisions (d), (g) and (q), 44265 and 44300. Those Education Code sections authorized the Commission to create limited term and emergency permits and authorized it to promulgate regulations governing the issuance of such permits. Pursuant to that authority, the Commission promulgated a regulatory scheme governing the issuance of such permits.

As part of a larger regulatory scheme, California Code of Regulations, title 5, section 80024.3.2 must be read in context with the rest of the scheme, especially sections 80023.2 and 80026.

a. Respondents fail to meet the requirements of Education Code section 44955, subdivision (c), because they failed to voluntarily request the transfer into the special education position and failed to pass a special education competency test prior to the March 15 notice. To rule otherwise would make the rest of the layoff process futile and meaningless, since there would be no way to determine which certificated personnel were subject to the layoff prior to the required March 15 notice.

The court dealt with a roughly analogous situation in *Degener v. Governing Board of Wiseman School District* (1977) 67 Cal.App.3d 689, 697-699. Degener was subject to layoff because at the time of the March 15 layoff notice and at the time of the May 15 layoff decision he was not competent and credentialed to bump a more junior teacher, who was being retained. However, after the May 15 decision, Degener received a credential that would have allowed him to teach the class taught by the less senior teacher, and thus bump her. The court noted that his late receipt of the credential meant that the governing board could not timely give the more junior teacher the March 15 notice and lay her off.

The court stated that: (1) Degener could not be assured of the new credential until it was issued; (2) there is no showing or claim that the Board knew that he had made application for the additional certificate; and (3) other employees may also have unknown applications with the state board (Commission on Teacher Credentialing) and school district authorities would never know to whom to give notice. The court further stated that: "[A] school board can only authorize a teacher to teach within his credential. At the time a district must prepare its lay-off notices it must analyze carefully the number of people to be laid-off, the seniority listing of employees, and the credentials and qualifications of the individuals. If a district decides it must lay-off a certain number of employees, it must give those employees proper notice. Once March 15 passes by a district may not notify additional employees that they may be terminated. . . . A district does not have the right to add to the lay-off list. [para.] . . . Respondent [Board] cannot be held accountable for the fact that Appellant Degener received his credential *after* all notices were sent, a hearing held, and final Board adoption of the decision." The court ruled against Degener.

Respondents are in much the same situation as Degener. They cannot be assured of receiving an emergency permit until it is issued. Since respondents did not request a transfer into special education and seek an emergency permit prior to March 15, there was no way the Governing Board could know that respondents would now make this claim. Other certificated employees may have unknown applications or unknown interest in possibly seeking an emergency permit from the Commission on Teacher Credentialing and School District authorities would never know to whom to give the March 15 layoff notice.

b. Prior to March 15, none of the respondents made any effort to comply with the competency requirement of Education Code section 44955, subdivision (c), so at the time of the March 15 notice, none of them was qualified to bump into the special education position. If the School District had attempted to bump any of the remaining respondents into the special education position at the time of the March 15 notice, it would have violated Education Code section 44955, subdivision (b).

c. Subdivision (b), states in relevant part: "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.”

The provisions of subdivisions (c) must be interpreted in conjunction with the provisions of subdivision (b) to give reasonable meaning to the whole of section 44955 and of the statutory scheme. The only way to give meaning to the provisions of both subdivisions is to require certificated employees to have taken all of the necessary preliminary steps for reassignment under subdivision (c), including passing a competency test and applying for an emergency permit prior to the issuance of the March 15 notice. To interpret subdivision (c) otherwise would frustrate any attempt by any school district to layoff unnecessary certificated personnel, and thereby make meaningless the rest of Section 44955 and all of Section 44949, in so far as they relate to layoffs.

Pursuant to subdivision (b), in determining which credentialed employees were affected by the layoff, the School District was required to take into account their seniority, credentials, and the competence of each as it existed when the determination was made. When the March 15 notice was sent, none of the three remaining respondents was certificated or competent or possessed an emergency permit authorizing service in special education. Therefore, under subdivision (b), none of the remaining respondents was qualified to bump into the special education position at the time of the March 15 notice.

d. Securing an emergency permit is not an easy process nor is the end result a foregone conclusion. An applicant for an emergency permit, or any other permit, must comply with a number of criteria. The criteria relevant to emergency permits are found in California Code of Regulations, title 5, sections 80023.2, 80024.3.2 and 80026.

