

BEFORE THE  
BOARD OF TRUSTEES  
SISKIYOU JOINT COMMUNITY COLLEGE DISTRICT  
COUNTY OF SISKIYOU  
STATE OF CALIFORNIA

In the Matter of the Teacher Reduction in Force of  
the Siskiyou Joint Community College District  
regarding:

OAH No. 2016031085

JUAN ROBERTO MAZARIEGOS,

Respondent.

**PROPOSED DECISION**

This matter was heard by Stephen J. Smith, Administrative Law Judge (ALJ) State of California, Office of Administrative Hearings, on April 26, 2016, in Weed, California, and June 13, 2016, in Sacramento, California.

Eileen O'Hare-Anderson, Attorney at Law, Liebert Cassidy Whitmore, represented the Siskiyou Joint Community College District (District).

Michael McCallum, Attorney at Law, represented Juan Roberto Mazariegos (respondent), who was present.

Evidence and testimony were received, and the record was held open for the receipt of written closing arguments and points and authorities. Simultaneous opening arguments and points and authorities were received May 20, 2016.

The parties stipulated in writing on April 30, 2016 and May 4, 2016, that the Proposed Decision will be due on or before June 30, 2016, and that the matter must be considered and acted upon by the Governing Board at its July, 2016, regularly scheduled meeting. The stipulation also confirmed that the statutory May 15, 2016, deadline for a Final Decision in the matter had been continued by agreement of the parties, in response to agreeing to respondent's earlier motion for a continuance, granted on April 11, 2016.

Counsel for the District moved in writing on May 20, 2016, to reopen the evidentiary portion of the hearing and augment the record by adding a document. The document is an Instructional Service Agreement (ISA) between the District and the Farmworker Institute for

Education and Leadership Development (FIELD). The motion and how to deal with the ISA was discussed at telephonic Trial Status Conferences (TSCs) on June 1 and 6, 2016.

The parties agreed, and the ALJ issued an Order confirming, that the previous Order on the record of April 26, 2016, closing the taking of the evidence, was set aside and vacated. The evidence was reopened, and further evidence was received June 13, 2016, in Sacramento, California, by agreement of the parties. All parties appeared. A copy of the Siskiyou County Superior Court's (Superior Court) Tentative Ruling and Tentative Statement of Decision in the matter of the appellate review via writ of mandamus of the 2015 layoff decision proceedings recently filed in the Superior Court was also submitted.

The parties submitted simultaneous final closing arguments and points and authorities pursuant to a scheduling Order of the ALJ made on June 13, 2016, at the close of the evidentiary hearing. Final closing arguments were received on June 20, 2016. The record closed and the matter was submitted for Decision on June 20, 2016.

Counsel for respondent moved to reopen the record on June 23, 2016, on the basis that the Siskiyou County Superior Court entered its Final Statement of Decision on First Amended Petition for Writ of Mandate on June 21, 2016, and this Final Decision of the Superior Court had just been served on the parties. Counsel's grounds for reopening the record was the fact that the Superior Court's decision was now final, as opposed to tentative, and the court's ruling on the bumping rights issue relating to the Critical Skills lab, EDUC 670 (below) was different than that in the court's Tentative Statement of Decision and Tentative Ruling relied upon by the parties and the ALJ in the June 13, 2016 proceedings. The Tentative Statement of Decision and Tentative Ruling was marked as an exhibit and was added to the record during those June 13 proceedings.

The matter of respondent's Motion to Reopen the Record was considered at a telephonic conference between the ALJ and counsel for the parties on June 27, 2016. The Motion to Reopen the Record was GRANTED, for the limited purpose of receiving the Superior Court's Final Decision, which was marked as an Exhibit and stipulated to be received as evidence and added to the record. Also marked and received were counsel for respondent's motion and argument, and the District's written reply. Oral argument of the parties was heard regarding the applicability of the changes in the Final Decision to the pending issues in this matter, and for consideration of the Superior Court's somewhat revised findings and conclusions with respect to the EDUC 670 Critical Skills lab bumping issue.

Following receipt of the Superior Court's Final Decision in evidence, and the parties' arguments, the record was again closed on June 27, 2016, and the matter was again submitted for Decision.

## FACTUAL FINDINGS

1. Scotty Thomason is the President and Superintendent (the Superintendent) of the District. On February 17, 2016, Superintendent Thomason gave notice to the District's Board of Trustees (Governing Board) of his recommendation that the equivalent of 1.0 full-time equivalent (FTE) of Spanish Instructor services be eliminated, or as much of that 1.0 FTE position as may remain at the end of the 2015-2016 academic year. The Superintendent advised the Board in the same notice that, due to the reduction or discontinuation of those services, it will be necessary to decrease the number of academic employees of the District by the equivalent of one 175 day instructor, or as much of that position as may remain at the end of the 2015-2016 academic year, for the ensuing 2016-2017 academic year. The Superintendent requested the Board's authorization to direct him or his designee to initiate procedures necessary to not reemploy the equivalent of 1.0 FTE, 175 day instructor equivalent academic employees of the District, or as much of that position as may remain at the end of the 2015-2016 school year, due to the reduction or discontinuation of those services.

2. On March 1, 2016, the Governing Board adopted Resolution No. 2015-16-02, regarding the "Reduction or Discontinuance of Certain Particular Kinds of Services for the 2016-2017 School Year" (PKS Resolution). Pursuant to the PKS Resolution, the Governing Board determined that it was necessary and in the best interests of the District to reduce or eliminate the number of Spanish courses the District will offer in the 2016-2017 school year, no later than the beginning of the 2016-2017 school year. In order to effectuate the Resolution, it was necessary to reduce an equivalent number of District academic employees no later than the beginning of the 2016-2017 academic year. The PKS Resolution directed the District President/Superintendent or his designee to initiate and pursue procedures necessary to not reemploy the equivalent of 1.0 FTE academic employee (175-Day Spanish Instructor) of the District in accordance with Education Code sections 87740 and 87743.<sup>1</sup>

3. On March 2, 2016, respondent was served with A Notice of Reduction or Discontinuance of Particular Kinds of Service (Preliminary Notice), pursuant to Education Code sections 87740 and 87743. The Preliminary Notice advised respondent that the Superintendent made a recommendation to the Board regarding the reduction/discontinuance of 1.0 FTE of PKS, or whatever remained of that 1.0 FTE after the 2015 layoff, and that respondent had been identified as a District employee whose services would no longer be required in the upcoming school year, due to the reduction or elimination of the PKS. The Preliminary Notice informed respondent of his right to request a hearing, and enclosed a copy of the PKS Resolution, sections 87740 and 87743, and a blank request for hearing form. In response to the Preliminary Notice, respondent filed a Request for Participation (a Request for Hearing) on March 4, 2016.

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<sup>1</sup> All statutory references are to the Education Code unless otherwise indicated.

## *Layoff 2015 and Writ Proceedings*

4. The District took action in 2015 to lay off respondent by discontinuing or eliminating the particular kind of service, 1.0 FTE of 175 hour Spanish instruction, position that respondent then provided as a District certificated employee. All procedural prerequisites were met, and respondent requested an evidentiary hearing such as this one. That evidentiary hearing took place on April 13, 2015 before ALJ Karl Engeman.

5. Judge Engeman issued a Proposed Decision, in which he sustained 0.7 FTE of the layoff, but found that because the evidence revealed that the District intended to continue providing some Spanish instruction in the upcoming 2015-2016 school year in the amount of .3 FTE, and that respondent was the only Spanish instructor employed by the District, that the layoff failed with respect to that .3 FTE. Judge Engeman ruled that as a result, respondent should be retained in that amount (.3 FTE) to teach those Spanish courses expected to be offered again in the upcoming school year. Specifically, Judge Engeman found in the subtitled portion of his decision “*Sufficiency of the PKS Reduction*:

Respondent is the District’s only Spanish Instructor. In the fall of this school year<sup>2</sup>, he taught a combined Spanish III and IV course (Intermediate Spanish) and a Spanish I course (Elementary Spanish). This semester<sup>3</sup>, he has been teaching two “on-line” Spanish I courses and a face-to-face Spanish II (second semester of Elementary Spanish) course. The District administration determined to reduce the Spanish offerings because of the small number of students enrolled in the classes. This was part of an overall survey of courses to assess the cost-effectiveness of the curriculum. There are only four Spanish majors enrolled in the college, and District will find alternatives, such as on-line courses at other institutions, to help them complete their required community college course work for a Spanish degree.

