

**BEFORE THE BOARD OF EDUCATION
OF THE RIM OF THE WORLD UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA**

In the Matter of the Employment Status of:

TRACY CAIRNS, et al.,

Respondents.

OAH No. 2012031114

PROPOSED DECISION

Robert Walker, Administrative Law Judge, State of California, Office of Administrative Hearings, heard this matter in Blue Jay, California, on April 20, 2012.

Todd M. Robbins, Attorney at Law,¹ represented the complainant, Dr. Arturo Delgado, Superintendent, San Bernardino City Unified School District.

The respondents are listed in exhibit A.

Michael Hersh, Staff Attorney, Department of Legal Services,² California Teachers Association, represented the respondents listed in exhibit B.

Mr. Hersh also represented Jack Allen, Barbara Berteaux, Lynn Klopfer, and Shalome Nichlos. Those teachers requested a hearing, but at the beginning of the hearing, Mr. Hersh announced that they withdrew their requests for a hearing.

No appearance was made by or on behalf of Carie Renero or Steven Wallace.

The matter was submitted on April 20, 2012.

¹Todd M. Robbins, Attorney at Law, 3450 Fourteenth Street, Suite 420, Riverside, California 92501.

²Michael Hersh, Staff Attorney, Department of Legal Services, California Teachers Association, P.O. Box 2153 Santa Fe Springs, California 90670-0153.

DEFAULT

As to Ms. Renero and Mr. Wallace, on proof of compliance with Government Code sections 11505 and 11509, this matter proceeded as a default pursuant to section 11520.

FACTUAL FINDINGS

General Findings Concerning Statutory Requirements

1. Education Code sections 44949 and 44955,³ provide for two notices to be given in connection with terminating certificated employees. The first notice, which will be referred to as the Preliminary Layoff Notice, is given by the superintendent. It is given to the governing board and to the employees the superintendent recommends for layoff. The Preliminary Layoff Notice gives the board and the employees notice that the superintendent recommends that those employees be laid off. The superintendent must give the Preliminary Layoff Notice no later than March 15. There is no requirement that a governing board take any action in March. But while it is unnecessary, governing boards usually adopt a resolution ratifying the superintendent's recommendations.

2. The second notice is a notice of a governing board's decision to terminate an employee. That notice is provided for in Section 44955 and must be given before May 15. That notice advises a teacher that the district will not require his or her services for the ensuing school year. That notice will be referred to as a Termination Notice.

3. In this case, not later than March 15, the superintendent notified the governing board and the respondents that he recommended that the respondents not be retained for the ensuing school year.

4. The Preliminary Layoff Notice stated the reasons for the recommendation. The recommendation was not related to respondents' competency.

5. A Preliminary Layoff Notice was delivered to each respondent, either by personal delivery or by depositing the notice in the United States mail, registered, postage prepaid, and addressed to respondent's last known address.

6. The Preliminary Layoff Notice advised each respondent as follows: He or she had a right to a hearing. In order to obtain a hearing, he or she had to deliver a request for a hearing in writing to the person sending the notice. The request had to be delivered by a specified date, which was a date that was not less than seven days after the notice was

³ All references to the Code are to the Education Code unless otherwise specified.

served.⁴ And the failure to request a hearing would constitute a waiver of the right to a hearing.

7. Respondents either timely filed written requests for a hearing or obtained a waiver of their failure to file. An accusation was timely served on respondents. Respondents were given notice that, if they were going to request a hearing, they were required to file a notice of defense within five days after being served with the accusation.⁵ Respondents either filed timely notices of defense or obtained a waiver of their failure to file. All prehearing jurisdictional requirements were either met or waived.

8. The governing board of the district resolved to reduce or discontinue particular kinds of services. Within the meaning of Section 44955, the services are “particular kinds of services” that can be reduced or discontinued. The decision to reduce or discontinue these services was not arbitrary or capricious but constituted a proper exercise of discretion.

Services the District Intends to Reduce or Discontinue

9. The governing board of the district determined that, because particular kinds of services are to be reduced or discontinued, it is necessary to decrease the number of permanent or probationary employees in the district.

10. The particular kinds of services the governing board of the district resolved to reduce or discontinue are:

Elementary Classroom Teachers	11.00	.T.E.	F
School Counselor	.00	.T.E.	F
Teacher on Assignment Technology/Computer Services	.00	.T.E.	F
Elementary Independent Study	.00	.T.E.	F
Secondary Algebra	0		F

⁴ Employees must be given at least seven days in which to file a request for a hearing. Education Code section 44949, subdivision (b), provides that the final date for filing a request for a hearing “shall not be less than seven days after the date on which the notice is served upon the employee.”