Section 80023.2 establishes the basic requirements for the issuance of an emergency permit. It requires that applicants, who already possess a California teaching credential, must still satisfy a number of additional requirements, including: subdivision (c) applicant must satisfy the relevant permit requirements for the requested permit as specified in Sections 80024.1 through 80024.8; subdivision (d) the school district must submit a Declaration of Need for Fully Qualified Educators that satisfies the provisions of Section 80026; and (f) applicant must submit a complete application packet, including a completed Application for Credential Authorizing Public School Service.

Section 80024.3.2 establishes the requirements for the initial issuance of an Emergency Education Specialist Instruction Permit in the areas of Mild/Moderate Disabilities, Moderate/Severe Disabilities, Deaf and Hard-of-Hearing, Physical and Health Impairments, Visual Impairments, and Early Childhood Special Education. It requires that applicants, who already possess a California teaching credential, must still satisfy a number of additional requirements, including: subdivision (a)(1) applicant and the school district

must meet the general requirements specified in Section 80023.2; and subdivision (a)(3) applicant must provide a written affirmation of his or her intent to complete the requirements set forth in Section 80026.6 during the period of the permit.

Section 80026 requires that the employing agency annually submit a Declaration of Need for Fully Qualified Educators as a prerequisite to the issuance of any emergency permit to certificated employees of that agency. Subdivision (a) requires that the declaration must specify the number of each type of emergency permit sought. Subdivision (b) requires a brief description of efforts that the employing agency has undertaken to locate and recruit individuals who hold the needed credentials. Subdivision (c) requires information about efforts to train people to fill the need, such as by co-sponsoring internships or other certification programs. Subdivision (d) requires the employing agency to certify that there are an insufficient number of certificated persons who meet the criteria to fill the positions. Subdivision (e) requires the governing board of a school district to adopt the Declaration of Need.

As can be seen from the above criteria, issuance of such permits is not automatic and there is no assurance that one will be issued. Not only must the applicant demonstrate compliance with the criteria, but the School District must submit a Declaration of Need. And even if the Commission were to issue an emergency permit to teach special education, it would most likely be issued to the best qualified person, Guest, the person with the existing special education permit and training.

e. Respondents failed to timely request transfer into special education prior to March 15 and their claims are now barred by laches.

Each of the respondents who raised this issue has known of his or her employment status, credentials, and whether he or she possessed an emergency credential or permit which would allow teaching in the special education program since well before the commencement of this layoff. If any of them wished to transfer into special education, they should have taken the necessary action well before March 15. Instead, they failed to take any action, failed to appraise the School District of any interest in a transfer, and failed to assert their position in a timely manner. Instead, they waited until this proceeding to raise the claim. Respondents' failure to act prevented the School District from taking any responsive action prior to March 15. Respondents delay thus caused prejudice to the School District because the School District was required by law to determine which certificated employees were affected by the layoff and give them the March 15 notice.

In *Campbell Elementary Teachers Association, Inc. v. Abbott* (1978) 76 Cal.App.3d 796, 814-815, the court held that it was each respondent's duty to timely have on file at the School District office all credentials, transcripts and any other qualification documentation that might qualify him or her to teach additional subjects, such as special education.



In *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 77, the California Supreme Court held: "The doctrine of laches bars a cause of action when the plaintiff unreasonably delays in asserting or diligently pursuing the cause and the plaintiff has acquiesced in the act about which the plaintiff complains, or the delay has prejudiced the defendant."

In this case, respondents failed to timely raise the issue before March 15, and their failure prejudiced the School District.