Despite the Governing Board’s Resolution reciting the elimination of 1.0 Full-Time Equivalent Faculty (FTEF), District has scheduled respondent to teach an on-line Spanish course (Spanish I) in the fall of the 2015-2016 school year, and another (Spanish II) in the spring. Thus, the actual PKS reduction is approximately .7 FTEF of Spanish Instruction, with respondent retaining approximately .3 FTEF of his position.

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<sup>2</sup> School year 2014-2015.

<sup>3</sup> Spring 2015

6. The District requested reconsideration, which was opposed by respondent. Judge Engeman denied the District's request for reconsideration on May 5, 2015.

7. The District gave respondent and his counsel notice that the District scheduled a special Board meeting for May 12, 2015, to consider Judge Engeman's Proposed Decision, and to take any action allowable, pursuant to Government Code section 11517, subdivision (c), including the taking of additional evidence. Respondent's counsel objected and made a special appearance at the Board's special meeting. Counsel objected to the lack of notice and the lack of subject matter jurisdiction to take additional evidence.

8. The Board allowed counsel to make a special appearance at the special meeting to contest jurisdiction. The Board overruled counsel's objections, and proceeded to take additional evidence in the form of additional testimony. Following the receipt of the additional evidence, the Board voted unanimously to modify Judge Engeman's Proposed Decision from a .7 FTE layoff to a 1.0 FTE layoff.

9. The Board issued its Final Decision on May 14, 2015, notifying respondent that his services would not be required for the upcoming 2015-2016 academic year, due to the discontinuation of his entire 1.0 FTE position.

10. Respondent, through counsel, filed a Petition for a Writ of Mandate (Petition) in the Siskiyou County Superior Court (Superior Court), challenging the Board's action, on June 5, 2015. The Petition was amended on June 24, 2015. The Petition was still pending and undecided at the time of these proceedings.

11. The District recalled respondent to teach .33 FTE Spanish in school year 2015-2016, as a precaution, and due to the pendency of the Petition proceedings. Respondent taught Spanish I in the fall semester of 2015, and Spanish II in the spring semester of 2016.

12. The Superior Court issued its Tentative Decision and Proposed Statement of Decision in the Petition for the Writ matter on May 24, 2016. Notice was given of the Tentative Decision and Proposed Statement of Decision to all parties on May 25, 2016, well after the first and main session of the evidentiary hearing in this matter.

13. Counsel for respondent filed a limited objection to the Proposed Statement of Decision on June 9, 2016. Counsel objected to the court's conclusion regarding whether apportionment was claimed by the District in 2014-2015 for the EDUC 670 Critical Skills courses. Counsel objected to the court's conclusion that the District claimed apportionment, based upon counsel's contention that the District failed to show that it claimed and received apportionment for the course. Counsel contended that the court should modify its Statement of Decision to note that the District, "did not present evidence that apportionment was claimed for the 2014-2015 school year," and, accordingly, that the court should conclude "that apportionment was not claimed for the 2014-2015 school year for the EDUC 670 courses as a result. All other findings and conclusions of the Superior Court (relevant portions below), including the court's conclusion that notice to respondent the Board gave

for the taking of additional evidence at the Board's special meeting was satisfactory, and did not violate Government Code section 11517, subdivision (c) were affirmed.

14. Due to the pendency of the Petition proceedings throughout the entire period of time relevant to these 2016 layoff proceedings, these proceedings at issue here were advanced as precautionary, due to the unresolved status of the 2015 layoff.

15. At the continuation of this evidentiary hearing on June 13, 2016, the legal status and effect of the Petition proceedings and the findings and legal determinations of the Tentative Decision and Proposed Statement of Decision from the Superior Court were discussed. The parties agreed that the Superior Court's decision regarding the 2015 lay off proceedings was final with respect to the .7 FTE discontinuation of Spanish found by Judge Engeman to have been appropriate. The parties agreed the Superior Court affirmed the discontinuation of that .7 FTE of PKS, and that .7 FTE reduction upon respondent's position as a District employee was final and effectuation of that reduction was appropriate. The Superior Court found that the Board's 2015 decision following its special meeting to eliminate the remaining .3 FTE of respondent's position was an abuse of the Board's discretion, and ordered the reinstatement of Judge Engeman's decision to that effect,

16. Counsel for respondent's one written objection to the Superior Court's Tentative Decision and the Proposed Statement of Decision addressed only the contention that respondent is entitled to bump into an assignment in the Critical Skills Laboratory, District Course EDUC 670. With respect to all other issues, and most important, with respect to the reduction of the .7 FTE Spanish instruction approved by the Superior Court, the parties agreed that the Superior Court's decision is final and not subject to any further review.

17. As a result of the Superior Court's decision, all that remains to be resolved in the instant proceedings is whether the District may eliminate the remaining .3 or .33 FTE of Spanish instruction that survived, and whether respondent may displace, i.e. "bump," any junior employee being retained by the District to perform a service for which respondent is credentialed and qualified to provide.

18. The District served respondent with an Accusation/District Statement of Reduction in Force, copies of relevant sections of the Education and Government Codes, and form Notice of Defense on March 29, 2016. Respondent timely requested an evidentiary hearing on the propriety of the layoff. This hearing resulted.

19. The parties stipulated that all prehearing jurisdictional requisites required by the Education Code and the Government Code have been met.

### *Spanish Teaching*

20. The District intends to terminate what remained of Spanish teaching from 2015 for the upcoming school year, 2016-2017, unlike 2015-2016, where approximately .3

FTE of Spanish was intended to be continued. The District's then intended continuation of a sequence of Spanish I for fall semester/Spanish II in spring, approximately .3 FTE, caused the 2015-2016 layoff to fail to that extent.

21. The District believed at the time of the 2015-2016 layoff, in April 2015, that there would be sufficient enrollment, between face-to-face and online components, to run the Spanish I class in the fall of 2015. It was not clear whether that was the case. Once the Spanish I class was offered in the fall of 2015, the District wanted students who completed Spanish I in the fall to have the opportunity to complete the sequence by offering Spanish II in the spring semester of 2016. Spanish II was offered in spring 2016, and respondent taught it, albeit with a good deal less enrollment than the Spanish I class that preceded it in the fall.

22. The circumstances present in school year 2015-2016 regarding Spanish instruction no longer exist. District administrators and HR personnel have determined that enrollment in District Spanish classes has continued to decline to the point where the District has decided that projected enrollment in Spanish I/Spanish II, if offered again in the upcoming school year, would be insufficient to make offering the classes a cost-effective proposition for the District. The Board approved the determination.

23. Enrollment figures offered in evidence were somewhat ambiguous as to whether enrollment is declining or merely flat, but it is difficult to characterize 24 students for a single Spanish 1 class, and 18 for Spanish 2 as enrollment demand bursting at the seams. Dr. South and another District HR witness both confirmed in their testimony that there was no specific enrollment number with respect to Spanish classes under which a class was clearly uneconomic, and over which running the class was a cost-effective proposition. Both confirmed that there were a number of complex factors involved in determining whether any given class could be run cost-effectively, and that the factors varied a good deal, depending on the class and the educational discipline.

24. A focus on enrollment statistics that appear to be at best flat, but clearly declining over the previous several years, and demanding the District commit to a cost-effectiveness breakeven point, only under which point the District is permitted to reduce or eliminate the class, ignores the larger and more salient question of whether the District may, in its discretion, decide to not offer Spanish instruction at all at COS. In school year 2015-2016, the District decided to offer a single beginning Spanish class and one follow-up class in Spanish II to permit the 24 or less students who were interested enough to enroll to actually complete a full year of Spanish. The District has now decided that to offer the single to class sequence in the upcoming school year is not a cost-effective proposition, and thus has determined to eliminate even that minimal offering, and not offer Spanish at all.

25. There was no evidence that the District is mandated to offer Spanish by any state or federal requirement, or that the District was or is under any legal obligation of any sort to offer Spanish classes to its students, if it determined it did not wish to do so. The District has decided, in an exercise of its discretion, not to offer any Spanish teaching in any modality, face-to-face or online, or hybrid, in the upcoming school year. Since the District

does not anticipate satisfactory and cost-effective enrollment of students who desire or require completion of the Spanish I-Spanish II sequence in the upcoming school year, the District has accordingly decided that the reason it chose to retain and offer those two courses in the 2015-2016 school year no longer exists.