⁵ Pursuant to Government Section 11506, a party on whom an accusation is served must file a notice of defense in order to obtain a hearing. Education Code section 44949, subdivision (c)(1), provides that, in teacher termination cases, the notice of defense must be filed within five days after service of the accusation.

	.60	.T.E.	
	0		F
Secondary Calculus	.20	.T.E.	
	0		F
Secondary English	.20	.T.E.	
	0		F
Secondary Health	.20	.T.E.	
	0		F
Secondary History	.40	.T.E.	
	0		F
Secondary Integrated Science	.20	.T.E.	
	0		F
Secondary Business Math	.20	.T.E.	
	0		F
Secondary Physical Education	.40	.T.E.	
	0		F
Secondary Foods	.20	.T.E.	
	0		F
Secondary French	.20	.T.E.	
	0		F
Secondary Geometry	.40	.T.E.	
	1		F
Moderate/Severe Special Day Class	.00	.T.E.	
	1		F
Certificated Director	.00	.T.E.	
			F
TOTAL CERTIFICATED POSITIONS	19.20	.T.E.	

Notices to be Rescinded

11. The district stipulated that it will rescind the Preliminary Layoff Notices served on the following respondents:

BAKER

KRISTIL

CAIRNS

TRACY

DE LA TEJERA

JESSICA

ELDERKIN

JOHN

FARR

AMANDA

FAUST

MICHAEL

HOSKING

KATEE

HUNYADY MAYER

KATI

ITO

STEPHANIE

LEIDNER

CARIS

LONGWORTH

CYNTHIA

MOSS

JEFFREY

SMITH

MARY

TUCH

ALFRED

WILSON

ALICIA

BATES

AMANDA

CHAPMAN

STACY

CRAIG

JUDITH

JOHNSON

LAURA

OLSEN

TRACY

TVELIA

SUE

Use of Tie-Breaking Criteria Based on the Current Needs of the District and Students

12. Pursuant to Section 44955, subdivision (b), the governing board of the district adopted criteria for determining the order of termination as among employees who first rendered paid service on the same day. Section 44955, subdivision (b), requires a district to adopt such criteria and provides that the criteria are to be based on “needs of the district and the students” The district’s tie-breaking criteria are as follows:

1. Highly Qualified Status under NCLB in area of assignment.
2. Credential status in area of assignment, in order of priority:
 - a. Clear or Preliminary, Life, Standard, etc.
 - b. Intern
 - c. Provisional, STC, STSP, PIP, or other provisional credentials/certificates/authorizations.
3. Possession of an authorization to teach English Language Learners in order of priority: (BCLAD, CLAD, SB1969, SB395, SB1292, SDAIE, etc.) and all other acceptable EL authorizations.
4. Number of years of continuous service in Rim of the World School District prior to any break in service from Rim of the World School District.

5. Total number of Clear or Preliminary credentials in different subject areas.

6. Total number of supplemental authorizations.

7. Possession of an Advanced Degree from the accreditation database of the United States Department of Education's database, earliest date prevails.

8. 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.

13. The district applied the tie breaking criteria with regard to teachers who shared the date of hire of August 28, 2006.

District's Intention to Deviate from Seniority (Skipping)

14. Pursuant to Section 44955, subdivision (d)(1), a district may deviate from terminating employees in the order of seniority, i.e., a district may *skip* over teachers with a particular qualification and terminate more senior teachers who do not possess that qualification. In order to skip, a district must demonstrate a specific need for personnel to teach a specific course or course of study or for personnel with a specialization in personnel services or nursing. If the need concerns a course or course of study, the district may skip a junior employee only if employees with more seniority do not possess the special training and experience necessary to teach the course and only if the junior employee does possess that special training and experience.

15. There was no evidence that the district engaged in skipping.

Right to be Retained According to Seniority and Qualifications – Date of Hire

16. Job security is not inherent in seniority. The Legislature chose to provide teachers with limited job security according to their seniority.

17. Kathleen Flores contends that she is more senior than the district lists her as being. Ms. Flores contends that her seniority date is February of 2006. The district contends it is October 1, 2007. As will be explained below, both are mistaken. Because of a break in service, Ms. Flores's seniority date is the beginning of the winter-spring semester of 2011, which is approximately January of 2011.