In a situation roughly analogous to this matter, the court in *American Federation of Teachers v. Board of Education* (1977) 77 Cal.App.3d 100, held that where a temporary teacher failed to make a claim that she should have been classified as probationary until after March 15, the point in time when a school district was required to issue a notice of non-re-election, the teacher was guilty of laches and was estopped from impeaching the temporary nature of her employment. The court held that her actions foreclosed the school district from giving her the dismissal notice, which must be given by March 15, and thereby caused prejudice to the school district.

Pursuant to these cases, respondents are barred by laches and estoppel from now claiming that the School District should have reassigned them to teach special education.

f. Further, respondents cannot rely on the ruling in *California Teachers Association v. Governing Board Of Golden Valley Unified School District* (2002) 98 Cal.App.4th 369, 384-385, where the court stated that the employing school district had an "obligation to apply for the emergency permit" for an otherwise uncredentialed employee in order to carry out its duty to put the employee's contract into effect. The facts in *Golden Valley* are distinguishable from the facts herein. In *Golden Valley*, the school district had entered into an employment contract for the ensuing school year with a teacher holding an emergency permit. Prior to the start of school, the district attempted to abrogate the terms of the employment contract by claiming that "it could not legitimately provide the CTC [Commission on Teacher Credentialing] with a declaration of need to justify the CTC issuing an emergency permit to [the teacher] for the 1999-2000 school year in light of the more than 25 applications Golden Valley received from teachers who were fully credentialed and qualified to teach." The court held that the school district had an obligation to perform a diligent search for qualified teachers before entering into a contract with a teacher holding an emergency permit; "Furthermore, Golden Valley's obligation to apply for the emergency permit is imposed by implication under the contract because such an obligation is necessary to carry the contract into effect." Here, in contrast, there was no contractual obligation between the School District and respondents that compelled the School District to seek an emergency credential or permit for respondents to teach special education, especially when respondents failed to take any action toward doing so prior to issuance of the March 15 Notice.

Therefore, based upon the above, respondents' arguments under the provisions of Education Code section 44955, subdivision (c), in conjunction with the provisions of California Code of Regulations, title 5, section 80024.3.2 is not persuasive.

12. No permanent or probationary certificated employee junior to respondents is being retained to perform a service which respondents are certificated and competent to render. Those certificated employees junior to respondents being retained will provide services which respondents are not certificated and competent to perform.

13. The reduction in particular kinds of services will not cause those services to fall below the level necessary to provide such services to the students nor will the reduction violate any mandate regarding the provision of such services.

14. The services identified in the Governing Board Resolution are particular kinds of services that can be reduced under Education Code section 44955. The Governing Board's decision to reduce the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion.

15. The reduction of the particular kinds of services is for the welfare of the School District and the pupils. The reduction in particular kinds of services is the sole cause for not re-employing respondents.

### **LEGAL CONCLUSIONS**

1. Education Code section 44949 provides:

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

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

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

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

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

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

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

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

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

(e) If after request for hearing pursuant to subdivision (b) any continuance is granted pursuant to Section 11524 of the Government Code, the dates prescribed in subdivision (c) which occur on or after the date of granting the continuance and the date prescribed in subdivision (c) of Section 44955 which occurs after the date of granting the continuance shall be extended for a period of time equal to the continuance.

2. Education Code section 44955 provides in relevant part:

(a) No permanent employee shall be deprived of his or her position for causes other than those specified in Sections 44907 and 44923, and Sections 44932 to 44947, inclusive, and no probationary employee shall be deprived of his or her position for cause other than as specified in Sections 44948 to 44949, inclusive.

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

service which said permanent employee is certificated and competent to render.

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

As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof. Upon the request of any employee whose order of termination is so determined, the governing board shall furnish in writing no later than five days prior to the commencement of the hearing held in accordance with Section 44949, a statement of the specific criteria used in determining the order of termination and the application of the criteria in ranking each employee relative to the other employees in the group. This requirement that the governing board provide, on request, a written statement of reasons for determining the order of termination shall not be interpreted to give affected employees any legal right or interest that would not exist without such a requirement.

(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.