26. The District has no Spanish majors, as the last few graduated in 2015-2016. The District does not offer a Spanish major and does not intend to offer a Spanish major in the future. There was no evidence that any Spanish class is mandatory in order to satisfy transfer requirements to any four-year university from COS. Offering Spanish is one of several discretionary elective foreign language alternatives available to those few District students who desire foreign language at COS, some, but not all of whom seeking to meet transfer requirements. District witnesses testified without contradiction that almost all District incoming students arrive with their transfer foreign language requirements already completed, almost always from high school language classes. There was no evidence that the District was required to exercise its discretion to offer Spanish, as opposed to any other foreign language, or American Sign Language (ASL), which the District has opted to continue to offer, despite what appeared to be slightly lower ASL enrollment than the previous Spanish I/Spanish II sequence. There was no evidence that the District's choice to continue to offer ASL and no longer offer Spanish was not an appropriate exercise of the District's discretion.

27. Respondent was and is the only Spanish teacher in the District. There will be no retained Spanish teaching, and no retained Spanish teacher for the upcoming school year respondent can bump.

28. The contention that the District's exercise of its discretion to terminate all Spanish teaching in the District offered through COS was arbitrary, capricious, or an abuse of the District's discretion was not proved. The contention and its supporting claims in effect seek to compel the District to exercise its discretion in a certain fashion to preserve respondent's position via preserving Spanish teaching. The contention lacks factual and legal support. Respondent's contention that the District's claim of declining enrollment is a subterfuge and is not supported by the evidence lacks support beyond speculation, argument and expression of opinion. Respondent did not contend nor can he prove that, even if Spanish enrollment were slightly increasing, that the District was not within its lawful discretion to determine that continuing to offer Spanish classes in the future was not a cost-effective proposition, especially when the District is not under any legal mandate to do so. The District's determination to eliminate Spanish entirely is merely an expression of discretion regarding why one optional choice should not have been made over another. Respondent has no legal standing, nor is there any factual basis, for the imposition of his opinion on how the District should exercise its discretion, as long as the exercise of that discretion was not arbitrary, capricious or fraudulent. None of that was proved here.

29. Offering Spanish to District students is entirely an optional proposition for the District, in the upcoming school year, as it was in 2015-2016. It was not proved that the District is legally precluded from being able to terminate offering Spanish to its students.



The weight of the persuasive and credible evidence offered in this matter on this point support the District's contention that the decision to terminate all Spanish teaching services offered in the District was an appropriate exercise of the District's discretion, and was in the best interests of the college and its students.

### *Bumping Rights*

30. Education Code section 87743, quoted in relevant part below, describes the causes for laying off tenured employees, including those noticed based on a reduction or discontinuance of particular kinds of service. The District's authority to do so is limited by the sentence that reads:

However, the services of no tenured employee may be terminated under this section while any probationary employee, or any other employee with less seniority, is retained to render a service in a faculty service area in which the records of the district maintained pursuant to Section 87743.5 reflect that the tenured employee ***possesses the minimum qualifications prescribed by the board of governors and is competent to serve under district competency criteria.*** (Emphasis added).

31. Respondent has identified, in similar fashion as he did in the 2015-2016 layoff, certain positions to which he asserts his right to displace, or "bump," as the practice is known, a more junior employee being retained to provide a service for which he is and credentialed and meets District minimum qualifications to teach. Respondent claimed rights to bump as follows; (1) Positions held by various temporary part-time faculty members working in the District's Critical Skills Lab providing services identified as EDUC 670; (2) The Men's and/or Women's Head Soccer Coach; (3) ESL and Basic Skills courses delivered through an ISA between the District and FIELD, and, (4), new in these proceedings, a rather vague claim that respondent can bump Mr. Reynolds from positions as Accreditation Liaison Officer, FIELD Coordinator and/or Program Review Chair.

#### 1. Critical Skills Lab EDUC 670

32. The District offers a non-credit course, EDUC 670, Critical Skills Laboratory (Critical Skills). Critical Skills was offered in 2014-2015 and 2015-2016 in the COS Academic Success Centers of the main Weed campus and, to a lesser extent, at the Yreka satellite campus.

33. Critical Skills is under District administrative review, as Dr. Scott mentioned in his testimony. The District hopes to offer Critical Skills again in 2016-2017 school year, and, to that end, published the course as expected to be offered in the COS Course Catalog for the upcoming school year. But the staffing, enrollment and delivery of Critical Skills services is very much in flux, and even whether the services will be offered at all are yet undetermined. Enrollment in Critical Skills and continuity of instruction varies wildly, and

Dr. Scott said in his testimony was “waning.” Enrollment variability in Critical Skills turns upon a number of variables, including the number of students at any given time who need the one or more of the assistance services offered, how long the student needs any given service (continuity of any student receiving a service can be very short, as little as a few days), and the availability of subject-matter-qualified faculty to deliver any required service. Critical Skills is very untraditional, in that it does not have an enrollment of students who start any given semester in the program and continue throughout the semester to the end. Students come and go as they have need, enrollment figures can vary widely day to day, and staffing is awkward and difficult, all due to the inconsistency and uncommon method of delivery of the service.

34. The issue of whether respondent was entitled to bump into EDUC 670 Critical Skills in school year 2015-2016 was fully litigated in the 2015 layoff proceedings, and was, with respect to the bump claim for 2015, a matter actually decided by the Superior Court in its now final Statement of Decision. Evidence was taken on the issue of whether respondent could bump into any Critical Skills position expected to be offered in 2016-2017, largely because the Superior Court had not yet ruled, and that issue with respect to 2015-2016 was still pending. The Superior Court’s ruling on respondent’s contention he was entitled to bump into EDUC 670 Critical Skills at the time of the 2015 layoff for the school year 2015-2016 is detailed in the quoted portions of the Superior Court’s Statement of Decision regarding that issue quoted below. That decision, however, binds only with respect to the 2015 matter, and the facts and circumstances proved to have been extant for the 2015-2016 school year. Beyond that, the Superior Court’s Decision is not binding on these proceedings, although some of the court’s reasoning and legal conclusions provide guidance.

#### *Critical Skills in 2016*

35. Critical Skills assistance is and has been offered to provide tutoring and extra help for students in specific targeted subject matter areas, especially students new to the college environment. The targeted assistance and additional tutoring areas are English (Reading and Writing), Mathematics, and Computer Skills and research. Critical Skills is described District course descriptions as:

An open-entry, noncredit class offering access to individualized instruction provided by faculty and staff in the Academic Success Center. This course provides students with supplementary instruction in critical skills such as computing, reading, writing, researching and mathematics that are necessary for success in courses in any discipline.

36. Students can enroll in Critical Skills at any time (open enrollment). Students using Critical Skills services sign in on a computer in the Academic Success Center to confirm attendance on any day they receive Critical Skills services.

37. Historically, prior to school year 2014-2015, the District has staffed Critical Skills with temporary, part-time faculty (adjunct faculty) possessed of a Master's degree (or equivalency) in one or more of the remedial subjects, i.e., English Reading and Writing, Mathematics, and Computer skills and research. Subject matter specific instructor/tutors' availability and schedules varied, depending on the individual instructor's other conflicting obligations and the needs of students. Instructor/tutors working in the Critical Skills program were paid by the hour and at the laboratory rather than regular instruction rate, because Critical Skills service is a lab, rather than a conventional class. The District also occasionally used student tutors and instructional aides to assist students in the Academic Success Centers. The District limited the hours provided by instructor/tutors working in Critical Skills to maintain the instructors' part-time status, and to avoid the expense of full-time employee benefits such as health care.

38. No full-time tenured faculty provided services in Critical Skills lab before school year 2014-2015. The Critical Skills laboratory was open for most of normal business hours from Monday through Friday while school is in session.

39. There was a change in staffing the Critical Skills lab during school year 2014-2015. At least three full-time faculty members were assigned to work in the Critical Skills lab at the main campus in Weed for periods of time, including respondent. All were assigned to provide occasional staffing for the Critical Skills lab, due to low enrollment in their respective courses, in respondent's case, low enrollment in some of his Spanish classes. Hours spent in the Critical Skills lab for full-time instructors, such as respondent, supplemented their regular teaching assignments in 2014-2015, in order to fill out full loads.