18. In order to determine Ms. Flores's seniority date, one must consider a number of statutes and judicial decisions.

19. The Education Code divides teachers into four classifications of employees: "permanent" and "probationary" employees are employed for a school year. "Temporary" employees are hired as needed during a given semester or school year because a regular

employee has been granted a long-term leave of absence or is experiencing a long-term illness. “Substitute” employees are employed from day to day to fill the position of a regular employee who is absent from service on a short-term basis. At the core of the classification scheme is the tenet that a teacher’s continuity of service should restrict a school district’s power to terminate employment. (*Santa Barbara Federation of Teachers v. Santa Barbara High Sch. Dist.* (1977) 76 Cal.App.3d 223, 228; *California Teachers Assn. v. Vallejo City Unified School Dist.* (2007) 149 Cal.App.4th 135, 144.)

20. Code section 44885.5, subdivision (b), provides that every certificated employee who has completed service as a probationary employee, and who is reelected and employed during the succeeding school year, shall, upon reelection for the next succeeding school year, to a position requiring certification qualifications, be classified as and become a permanent employee of the district. The governing board shall notify the employee, on or before March 15 of the employee’s last complete consecutive school year of probationary employment in a position requiring certification qualification, of the decision to reelect or not reelect the employee for the next succeeding school year. In the event the governing board does not give notice pursuant to this section on or before March 15, the employee shall be deemed reelected for the next succeeding school year.

21. Code section 44915 provides that the governing board of a school district shall classify as probationary employees, those persons employed in positions requiring certification qualifications for the school year, who have not been classified as permanent employees or as substitute employees. Although section 44915 sets probationary status as the “default” classification for teachers (*California Teachers Assn. v. Vallejo City Unified School Dist.*, 149 Cal.App.4th at p. 143), it does not prohibit a school district from classifying an employee as a temporary or as a substitute employee.

22. Code section 44916 provides: “The classification [of an employee] shall be made at the time of employment and thereafter in the month of July of each school year. At the time of *initial employment* during *each* academic year, *each new* certificated employee of the school district shall receive a written statement indicating his [or her] employment status and the salary that he [or she] is to be paid. If a school district hires a certificated person as a temporary employee, the written statement [required by this section] shall clearly indicate the temporary nature of the employment and the length of time for which the person is being employed. *If a written statement does not indicate the temporary nature of the employment, the certificated employee shall be deemed to be a probationary employee of the school district, unless employed with permanent status.*” (Italics added.)

23. Code section 44917 provides that the “governing boards of school districts shall classify as substitute employees those persons employed in positions requiring certification qualifications, *to fill positions of regularly employed persons absent from service.*” It further provides: “Any person employed for one complete school year as a temporary employee shall, if reemployed for the following school year in a position requiring certification qualifications, be classified by the governing board as a probationary employee and the previous year’s employment as a temporary employee shall be deemed one year’s

employment as a probationary employee for purposes of acquiring permanent status.” (Italics added.)

24. Ms. Flores began the 2005 – 2006 school year as a day-to-day substitute. In February of 2006 the district created a new position – a position for a teacher in a combination kindergarten and first grade class. Ms. Flores moved into that position and taught that class for the remainder of the year. Ms. Flores did not realize that she was in a probationary position. She assumed she was continuing as a substitute teacher. But Code section 44917 provides that a district shall classify as substitutes those persons employed *to fill positions of regularly employed persons* absent from service. Beginning in February of 2006, Ms. Flores no longer was filling a position of a regular employee who was absent from service. Therefore, the district could not classify her as a substitute. Ms. Flores recently came to understand that the district could not classify her as a substitute while she taught in the newly created position, and this is the basis for her contention that her seniority date is February of 2006.

25. In *Kavanaugh v. West Sonoma County Union High School District* (2003) 29 Cal.4th 911, the California Supreme Court held that, in accordance with section 44916, an employing school district must provide a new certificated employee with written notice of employment status “[a]t the time of initial employment.” If the school district fails to provide such notice, or if the notice fails to indicate employment is “temporary,” under section 44916, the certificated employee shall be deemed to be a probationary employee. As the court explained:

[T]he Legislature’s intent and purpose in enacting section 44916 was to benefit teachers. Stated differently, section 44916 reveals the Legislature’s intent that certificated teachers be informed of their classification at a time that is sufficiently early in the process to enable them to make informed decisions regarding their future employment. ...