3. Education Code section 44956(a)(1) provides in relevant part:

(a) Any permanent employee whose services have been terminated as provided in Section 44955 shall have the following rights:

(1) For the period of 39 months from the date of such termination, any employee who in the meantime has not attained the age of 65 years shall have the preferred right to reappointment, in the order of original employment as determined by the board in accordance with the provisions of Sections 44831 to 44855, inclusive, if the number of employees is increased or the discontinued service is reestablished, with no requirements that were not imposed upon other employees who continued in service; provided, that no probationary or other employee with less seniority shall be employed to render a service which said employee is certificated and competent to render. However, prior to reappointing any 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.

4. Education Code section 44225, subdivisions (d), (g) and (q), provide:

Duties of commission

The commission shall do all of the following:

...

(d) Establish standards for the issuance and renewal of credentials, certificates, and permits. In setting standards, the commission shall seek to ensure, through its credentialing of teachers, that public school teachers satisfy all of the following criteria:

(1) Are academically talented.

- (2) Are knowledgeable of the subjects to be taught in the classroom.
- (3) Are creative and energetic.
- (4) Have the human skills to motivate and inspire pupils to achieve their goals.
- (5) Have the sensitivity to foster self-esteem in pupils through recognition that each pupil has his or her own goals, talents, and levels of development.
- (6) Be willing to relate the educational process and their instructional strategies to meet pupils' needs.
- (7) Are able to work effectively with and motivate pupils from a variety of ethnic, socioeconomic, cultural, academic, and linguistic backgrounds.
- (8) Have an understanding of principles and laws related to educational equity, and the equitable practice of the profession of education among all pupils regardless of their ethnicity, race, gender, age, religious background, primary language, or handicapping condition.

...

(g) Establish alternative methods for entry into the teaching profession, and into other certificated roles in the schools, by persons in varying circumstances, including persons who have been educated outside of California, provided that each applicant satisfies all of the requirements established by the commission. One alternative method shall be the successful completion of at least two years of classroom instruction under a district intern certificate, pursuant to Article 7.5 (commencing with Section 44325). In establishing alternative methods for entry into the teaching profession, the commission shall develop strategies to encourage classroom aides to become credentialed teachers.

...

(q) Propose appropriate rules and regulations to implement the act which enacts this section.

5. Education Code section 44265 provides:

Credentials for teaching specialties, including, but not limited to, bilingual education, early childhood education, and special education, shall be based

upon a baccalaureate degree from an accredited institution, completion of a program of professional preparation, and any other standards which the commission may establish.

In adopting the necessary rules and regulations establishing the requirements for the preparation of special education specialties, the commission shall ensure that teachers have sufficient knowledge of subject matter that is the core of the California public school curriculum and experience with nonspecial education pupils to the extent deemed appropriate by the commission.

All administrative regulations governing special education specialists credentials that were in effect on December 31, 1989, shall continue to be operative until the commission amends or repeals those regulations to implement the provisions of this section.

6. Education Code section 44300 provides:

(a) Commencing January 1, 1990, the commission may issue or renew emergency teaching or specialist permits in accordance with regulations adopted by the commission corresponding to the credential types specified in paragraphs (1), (2), and (3) of subdivision (b) of Section 44225, provided that all of the following conditions are met:

(1) The applicant possesses a baccalaureate degree conferred by a regionally accredited institution of higher education and has fulfilled the subject matter requirements of Section 44301.

(2) The applicant passes the state basic skills proficiency test as provided for in Section 44252.

(3) The commission approves the justification for the emergency permit submitted by the school district in which the applicant is to be employed. The justification shall include all of the following:

(A) Annual documentation that the district has implemented in policy and practices a process for conducting a diligent search that shall include, but is not limited to, distributing job announcements, contacting college and university placement centers, advertising in local newspapers, exploring the incentives included in the Teaching As A Priority Block Grant established pursuant to Section 44735, participating in the state and regional recruitment centers established pursuant to Sections 44751 and 90530, and participating in job fairs in this state, but has been unable to recruit a sufficient number of



certificated teachers, including teacher candidates pursuing full certification through internship, district internship, or other alternative routes established by the commission.