40. Respondent testified at the 2015 layoff hearing about his assignment, role and activities when he was assigned to the Critical Skills lab. Respondent described his role when he was present at the Critical Skills lab as the "instructor of record," with the responsibility of directing students to appropriate specialists, based on a student's declared subject matter deficiencies and needs. Judge Engeman's decision reads skeptical of these claims (Factual Finding 44, below), but made no specific finding whether these claims had merit. The Superior Court took respondent's claims at face value. Judge Engeman's 2015 layoff decision does not, however, reflect any claim by respondent, nor does the Superior Court's Statement of Decision make any Factual Finding, that respondent provided or claimed to have provided any Spanish tutoring or services to any student in the Critical Skills lab in the 2014-2015 school year.

41. In what proved to be rather important Factual Findings that unleashed a tsunami of ink spent on later arguments, Judge Engeman identified what proved to be a critical factual deficit:

The evidence did not establish whether the District counts enrollment in the lab as part of its 'apportionment,' or entitlement to state funding based on full-time equivalent students.

Competencies for full-time faculty require faculty members to meet one of three criteria: (1) satisfying the minimum qualifications established by the Board of Governors of the California Community Colleges; (2) Possession of a Community College teaching credential in the discipline; or (3) Equivalence in the discipline as established by the District's Equivalency Committee and application for such equivalency submitted to Human Resources no later than February 15 of the academic year.<sup>4</sup>

42. The Superior Court, in its Tentative Statement of Decision, pointed out that there exists a significant difference in whether minimum qualifications are required to provide a service in the Critical Skills lab, and that difference turns upon whether the District sought and received apportionment for services provided in the Critical Skills lab by a District employee, such as respondent. The Superior Court compared, as did Judge Engeman, two regulations that may apply to govern whether minimum qualifications are required for the Critical Skills lab, depending upon whether the District did or did not seek and obtain that apportionment for the instruction; California Code of Regulations, title 5, sections 53412 and 53415. The Superior Court ultimately agreed with Judge Engeman's Legal Conclusion that section 53415 governed the determination of whether a District employee meets minimum qualifications to perform services in the Critical Skills lab as it has been offered to students by the District, provided by District employees such as respondent, who had staffed the position as respondent did. The court struggled with the ambiguity of the evidence from the 2015 layoff hearing regarding lack of clarity on the key factual triggering point; whether the District did or did not seek and obtain apportionment for the 2014-2015 school year, when respondent provided some of the services in the Critical Skills lab. In fact, this ambiguity is the reason respondent's attorney filed a limited objection to the Superior Court's Tentative Ruling and Tentative Statement of Decision.

43. Judge Engeman set out the regulatory alternatives:

Minimum qualifications are defined by the Board of Governors of the California Community Colleges and described in regulations promulgated by the Chancellor's Office.

California Code of Regulations, title 5, section 53415, reads:

The minimum qualifications for service as a learning assistance or learning skills coordinator or instructor, or tutoring coordinator, shall be either (a) or (b) below:

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<sup>4</sup> Article 20, section 20.2 of the MOU.

(a) The minimum qualifications to teach any master's level discipline in which learning assistance or tutoring is provided at the college where the coordinator is employed; or

(b) A master's degree in education, educational psychology, or instructional psychology, or other master's degree with emphasis in adult learning theory.

***Minimum qualifications do not apply to tutoring or learning assistance for which no apportionment is claimed.*** (Emphasis added)

¶¶ ... ¶¶

California Code of Regulations, title 5, section 53412, subdivisions (a), (b) and (c) provides:<sup>5</sup>

Except as provided elsewhere in this article, the minimum qualifications for service as a faculty member teaching a noncredit course shall be the same as the minimum qualifications for credit instruction in the appropriate discipline, or as follows:

(a) For an interdisciplinary noncredit basic skills course, a bachelor's in any social science, humanities, mathematics, or natural science discipline or in liberal studies, as appropriate for the course.

(b) For a noncredit basic skills course in mathematics, a bachelor's in mathematics.

(c) For a noncredit basic skills course in reading and/or writing, either: a bachelor's degree in English, literature, comparative literature, composition, linguistics, speech, creative writing, or journalism; or a bachelor's degree in any discipline and twelve semester units of coursework in teaching reading.

44. Judge Engeman concluded in his 2015 layoff decision that:

Respondent did not function as a learning skills coordinator, learning skills instructor, or tutoring instructor in the Critical Skills lab. Although respondent described his role in the course as the 'instructor of record,' he limited his responsibilities to

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<sup>5</sup> The remaining subdivision relate to courses that are taught in the Critical Skills Lab.

directing students to appropriate specialists. The evidence did not clearly establish respondent's designated role, if any, in the lab this school year. As noted in the Factual Findings, he was observed in the lab working independently on a computer and not assisting students. More importantly, it was not established that such a position even existed in the lab this year or will exist in the next academic year.

45. The Superior Court concluded on this point:

The court therefore finds that the weight of the evidence supports a finding that section 53415 is the applicable Regulation for determining minimum qualifications.

Having determined that the weight of the evidence supports a finding in this case that instructors in the Critical Skills lab are learning assistance or learning skills coordinators or instructors, and that section 53415 of the Code of Regulations applies, the next issue is whether petitioner meets minimum qualifications.

Regardless of the interpretation of section 53415, the regulation provides that 'minimum qualifications do not apply to tutoring or learning assistance for which no apportionment is claimed.' (Citing California Code of Regulations, title 5, section 53415).

46. The Superior Court continued:

Apportionment is a means by which a college obtains funding and it is reasonable that they would want to claim apportionment where possible. Whether or not apportionment was actually claimed for Education 670 in the past, it is undisputed that apportionment was claimed in the fall of 2015. Petitioner claims this is irrelevant because the only relevant inquiry is with regard to the circumstances and existence in the April/May 2015 timeframe. However, the evidence as to the circumstances and the intentions of the District were not clearly delineated at the administrative hearing and there is insufficient evidence for this court to determine not only whether or not apportionment was claimed previously, but when the decision was made to claim apportionment for fall 2015. Additionally, the one part of Regulation 53415 that is clear is that minimum qualifications do not apply if apportionment is not claimed. As long as apportionment is not claimed, petitioner is entitled to bumping rights. If apportionment is claimed he does not meet

the minimum qualifications and is not entitled to bumping rights.

The court finds that even though employees with less seniority were assigned to Education 670 for the fall 2015 term, petitioner was not entitled to bumping rights because since apportionment was claimed, the minimum qualifications applied and he did not meet those minimum qualifications.<sup>6</sup>

47. The District used Ms. Shipley and Mr. Cortese in staffing Critical Skills during the 2015-2016 school year. There were other staffers as well, including instructional aides, classified employees and temporary help who helped but who were not otherwise identified.

48. Respondent did not work in Critical Skills during 2015-2016, being limited to his two Spanish classes and a .33 FTE in that school year. Very little evidence was presented in the 2015 hearing regarding the credentials, qualifications or status of either Ms. Shipley or Mr. Cortese. Thus, it was not known then whether either or both met section 53415 minimum qualifications for working in Critical Skills, or whether either or both were temporary or permanent employees.

49. The Superior Court added to and revised its Tentative Statement of Decision, and in its final Statement of Decision, found that neither Mr. Shipley nor Mr. Cortese were listed on the District Seniority List or Faculty Competence List, and that they were “described” as part-time faculty, which may reflect little more than an inference. Ms. Shipley was described as having a three-part position, Instructor, Instructional Aide and Computer Tech.

50. The Superior Court found in its Final Statement of Decision on this point:

Based on the ambiguous and inconsistent testimony provided, the court is not able to determine if Ms. Shipley or Mr. Cortese were regular employees subject to being “bumped” by a more senior employee, or a temporary employees for which there would be no bumping rights. This is, however an issue that the District was obligated to consider as part of the layoff process.

There was also insufficient evidence presented as to whether Ms. Shipley or Mr. Cortese met the minimum qualifications set forth in [citation] section 53415. Presumably, since the District assigned them to the Critical Skills lab for the 2015-2016 school year and elected to claim apportionment for the lab, both met the minimum qualifications required by section 53415. If they

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<sup>6</sup> Tentative Statement of Decision, Siskiyou County Superior Court case no. SCCVPT 15-0699, May 24, 2016, pp. 13-14.

did not meet the minimum qualifications, however, a different analysis would apply.