Reading section 44916 to mean that certificated teachers must be informed in writing, on or before their first day of paid service to their employing districts, of their salary and employment status is thus consistent with the apparent purpose of the statute. Once a school year begins, for teachers to find a job as other than a substitute is much more difficult. A requirement that employing districts inform applicants for certificated positions of their proposed employment status (permanent, probationary, temporary, substitute) before they actually begin working avoids the kind of bait-and-switch scenario in which a teacher begins the school year believing his or her status is probationary (with the accompanying level of job

protection) only to discover after the year has started—when it is too late to find another position—that the position is only temporary. (*Kavanaugh, supra*, 29 Cal.4th at pp. 912-922.)

26. Certificated employees must be classified as being in one of four classifications: substitute, temporary, probationary, or permanent. (*Bakersfield Elementary Teachers Association v. Bakersfield City School District* (2006) 145 Cal.App.4th 1260, 1278.) In determining whether a certificated employee should be classified as a substitute, temporary, probationary, or permanent teacher, a school district must comply with section 44916, which provides:

The classification shall be made at the time of employment and thereafter in the month of July of each school year. At the time of initial employment during each academic year, each new certificated employee of the school district shall receive a written statement indicating his employment status and the salary that he is to be paid. If a school district hires a certificated person as a temporary employee, the written statement shall clearly indicate the temporary nature of the employment and the length of time for which the person is being employed. If a written statement does not indicate the temporary nature of the employment, the certificated employee shall be deemed to be a probationary employee of the school district, unless employed with permanent status.

27. Regarding Ms. Flores’s February 2006 employment, there was no evidence that the district notified her that she was a temporary employee, and because of the definition of “substitute” in Code section 44917, she was not a substitute. Thus, Ms. Flores is correct in her contention that, beginning in February of 2006, she was a probationary employee.

28. During the winter-spring semester of 2006, the district did not serve Ms. Flores with a notice of non-reelection and did not serve her with a Preliminary Layoff Notice. In spite of not having served either notice on Ms. Flores, the district did not give her a regular teaching position in the 2006 – 2007 school year. Rather, the district employed her that year as a substitute. There was no evidence that she worked 75 percent of the days school was in session.

29. On October 1, 2007, the district employed Ms. Flores as a probationary teacher to teach a fifth grade class. She taught in that position for two consecutive school years. In March of 2009, however, the district served Ms. Flores with a Preliminary Layoff Notice. She did not request a hearing, and pursuant to Code section 44955, she was terminated at the end of the 2008 – 2009 school year. If Ms. Flores had continued in her

position in the fall of 2009, she would have become a permanent employee with a seniority date of February 2006.

30. At the time Ms. Flores was terminated, she obtained certain reappointment rights that she could exercise in the event the district increased the number of its employees or reestablished a discontinued service. Code section 44957 provides that a probationary employee whose services have been terminated as provided in section 44955 shall have a preferred right of reappointment for 24 months. When an employee is reappointed, the period of absence shall be treated as a leave of absence and shall not be considered a break in the continuity of service. Thus, the employee retains the classification and seniority date he or she had when terminated. Code section 44956 provides a similar preferred right of reappointment for permanent employees except that they have that right for a period of 39 months. Ms. Flores, however, was still a probationary employee at the time of her termination, and her reappointment rights were for only 24 months.

31. The district did not employ Ms. Flores during the 2009 – 2010 school year.

32. During the fall semester of the 2010 – 2011 school year, Ms. Flores worked as a day-to-day substitute. During the winter-spring semester of the 2010 – 2011 school year, she worked as a temporary employee teaching a kindergarten class.

33. In October of 2011, the district hired Ms. Flores as a probationary employee, and she continues in that position. Unfortunately for Ms. Flores, her 24-month preferred right of reappointment expired before October of 2011. If she had been reappointed before the 24 months expired, she would have retained her seniority date of February 2006. After the 24 months expired, however, she had a break in service, and her new seniority date is October of 2011.

Right to be Retained According to Seniority and Qualifications – (Bumping)

34. The second paragraph of section 44955, subdivision (c), does not add to teachers' seniority rights. It does, however, make it clear that governing boards must make assignments in such a way as to protect seniority rights. Employees must be retained to render any service their *seniority* and qualifications entitle them to render. Thus, if a senior teacher whose regular assignment is being eliminated is certificated and competent to teach a junior teacher's courses, the district must retain the senior teacher and reassign him or her to render that service. This is commonly referred to as bumping. The district must either reassign or terminate the junior employee.