(B) A declaration of need for fully qualified educators based on the documentation set forth in subparagraph (A) and made in the form of a motion adopted by the governing board of the district or the county board of education at a regularly scheduled meeting of the governing board or the county board of education. The motion may not be part of the consent agenda and shall be entered in the minutes of the meeting.

(b) The commission may deny a request for an emergency permit that does not meet the justification set forth in subparagraph (A) of paragraph (3) of subdivision (a).

(c) It is the intent of the Legislature that all of the following occur:

(1) The commission shall issue preintern certificates in place of emergency teaching permits as sufficient resources are made available to school districts to provide services pursuant to Article 5.6 (commencing with Section 44305) to preinterns pursuing multiple subject or single subject teaching credentials.

(2) If the examination of the Pre-Internship Teaching Program required by this chapter demonstrates that the program should continue because it has been successful in better preparing and retaining preintern teachers than the emergency permit system, sufficient resources to fully fund the Pre-Internship Teaching Program shall be appropriated by July 2002. For purposes of this paragraph, two thousand dollars (\$ 2,000) in state funding per preintern shall be deemed to be sufficient resources.

(3) The commission shall continue to issue emergency teaching permits to individuals employed by school districts defined in regulations as remote from regionally accredited institutions of higher education.

(d) Commencing January 1, 1990, the commission may issue and reissue emergency permits corresponding to the credential types specified in paragraph (4) of subdivision (b) of Section 44225. The commission shall establish appropriate standards for each type of emergency permit specified in paragraph (4) of subdivision (b) of Section 44225.

(e) The exclusive representative of certificated employees, if any, as provided under Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1

of the Government Code, may submit a written statement to the commission agreeing or disagreeing with the justification submitted to the commission pursuant to paragraph (3) of subdivision (a).

(f) Commencing January 1, 1990, a person holding an emergency teaching or specialist permit shall attend an orientation to the curriculum and to techniques of instruction and classroom management, and shall teach only with the assistance and guidance of a certificated employee of the district who has completed at least three years of full-time teaching experience, or the equivalent thereof. It is the intent of the Legislature to encourage districts to provide directed teaching experience to new emergency permitholders with no prior teaching experience.

(g) The holder of an emergency permit shall participate in ongoing training, coursework, or seminars designed to prepare the individual to become a fully credentialed teacher or other educator in the subject area or areas in which he or she is assigned to teach or serve. The employing agency shall verify that employees applying to renew their emergency permits are meeting these ongoing training requirements.

(h) Emergency permits for pupil personnel services shall not be valid for the purpose of determining pupil eligibility for placement in any special education class or program.

(i) This section shall not apply to the issuance of an emergency substitute teaching permit, or of an emergency permit to a teacher who has consented to teach temporarily outside of his or her field of certification, for which the commission shall establish minimum requirements.

7. California Code of Regulations, title 5, section 80023.2 provides:

The following requirements apply to the initial issuance of all emergency permits specified in Section 80023.

(a) The applicant must possess a baccalaureate or higher degree from a regionally accredited college or university.

(b) The applicant must verify passage of the California Basic Educational Skills Test (CBEST), unless exempt by statutes or regulations.

(c) The applicant must satisfy the requirements for the permit being requested as specified in Sections 80024.1 through 80024.8.

(d) The employing agency must submit a Declaration of Need for Fully Qualified Educators that satisfies the provisions of Section 80026.

(e) If the applicant does not already have fingerprint clearance on file with the Commission, the permit application must include two fingerprint cards and the completed Application for Character and Identification Clearance (form 41-CIC, rev 11-93), and fee(s). No permit will be issued until the clearance process is completed.

(f) Issuance of an emergency permit also requires the submission of a complete application packet, including a completed Application for Credential Authorizing Public School Service (form 41-4, rev 11-94), payment of the fee(s) required by Section 80487, and other documents required by the Commission to verify completion of all requirements for the emergency permit.