51. The Superior Court in its Final Decision, remanded the matter to the District to determine whether, as of April 2, 2015, Ms. Shipley and/or Mr. Cortese were regular or temporary employees, and if they met the minimum qualifications set forth in section 53415. The Superior Court concluded that if either or both were temporary employees, that respondent would not have bumping rights, and if they were regular employees and one or both did not meet minimum qualifications, respondent may have rights to bump into their position.

52. The Superior Court affirmed Judge Engeman's finding that the District received apportionment for Critical Skills for Spring 2015 semester. Dr. Scott confirmed in his testimony that the District has continued to seek and has received apportionment for each semester since Spring 2015, and will continue to do so, if Critical Skills is offered in the upcoming school year. He testified receipt of apportionment is necessary to maintain the fiscal viability of the program. Dr. Scott testified the District cannot not afford to operate Critical Skills without receipt of State apportionment funds.

53. There was no credible evidence that the District's Critical Skills program has ever been offered as part of the Critical Skills services that provide specific instructional assistance or tutoring in any foreign language, such as Spanish. Respondent made an uncorroborated claim for the first time during the 2016 evidentiary hearing that he occasionally provided occasional Spanish tutoring to students who had come to the Academic Success Center to avail themselves of assistance through Critical Skills when he worked in the position during the 2014-2015 school year. If respondent provided any such tutoring help in Spanish, it was not part of the District's official Critical Skills services program curriculum, or part of any of the identified subject matter supports provided by the District through the Critical Skills program. If respondent actually provided Spanish tutoring or Spanish assistance as he claimed, that assistance was extra-curricular, and gratuitous. Respondent is not entitled to credit here for purposes of his entitlement to bump, based upon provision of extra-curricular services he may have provided, if in fact those services were actually provided.

*Samantha Worthington*

54. Samantha Worthington provided some services in Critical Skills during the spring semester of school year 2015-2016. She is identified as the assigned employee for Critical Skills in the District's Course Listings publication for 2016-2017 school year.

55. There was no clear and reliable evidence that Ms. Worthington actually provided any instruction in 2015-2016 to students in any of the Critical Skills targeted instruction areas where minimum qualifications are required. There was evidence that she served in an unknown amount as the coordinator of the program; the person who received students who presented to the Academic Success Center seeking Critical Skills tutoring or



academic assistance. Her role was to find out what help the student needed, and route the student to the instructor who had the specialized expertise and met minimum skills to provide that tutoring, support or instruction, as the student needed.

56. There was no evidence that Ms. Worthington was a regular employee of the District at the time she performed that coordinator service. There was no evidence that the coordination service was anything other than an administrative position not requiring any teacher credentials or qualifications at all. Dr. Scott testified that he did not know what qualifications Ms. Worthington had, how much time she spent working in the Critical Skills lab in 2015-2016, or what the nature of her employment with the District was, other he believed she was part-time and temporary because her name cannot be found on the roster of District permanent employees, the District Seniority List, or the District's Roster of Qualifications for regular faculty. Ms. Worthington is not listed on the District Seniority List or the District Faculty Competencies List in evidence.

57. One of respondent's witnesses testified that he served as part of the academic faculty's Equivalency Review Committee (ERC, see below), and that Ms. Worthington sought equivalency in English based on a communications degree. The witness testified that Ms. Worthington's request for English subject matter equivalency was denied by the ERC, and the President affirmed the denial. Testimony did not place this action in time, thus it is not known whether Ms. Worthington sought equivalency and approval for minimum qualifications in English during the 2015-2016 school year. There was no evidence whether Ms. Worthington would seek equivalency again, and try once more to meet minimum qualifications through equivalency in English for 2016-2017.

58. There was no evidence Ms. Worthington provided any English tutoring or assistance to any student in English in Critical Skills during 2015-2016 school year. However, it would be pointless for Ms. Worthington to seek equivalency in English in an effort to meet minimum qualifications in the Critical Skills lab, were the District not enforcing minimum qualifications requirements for instructors serving in the Critical Skills lab before assigning instructors to provide students tutoring or instruction in any of the given target subject matter areas.

59. Dr. Scott also testified that no final decision has been made whether Critical Skills would be offered in 2016-2017, or who might be assigned to work in Critical Skills, if it is offered. Dr. Scott acknowledged that the District's 2016-2017 Course Listing publication shows Critical Skills as a listed course offering for 2016-2017, and Ms. Worthington listed as the assigned person for Critical Skills. Dr. Scott was quick to point out that both course listings show the course to be "TBA," meaning, to be announced whether the District would offer a Critical Skills lab at all, or in some portion, and, if offered, how much would be offered. He testified that these decisions will be made at a later time, after his review, based upon whether there appears to be sufficient student demand for the services. Dr. Scott testified that the most current information he had received about Critical Skills was that, "student demand was waning" for Critical Skills assistance. He testified that

Critical Skills is, “on my list of things to evaluate,” for 2016-2017, to determine whether there is sufficient demand to offer the service.

60. If Critical Skills is offered in 2016-2017, it appears that unless Ms. Worthington is approved for equivalency in English by the ERC as meeting minimum qualifications as having satisfactory equivalency, she may not provide direct instruction in any of the targeted assistance areas offered in the service (she has no other subject matter minimum qualifications). In this sense, Ms. Worthington stands in the same stead as respondent does, in that he does not meet minimum qualifications to provide instruction in Critical Skills either. It not known whether Ms. Worthington can continue to serve in the capacity of the coordinator, or whether that position is purely an administrative slot. Dr. Scott thought that the coordinator position was a classified position, but he did not know with any degree of certainty. Respondent served the capacity as coordinator as a load filler in 2014-2015, the year that his Spanish classes were under-enrolled. Dr. Scott testified no regular employee of the District will be used like respondent was that year again in the future, including 2016-2017, if Critical Skills is offered.

61. In sum, Ms. Worthington does not appear to be a permanent regular employee of the District. Ms. Worthington is junior to respondent, in that it does not appear she has any District seniority at all. Thus there was no evidence Ms. Worthington is an employee of the District that the District intends to retain to perform a service for which respondent is credentialed and meets minimum qualifications to provide. There was no evidence that as of the evidentiary hearing in 2016, the District had made a firm decision to retain Ms. Worthington for the upcoming year. There was thus no evidence that respondent has any right to bump into Critical Skills due to retention of Ms. Worthington, or any other junior employee of the District who the District intends to retain to provide service respondent is credentialed and meets minimum qualifications to provide. If the position of Critical Skills coordinator is classified or administrative, as the evidence appears to suggest, there was no evidence that respondent can bump into such a position, or even that he would want to, assuming he could do so.

62. If Ms. Worthington is rehired for the upcoming school year, what services she will provide, and the correlation, if any, to minimum qualifications, and whether she meets those, and her status as an employee will all need to be evaluated with respect to whether respondent’s potential reappointment rights might allow him to displace her. But that is entirely speculative at the moment, and any firm decision about whether respondent can or cannot displace Ms. Worthington in 2016-2017 relies at this point in time upon a large body of assumptions, none of which are appropriate to make at this point, in the absence of a firm commitment by the District to run the course and its staffing, which does not exist at this time.

*Shiple and Cortese*

63. Counsel for the District represented during the June 27, 2016, telephone conference to hear respondent’s motion to augment the record with the Superior Court’s

Final Decision, that upon receipt of that Decision, she had instructed her client to investigate the credentials and status of both Mr. Shipley and Mr. Cortese. Counsel represented that the results of the investigation were that both Mr. Shipley and Mr. Cortese met minimum qualifications in 2015-2016 school year, and that both were part-time, temporary instructors. As the Superior Court noted, the District's records confirmed the fact that neither Ms. Shipley nor Mr. Cortese are listed on the District Seniority List or Faculty Competence Chart as regular employees of the District.

64. Whether Ms. Shipley and/or Mr. Cortese were regular or temporary employees, and whether respondent had a right to bump one or both for the 2015-2016 school year, is not germane to this matter. There is no evidence that either or both have been retained to work in Critical Skills during 2016-2017. Neither Ms. Shipley nor Mr. Cortese factored into the equation of whether respondent can bump into a Critical Skills lab position for 2016-2017.