35. The respondents did not raise any issues as to the district's decisions regarding bumping.

Mandated Services

36. State and federal laws mandate that certain services be provided at or above mandated levels. There was no evidence that the district is reducing those services below mandated levels.

Summary of Findings Regarding Retention of Employees

37. Pursuant to the district's stipulation, the district shall rescind the Preliminary Layoff Notices served on the respondents listed in Finding 11.

38. With regard to respondents who are permanent employees, the district will not be retaining any probationary employee to render a service that such a respondent is certificated and competent to render.

39. With regard to respondents who are permanent employees, the district will not be retaining any employee with less seniority than such a respondent has to render a service that the respondent is certificated and competent to render.⁶

40. With regard to respondents who are either permanent or probationary employees, the district will not be retaining any employee with less seniority than such a respondent has to render a service that the respondent's qualifications entitle him or her to render.⁷

LEGAL CONCLUSIONS

General Conclusions

1. Jurisdiction in this matter exists under Sections 44949 and 44955. All notice and jurisdictional requirements contained in those sections were satisfied.

2. Within the terms of Sections 44949 and 44955, the district has cause to reduce or discontinue particular kinds of services and to give Termination Notices to certain respondents. The cause relates solely to the welfare of the schools and the pupils.

Conclusion Regarding Ms. Flores's Seniority Date

⁶ Section 44955, subdivision (b), provides seniority protection for a permanent employee in terms of the services *the employee is "certificated and competent to render."*

⁷ Section 44955, subdivision (c), provides seniority protection for both permanent and probationary employees in terms of the services *an employee's "qualifications entitle [him or her] to render."*

3. By reason of the matters set forth in Findings 17 through 33, it is determined that Ms. Flores's seniority date is October of 2011.

Cause Exists to Terminate Certain Respondents

4. Cause does not exist to terminate the respondents identified in Finding 11.

5. With that exception, cause exists to give notice to the respondents that their services will not be required for the ensuing school year.

ORDER

1. Pursuant to stipulation, the district shall rescind the Preliminary Layoff Notices served on the following respondents, and the district shall not give Termination Notices to them:

BAKER

KRISTIL

CAIRNS

TRACY

DE LA TEJERA

JESSICA

ELDERKIN

JOHN

FARR

AMANDA

FAUST

MICHAEL

HOSKING

KATEE

HUNYADY MAYER

KATI

ITO

STEPHANIE

LEIDNER

CARIS

LONGWORTH

CYNTHIA

MOSS

JEFFREY

SMITH

MARY

TUCH

ALFRED

WILSON

ALICIA

BATES

AMANDA

CHAPMAN

STACY

CRAIG

JUDITH

JOHNSON
OLSEN
TVELIA

LAURA
TRACY
SUE

As to those respondents, the accusation is dismissed.

2. The district may give Termination Notices to the remaining respondents.

Dated: May 3, 2012

ROBERT WALKER
Administrative Law Judge
Office of Administrative Hearings

EXHIBIT A
RESPONDENTS
RIM OF THE WORLD UNIFIED SCHOOL DISTRICT
2012

CAIRNS
DE LA TEJERA
ELDERKIN
FARR
FAUST
FLORES
HOSKING
HUNYADY MAYER
ITO

LEIDNER
LONGWORTH
MOSS

RENFRO
SMITH

WILSON
BATES
CHAPMAN
CRAIG
JOHNSON
OLSEN
TVELIA

TRACY
JESSICA
JOHN
AMANDA
MICHAEL
KATHLEEN
KATEE
KATI
STEPHANIE

CARIS
CYNTHIA
JEFFREY

CARIE
MARY

ALICIA
AMANDA
STACY
JUDITH
LAURA
TRACY
SUE

EXHIBIT B
RESPONDENTS REPRESENTED BY MR. HERSH
RIM OF THE WORLD UNIFIED SCHOOL DISTRICT
2012

CAIRNS
DE LA TEJERA
ELDERKIN
FARR
FAUST
FLORES
HOSKING
HUNYADY MAYER
ITO

LEIDNER
LONGWORTH
MOSS

SMITH

WILSON
BATES
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CRAIG
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MICHAEL
KATHLEEN
KATEE
KATI
STEPHANIE

CARIS
CYNTHIA
JEFFREY

MARY

ALICIA
AMANDA
STACY
JUDITH
LAURA
TRACY
SUE

RIM OF THE WORLD UNIFIED SCHOOL DISTRICT

OAH No. 2012031114

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Interim Superintendant
Rim of the World Unified School District
P.O. Box 430
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