8. California Code of Regulations, title 5, section 80024.3.2 provides:

(a) Requirements for the initial issuance of an Emergency Education Specialist Instruction Permit in the areas of Mild/Moderate Disabilities, Moderate/Severe Disabilities, Deaf and Hard-of-Hearing, Physical and Health Impairments, Visual Impairments, and Early Childhood Special Education include all of the following:

(1) The applicant and the employing agency must meet the general requirements specified in Section 80023.2.

(2) In addition, the applicant must meet (A), (B), (C) or (D) below:

(A) must possess a valid California teaching credential requiring a baccalaureate degree and a professional preparation program, including student teaching, or

(B) must possess or show eligibility for an out-of-state credential in special education requiring a baccalaureate degree, and have completed a program approved by the responsible state licensing agency at a regionally accredited institution, or

(C) must verify a minimum of three years of successful full-time classroom experience, or the equivalent in part-time experience, working with special education students in a public school or a state certified nonpublic, nonsectarian school or a state certified nonpublic, nonsectarian agency with students in the age range of the authorization being requested, or

(D) must verify a minimum of nine semester units of coursework in special education or in a combination of special education and regular education that are appropriate to a special education or regular education teaching credential.

(3) The applicant must provide a written affirmation of his or her intent to complete the requirements set forth in Section 80026.6 during the period of the permit.

(b) To reissue an Emergency Specialist Instruction Permit in the areas of Mild/Moderate Disabilities, Moderate/Severe Disabilities, Deaf and Hard-of-Hearing, Physical and Health Impairments, Visual Impairments, and Early Childhood Special Education, the applicant and the employing agency must meet the requirements for reissuance of emergency permits specified in 80026.6.

(1) The applicant who completed a professional preparation program as described in Section 80048.3(b)(2) must complete at least six semester units of coursework toward completion of the requirements described in Section 80048.3(b)(4) through (8) in lieu of the requirements described in 80026.6(a)(5)(A).

(2) The applicant who has not completed the subject matter knowledge requirement specified in Section 80413(a)(3) may, for the first reissuance only, take all components of the appropriate subject matter examination as described in Section 80071 in lieu of six semester units of coursework from a regionally accredited college or university.

(c) Authorization: An Emergency Education Specialist Instruction Permit authorizes the same service as the Education Specialist Instruction Credential in the authorized field(s) listed on the permit.

9. California Code of Regulations, title 5, section 80026 provides:

Submission of a Declaration of Need for Fully Qualified Educators by the employing agency shall be a prerequisite to the issuance of any emergency permit and/or limited assignment permit for that agency. Charter schools as

defined in Education Code Section 47600 shall be exempt from submitting a Declaration of Need for Fully Qualified Educators. The Declaration of Need for Fully Qualified Educators by an employing agency shall be valid for no more than twelve months, and shall expire on the June 30 following its submission to the Commission, unless the employing agency has an approved Plan to Develop Fully Qualified Educators which specifies a period of validity longer than twelve months. The Declaration of Need for Fully Qualified Educators shall be submitted to the Commission on a form to be provided by the Commission, and shall include all of the following information:

(a) Estimated Need: This shall include the title(s) and number of each type of emergency permit and limited assignment permit which the employing agency estimates, based on previous year actual needs and projections of enrollment, it will need during the year covered by the Declaration. In addition, it shall include each subject to be listed on Emergency Single Subject and Limited Assignment Single Subject Teaching Permits and the target language on Emergency Multiple Subject or Single Subject Teaching Permits with a Bilingual, Crosscultural, Language and Academic Development (BCLAD) Emphasis or on Emergency BCLAD Permits. The Declaration of Need for Fully Qualified Educators shall be revised, when the number of emergency permits and limited assignment permits needed exceeds the estimate by ten percent, by the governing board or superintendent/administrator of the employing agency, as specified in subsection (e) below.

(b) Efforts to Recruit Certified Personnel. This shall include a brief description of efforts that the employing agency has undertaken to locate and recruit individuals who hold the needed credentials, such as dated copies of written announcements of its vacancy or vacancies which were mailed to college or university placement centers.