#### EDUC 670 In sum

65. No Critical Skills assignments will be made or will exist for any full-time instructor in the upcoming school year. The evidence was quite clear that the District will seek apportionment for any enrollment in the Critical Skills lab in the upcoming school year, regardless who provides the service, assuming a decision is made to offer Critical Skills. The District's evidence from Dr. Scott's testimony about apportionment in this instance fully removes any ambiguity about apportionment.

66. Under these circumstances, Regulation section 53415 governs, as confirmed by the Superior Court, and under that regulation, respondent does not meet minimum qualifications to provide any service offered in the Critical Skills lab in the upcoming school year, assuming Critical Skills is offered. Second, there does not appear to be a position in Critical Skills extant and to which the District has committed itself for the upcoming school year into which respondent can bump. If the District offers Critical Skills in 2016-2017; and if it seeks apportionment for the enrollees, as it says it will do; and if staffs Critical Skills with any regular or non-temporary employees; and if any of those regular or non-temporary employees fail to meet minimum qualifications and/or deliver instruction within the Critical Skills course subject matter areas; and if any such employee is junior to respondent; then and only then will respondent likely have reappointment rights to that position. That is a large number of "ifs," and nothing is firm about Critical Skills or its staffing at this point. There is simply nothing for respondent to bump into right now, and no person identified who is being retained to serve in Critical Skills respondent can bump. There is no present remedy for available to respondent through a bump into EDUC 670.

#### 2. Men's and Women's Head Soccer Coaches

67. The District's coaches are faculty members and the COS men's and women's soccer teams in school year 2015-2016 were coached by the same full-time faculty member, Mr. Kephart. Mr. Kephart had a mixed assignment in 2015-2016, because his position was

one which combined soccer coaching with kinesiology teaching. The women and men soccer teams compete only in the fall semester. Men's and women's soccer are three unit, for-credit classes for which the District seeks apportionment. There is no load-required soccer coaching activity of any significance in the spring semester.

68. Mr. Kephart's 1.0 FTE assignment could not be completed on the basis of soccer coaching alone. Mr. Kephart teaches sections of kinesiology in the spring to fill out the 1.0 FTE position. Men's and women's soccer coaching is a portion of a composite assignment that blends the active coaching in the fall with classroom kinesiology teaching predominately in the spring for the remainder of the assignment.

69. Competence and qualification evaluations in the District are made through a tiered process that begins with the District's Vice President for Human Resources (HR) Ms. Miller. Ms. Miller testified that in certain instances, competence and qualifications of a candidate for a position are obvious, such as a candidate for a position with only a degree requirement and no additional minimum qualifications, and the candidate has the required degree. Where the candidate obviously has the appropriate credential and the required minimum qualifications and experience, and Ms. Miller has no doubts or concerns that the qualifications possessed by the candidate and the qualifications required by the position line up seamlessly, Ms. Miller approves and certifies the candidate without further review. An excellent example of this is respondent's qualifications and competence to teach Spanish in the District, which requires either a Bachelor's degree in Spanish and Spanish teaching experience, or a Master's degree in Spanish. It is obvious respondent meets those minimum competency and qualifications standards, and had he been seeking an open position in Spanish, Ms. Miller would have approved him without further review.

70. Nevertheless, there are many instances in which whether the candidate meets minimum qualifications is ambiguous or unclear, or in Ms. Miller's opinion, the candidate does not meet the qualifications, and the candidate disputes the decision. Ms. Miller's practice is to refer all matters in which she has a question to a faculty disciplinary review by the Faculty Equivalency Review Committee (ERC), a committee of tenured faculty members with expertise in the subject matter area under review who evaluate whether an applicant's claimed competence and qualifications do or do not meet District minimum standards. The ERC conducts its review and produces a report containing its determination, which is subject to review by the President, who then makes a recommendation to the Board, which has the ultimate authority to approve or disapprove a candidate's competence and qualifications. Ms. Miller testified that it is her practice to refer all matters of competence and qualifications in which she has any question or concern, or any lack of certainty, to the ERC.

71. The District advertised for a part-time head soccer coach for both men's and women's teams on its website in the spring of 2015. The advertisement solicited only for a position as the coach, and not for a mixed assignment including coaching and other teaching. The District was hoping to revive its suspended intercollegiate soccer program. There was evidence the District previously fielded men's and women's soccer teams in the late 1990s, but suspended sponsoring intercollegiate soccer teams due to budgetary constraints. The

revived men's and women's soccer intercollegiate teams first took the field again in the fall of 2015, with Mr. Kephart the coach.

72. Respondent addressed a letter to the District's Human Resources Department on April 5, 2015, received by the District HR Department on April 7, 2015, expressing his interest in applying for "the soccer position." Respondent's letter did not acknowledge his awareness that the advertisement for the soccer coaching position was for a part-time position. He recited his semi-professional experience as a soccer player in Guatemala for several years before emigrating to the United States and his participation on a pre-Olympic Guatemala soccer team training for the 1976 Olympics. Respondent also noted that he took several soccer theory classes at Canãda College in Redwood City, California, in the fall of 1987 and advanced soccer classes at CSU-Chico during the fall of 1989 and spring of 1990. He was a volunteer Assistant Coach of the District's women's soccer team during the 1997 and 1998 seasons.

73. An Administrative Assistant in the District HR Department replied to respondent's letter by email on April 10, 2015. The response thanked respondent for his interest in the part-time soccer coaching position, but advised him that the District "has decided to open a full-time tenure-track kinesiology instructor/head men's and women's soccer coach position." The email continued, advising respondent, "if you are interested in applying for the full-time position, please let me know and I will email you when the job announcement is finalized." The email continued by advising respondent that if he were interested in a part-time coaching position and would be interested in being considered for the assistant soccer coach for either men's or women's soccer, that respondent should let the author of the email know, and she will leave a part-time faculty position application and materials for him in the office for those positions that he could complete and submit.

74. Respondent testified that he had no recollection of receiving the April 10, 2015 reply email. Respondent's claim of nonreceipt of the email lacked credibility. Respondent's failure to follow up on his letter strongly infers that he received the email and, discovering that he had been offered an opportunity to either apply for a full-time position for which he indisputably failed to meet the minimum qualifications, or for a part-time position for which he was required to submit a part-time position application. He made no response to either alternative proposal, other than to belatedly blame the District in April 2016 for; its failure to follow up on his email; its failure to evaluate his qualifications without him having submitted any collateral verification besides his own statements in his letter; its failure to advise him that he needed to complete and submit an application with a resume and statement of qualifications in order to be actually considered an applicant for either position; and its failure to independently pursue a review of his qualifications before the faculty ERC without the necessity of producing for review collateral verification of his claims of qualifying experience.

75. Respondent contends that had he received a reply instructing him to apply for the position, he would have done so. That claim lacks credibility and is excluded as entirely speculative, especially considering respondent's long experience in teaching in the District,

and the fact that this very issue was raised and discussed during the 2015 layoff proceedings. Further, the email advised that the position respondent inquired about in his letter was being delisted, so respondent could not have intended to apply for a position he was timely notified after his letter that no longer existed. The fact is, respondent made no effort to follow up on his alleged interest to become either the men's or women's soccer coach, most probably because he did not meet the kinesiology requirements that compose the majority of the position.

76. At the time of the 2015 lay off, the District had not yet advertised for the full-time blended soccer coaching/kinesiology position, but by the time of the instant layoff, the District had hired Mr. Kephart to coach both soccer teams and teach kinesiology to fill out a 1.0 FTE. It was not disputed, nor did respondent contend that, he meets minimum qualifications to teach kinesiology.

77. Ms. Miller testified that respondent did not submit an application to coach soccer for school year 2015-2016. Ms. Miller testified credibly that an email expressing interest in applying for a position is not the equivalent of an application, which requires an attached resume and a detailed statement of qualifying experience, along with a formal District application for the position. Proof of claimed qualifying experience is also required of the applicant. As noted above, the position for which respondent expressed an interest was withdrawn.

78. Ms. Miller testified all expressions of interest emails are responded to by the District's HR office promptly, with instructions to the inquirer that if the applicant is genuinely interested in the position, a formal application, resume and statement of qualifications and experience must be submitted to the District's HR office for consideration. That practice was followed here, as detailed above, and evidenced by the April 10, 2015, responsive email to respondent's letter of interest in making the application. Respondent acknowledged that he did not follow that process and submit an actual application to the District, seeking either the part-time position to which his letter expressed interest, or the later, reposted full-time blended position.

79. Respondent also contends that the District had a duty, as part of its duty to assign and reassign and conduct a bumping analysis before laying him off, to respond to his inquiry about the position. Respondent claims this District duty extends to requiring the District to inform him what the deficiencies were in his letter of expression of interest in the position. He also contends that the District, before it lays him off for a position he claims he is competent and qualified to fill, is under a duty to evaluate his qualifications and determine whether he meets District minimum qualifications for the position.

80. These contentions lack merit and seek to transfer responsibility for respondent's lack of diligence in pursuing the position into a District duty. Respondent's lack of diligence appears to have correlated with his acquiring knowledge that the position required qualifications in kinesiology, and that he does not meet minimum qualifications for the majority of the newly revised and offered position. Regardless of why respondent failed

to follow up on the position, respondent's lack of diligence at the time cannot be laid off upon the District as a duty deficit not satisfied which the District was required to resolve.

81. Ms. Miller was (due to this issue being raised and fully litigated in the 2015 layoff proceedings), and is, aware of respondent's claimed experiential qualifications to coach the soccer team set forth just above. She testified that had respondent filed an application for the position, with collateral verification of those claimed qualifications appended, his claim that his qualifications and experience met position minimum qualifications would have been referred to the faculty ERC to rule on whether his claimed experience met the minimum qualification equivalencies for the position. She testified that she was in no position to rule upon respondent's claimed athletic coaching experiences equivalencies, and that a faculty members with experience in athletic coaching on the ERC should be involved in making that determination. Ms. Miller's response was entirely reasonable under the circumstances.

82. Respondent's claimed qualifications and experience to coach either men's or women's soccer have never been verified or evaluated by anyone at the District, particularly not the District's faculty ERC, in no small part because respondent has never presented documentation of his claimed experience and qualifications, besides an old program, listing him as a volunteer women's soccer coach in 1998. Respondent has never requested an ERC review for his claims of qualifying soccer coach experiences, largely because the manner in which an ERC review takes place is triggered when an applicant such as respondent for a position files an application and a question about qualifications arises, resulting in a referral to the ERC. Respondent's failure to follow this process is particularly telling because the entire process of the ERC review was discussed in detail and fully litigated during the April 2015 evidentiary hearing.

83. Respondent's contentions and claims appear to suggest that, despite respondent's actual knowledge of how the District's minimum qualifications ERC review process works, it is the District's responsibility to seek and conduct that ERC review for him before laying him off, even if, as here, he has not filed an application that would trigger the process. Respondent's contention seeks to relieve him of all responsibility for a rather palpable lack of diligence, at least one logical inference of which is a reflection of a lack of genuine desire to obtain a soccer coaching position.

84. Respondent's slightly revised contentions and argument for this layoff hearing are two-pronged. The first thrust is an effort to avoid that ERC review process entirely, by contending that the ALJ should substitute his own judgment for that of the ERC and make the determination "as a matter of law," that respondent meets minimum qualifications for the position of soccer coach, presumably upon the strength of respondent self-serving statements in his letter and a copy of an old program. Alternatively, respondent contends that the ALJ should remand the matter to the District, and order the District's faculty ERC perform the review, and if applicant's qualifications pass muster with the ERC, and are approved by the President and the Board, applicant must be retained to coach soccer, bumping out Mr. Kephart.

85. There are several considerable deficits with this contention. Tempting as the offer might be, the ALJ simply does not have jurisdiction, authority or the desire to substitute his judgment for that of the ERC qualifications review process adopted by the District to have such decisions made through its own faculty review mechanism. The ALJ here appreciates the vote of confidence, but defers, for the same reason Ms. Miller did. Even if the ALJ were so inclined, respondent has provided little help; no supporting documentation or verification of any of his claimed experience beyond his own statements on a letter and his testimony to that effect. It is inconceivable that the faculty ERC would make anything but a negative decision without additional documentation and verification.

86. Remanding the matter and ordering the faculty ERC to assess respondent's claimed qualifications and experience, when respondent did not file an application and trigger and pursue that review process himself after the job was advertised, would reward respondent for his lack of diligence and failure to submit an application at the time that the current and revised position was advertised. The ALJ is not convinced that he has the jurisdiction or authority to make such an order, or that the District would have a duty to follow it, if the ALJ were so inclined.

87. Respondent's contentions seek to expand the District's duty to not lay off respondent for any position for which he is credentialed and meets minimum qualifications far beyond reasonable boundaries. Giving traction to respondent's contentions would have the collateral effect of rewarding respondent for his lack of diligence in pursuing the position on his own, assuming that his interest in actually obtaining and occupying the position was genuine, and reflective of something other than a last grasp to preserve the remaining vestiges of his position upon realization that he was likely to be fully laid off, once all of the legal processes have been fully exhausted.

#### Impermissible Partial Bump

88. Lastly, assuming what respondent believes would occur at the end of such a process; that the ERC would conclude that his qualifications and experience are satisfactory, would result in respondent being eligible to obtain only a partial bump, in that he is indisputably not competent or qualified to teach the greater portion of the assignment. Respondent does not contend that he is qualified to teach the kinesiology portions of Mr. Kephart's assignment, and that portion of the assignment is more than half the 1.0 FTE of the position. A partial bump would require the District to break up the 1.0 FTE position Mr. Kephart now occupies into two pieces, and the District is not legally required to break apart an existing full-time position in order to permit a part-time employee such as respondent (he retained and taught only a .33 FTE in 2015-2016) being displaced to exercise a partial bump, regardless of seniority.<sup>7</sup>

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<sup>7</sup> *Hildebrandt v. St. Helena Unified School District* (2009) 172 Cal. App.4th 334, 342.



### 3. FIELD ESL Program

89. The District contracts through an Instructional Service Agreement (ISA) with The Farmworker Institute for Educational and Leadership Development (FIELD) for the provision of not-for-credit Basic Skills and English as a Second Language (ESL) instruction to farm workers in the Bakersfield College service area. FIELD is an entity that recruits, hires, trains, assigns and oversees Basic Skills and ESL instructors, and organizes the delivery of Basic Skills and ESL instruction through its employees to farm workers.

90. The mutual obligations created by the ISA between the District and FIELD are complex and the legal relationships between the contracting parties created by the ISA are, at best, ambiguous. These mutual obligations and the nature of the legal relationships created by the ISA contract were the subject matter of almost the entire proceeding in June 2016.

91. The District's witness Dr. Scott testified that the District has three such ISAs in place. He pointed out that ISA agreements are heavily regulated by Title 5 of the California Code of Regulations and the Chancellor of Community Colleges' office. ISAs are subject to strict limitations and terms, the most important of which are compliance with California Code of Regulations,, title 5, section 58058, subdivision (b) and, in this case, the consent of the college in whose service area the ISA's contracted services are delivered by FIELD; Bakersfield College.

92. The legal status of a person delivering Basic Skills and ESL instruction to a farmworker under the ISA with FIELD is at issue because respondent contends he is competent and qualified to deliver the ESL and Basic Skills instructional services called for by the ISA, and that he is legally entitled to bump into one of those instructional positions. The District disputes the contention, pointing to the terms and provisions of the ISA, contending that the persons actually delivering instruction to the farm workers are, by the terms of the ISA contract, employees of FIELD. The District contends it has no authority to compel FIELD to displace one of its employees delivering instruction under the ISA and require FIELD to employ respondent in one of those positions.

93. Respondent's responsive contentions make clear that it is respondent's belief that the terms of the ISA and the consent with Bakersfield College must yield to respondent's right to retain a position for which he is competent and credentialed to teach, regardless of whether in so doing the ISA's terms and the Bakersfield College consent must be revised or disregarded. There is an enormous legal flaw in this claim, as detailed below.

94. Respondent contends the ALJ should order the District to compel FIELD to employ respondent as an ESL and Basic Skills instructor, while still remaining a District employee. Implicit in the contention is that respondent does not want to be directly employed by FIELD as one of its instructors, confirmed by the fact that there is no evidence that respondent has ever made any attempt to contact FIELD or apply for a position with FIELD teaching ESL and Basic Skills to farm workers as part of FIELD's ISA with the District.