(c) Efforts to Establish Alternative Training Options. The Declaration shall:

(1) identify the names of institutions of higher education co-sponsoring internships or other certification programs with the employing agency or, if no such programs exist, briefly explain why;

(2) if the employing agency participates in pre-internship or internship programs, estimate the number which the employing agency reasonably expects to employ during the year covered by the Declaration; and

(3) indicate whether the employing agency has considered developing a "Plan to Develop Fully Qualified Educators" in cooperation with other education

agencies in the region pursuant to Section 80026.4, or if not, briefly explain why.

(d) Stipulation of Insufficiency of Suitable Applicants. The employing agency shall certify that there is an insufficient number of certificated persons who meet the employing agency's specified employment criteria to fill necessary positions.

(e) Adoption of the Declaration. The Declaration of Need for Fully Qualified Educators shall be adopted by the governing board of a school district, or by the superintendent of a county office of education or by the administrator of a state school or nonpublic, nonsectarian school or agency.

(1) A Declaration of Need for Fully Qualified Educators by a school district shall be adopted by the governing board in a regularly-scheduled, public meeting of the board. The entire Declaration of Need for Fully Qualified Educators shall be included in the board agenda, and shall not be adopted by the board as part of a consent calendar.

(2) A superintendent of a county office or the administrator of a state school or nonpublic, nonsectarian school or agency shall publicly announce his or her intent to adopt a Declaration of Need for Fully Qualified Educators at least 72 hours prior to adopting the Statement. The adopted Statement shall be signed by the superintendent or administrator.

10. The Governing Board may reduce or discontinue a particular kind of service and then provide the needed services to the students in another manner. (*Gallup v. Board of Trustees* (1996) 49 Cal.Rptr.2d 289, 41 Cal.App.4th 1571, [rehearing denied, review denied] and *California Teachers Association v. Board of Trustees of Goleta Union School District* (1982) 182 Cal.Rptr. 754, 132 Cal.App.3d 32.)

11. In the course of reducing or discontinuing a particular kind of service, the Governing Board may retain certificated employees junior to respondents to perform services which respondents are not certificated and competent to render. (*Moreland Teachers Association v. Kurze* (1980) 109 Cal.App.3d 648, 167 Cal.Rptr. 343, and *Lewin v. Board of Trustees* (1976) 62 Cal.App.3d 977, 133 Cal.Rptr 385.)

12. A school board may reduce services within the meaning of statute either by determining that a certain type of service shall not be performed at all or by reducing the number of district employees who perform such services. (*Rutherford v. Board of Trustees of Bellflower Unified School District* (1976) 64 Cal.App.3d 167.)

13. A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated and competent to fill. In doing so, the senior employee may displace or "bump" a junior employee who is filling that position. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469.) Junior teachers may be given retention priority over senior teachers if the junior teachers possess superior skills or capabilities which their more senior counterparts lack. (*Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399; *Santa Clara Federation of Teachers, Local 2393, v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831.)

14. Jurisdiction for the subject proceeding exists pursuant to Education Code sections 44949 and 44955. All notices and other jurisdictional requirements of those sections have been met.

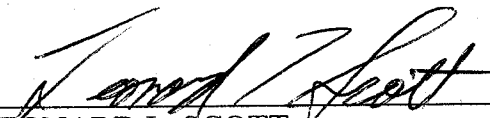
15. Cause exists for the reduction or discontinuation of particular kinds of services and of 8.6 full-time equivalent certificated positions at the end of the 2005-2006 school year, pursuant to Education Code sections 44949 and 44955. Therefore, cause exists pursuant to Education Code sections 44949 and 44955 to give notice to respondents that their services will not be required for the ensuing school year, 2006-2007.

### ORDER

Notice shall be given to the three remaining respondents that their services will not be required for the ensuing school year, 2006-2007, because of the reduction or discontinuation of particular kinds of services.

Notice shall be given in inverse order of seniority.

Dated: May 3, 2006

  
LEONARD L. SCOTT  
Administrative Law Judge  
Office of Administrative Hearings