95. Respondent's contentions require disregard of key provisions of contractual arrangements the ISA created with FIELD. It would also require violation of the contingent requirement of Bakersfield College's required consent to the ISA agreement between the District and FIELD. That consent is strictly limited, and is contingent upon FIELD's employees providing the instructional services to the farm workers. The contingencies would be violated if the District provided a District-employed certificated teacher to deliver the ESL or Basic Skills instruction to the farm workers, as Bakersfield College has reserved that right for itself and its own certificated teachers within its own Community College service area. Violation of the contingencies and withdrawal of the Bakersfield College consent would cause the ISA to become invalid, and would result if respondent's contentions prevail here.

96. The ISA at issue was executed by the Superintendent and the CEO of FIELD on August 17, 2015 and August 28, 2015. Paragraph 1 of the ISA provides that the ISA shall not take effect until after the District received written confirmation from the affected Community College District (in this instance, Bakersfield College) that the terms of section 55301 of Title 5, California Code of Regulations, have been met to permit the District to establish courses outside of its boundaries.

97. Paragraph 2 of the ISA details the "Instructional Services to be Provided" under the ISA by FIELD. The preamble portion of Paragraph 2 provides:

FIELD will provide instructional and other services for Basic Skills and English as a Second Language programs as follows and as described below. DISTRICT is responsible for the educational program described in this agreement.

98. Paragraph 2, subdivision (c), subpart 1 provides, in part:

1. FIELD will provide the services of qualified instructors as determined by DISTRICT, administrative supervision for that instruction, record-keeping and other administrative services pertaining to students enrolled in the classes and subject area experts as guest speakers.

99. Paragraph 2, subdivision (c), subpart 5 of the ISA provides:

5. FIELD agrees that its employees who serve as instructors under this Agreement are employees of FIELD, and shall be deemed employees of DISTRICT for sole purposes of, and in accordance with, section 58058, subdivision (b) of Title 5. FIELD agrees that its employees who serve as instructors under this Agreement shall receive no compensation or benefits from DISTRICT and may be terminated from their role as instructors

by DISTRICT at any time for any reason whatsoever and without cause.

100. Paragraph 2, subdivision (c), subpart 5 of the ISA further provides that, “FIELD employees who serve as course instructors shall use District attendance and grading forms in recording attendance,” and shall ensure that “students who are enrolled in District courses are engaged in appropriate package educational activities and are held to an appropriate level of academic rigor.”

101. Paragraph 2, subdivision (c), subpart 4 of the ISA provides:

4. Prior to the commencement of instruction, each instructor of the referenced course(s) shall enter into a written agreement with DISTRICT in accordance with Title 5, section 58058, subdivision (b) of the California Code of Regulations, a copy of which is attached as Attachment B, and is incorporated herein by reference. FIELD has reviewed and approves the Instructor Agreement and is bound by any provisions of that agreement that require FIELD activities. FIELD shall assure applicable provisions of Title 5 are followed in the conduct of the course(s). DISTRICT has the primary right to control, direct, and evaluate the activities of the instructor (s) furnished by FIELD during the term of the contract. DISTRICT shall furnish the instructors provided by FIELD with an orientation, Instructor’s Manuals, course outlines, curriculum materials, testing and grading rosters and procedures necessary to implement DISTRICT courses.

102. Paragraph 2, subdivision (c), subpart 6 of the ISA provides in part that FIELD shall ensure that its employees who serve as course instructors or who otherwise have access to student information, maintain the confidentiality of student education records in accordance with federal and state law.

103. Paragraph 2, subdivision (c), subpart 7 of the ISA provides that, “FIELD shall ensure that its employees satisfy all applicable provisions of Title 5 of the California Code of Regulations that require the instructor to provide immediate supervision and control of students in the conduct of DISTRICT courses.”

104. Paragraph 2, subdivision (b) of the ISA provides:

FIELD will provide outreach and recruitment, assessment, student follow-up and orientation services to students in the basic skills and English as a Second Language program covered by this Agreement. DISTRICT will provide training for FIELD staff in how to conduct assessment and will provide all

necessary materials for the assessment process. DISTRICT and FIELD will jointly conduct an orientation for the students involved in this program. Nothing in this section or elsewhere in this Agreement requires DISTRICT employees to travel to any instructional site outside of DISTRICT boundaries.

105. An Addendum to the ISA was executed on a date not disclosed on the Addendum document, but after July 1, 2015 and before January 1, 2016, that modified the existing ISA, effective January 1, 2016, through the expiration date of the ISA of June 30, 2016. The Addendum allowed FIELD to offer more ESL classes to more students, and increased the level of reimbursement from the DISTRICT to FIELD at a rate for each “California Community College-eligible enhanced non-credit contact hour generated by enrollment in the Basic Skills and ESL classes.” The Addendum required instructors employed by FIELD to keep detailed daily attendance records for all students. The addendum increased the instructional reimbursement rate to FIELD for instruction delivered by FIELD instructors to enrolled students in the Basic Skills and ESL courses. It is reasonable to assume that FIELD does not pay its employees equal to or more than the reimbursement FIELD receives from the District per FTSE hour of instruction provided to enrollees. The reimbursement rates to FIELD are contained on attachments to the ISA and the Addendum, are far beneath the District pay scales that are contained in the copy of the MOU between the District and its Teacher’s Association (Exhibit 17).

106. The President of Bakersfield College wrote a letter to Dr. South, then Dean of Student Learning of COS on January 13, 2016, regarding “Service Area Partnership.” President Christian’s letter accepted Dr. South’s offer to enter into partnership with FIELD within the Bakersfield College service area upon several specific and strict stipulations. The President on behalf of Bakersfield College agreed in the letter to permit COS cataloged ESL and Basic Skills courses to be offered within the service area of Bakersfield College, but limited the permissible courses to, “Only lower-level ESL courses will be offered, specifically only those similar to courses previously offered by Bakersfield College through FIELD (see appended list of courses). Upper-level credit courses will be taught by Bakersfield College.”

107. The Bakersfield College limited approval with its contingencies, and the ISA are both renewable. It is “expected but not confirmed” that the District will renew the ISA and continue the contractual partnership with FIELD in the upcoming 2016-2017 school year, on the same terms as set forth in the ISA modified by the Addendum. It was not disputed that the scope of the anticipated ISA instructional delivery partnership with FIELD for the upcoming school year is broad enough to provide a position for respondent, if he is otherwise eligible to bump into one of the FIELD-employed instructional positions. It was also not disputed that respondent meets minimum qualifications to teach ESL and/or Basic Skills, or could attain that minimum qualification level within the first semester of being assigned to teach either or both of the courses.

108. Dr. Scott, who succeeded Dr. South as primarily responsible for the implementation and oversight of the ISA, testified at some length at the April hearing, and again in the June reopening hearing about the ISA, the Addendum, and the contingent approval agreement with Bakersfield College. Dr. Scott testified that the courses offered by FIELD through the ISA are cataloged, advertised and enrollment and attendance tracked administratively by the District, because the District seeks apportionment for the enrollment and must report attendance census in order to obtain apportionment disbursements. Dr. South acknowledged that the District and FIELD share many administrative responsibilities and tasks in the ISI, and many duties are joint obligations of both parties. The District is administratively responsible for the course content and for some administrative oversight to ensure that minimum requirements of Title 5 are being met in course content and delivery by FIELD instructors. But the District does not provide the teachers or the teaching, and absent a right to treat FIELD employed instructors as at-will employees, subject to discharge for any reason, or no reason at all, the District is not involved in hiring or firing FIELD instructors.

109. The District's administrative oversight role under the ISA is to conduct two meetings in Bakersfield to help FIELD-employed instructors make certain their syllabus, curricula, instructional materials and delivery "meets our standards," i.e., compliance with Title 5 requirements essential to obtain apportionment. These District employees also evaluate the FIELD instructors. Persons that conduct these two meetings and evaluations are District full-time employees who go to Bakersfield for a few days and conduct the meetings and perform the evaluations, and are paid for those services separately on a stipend, rather than as part of their District employment contract salaries.

110. Dr. South pointed out that the ISA is a three party partnership contractual arrangement that hires a private contractor, FIELD, to actually deliver a nontraditional instructional program to the farm workers located in another Community College's service, with the District's role being limited to record-keeping and administrative oversight to make certain what the FIELD employees deliver conforms to Title 5 standards. The District receives apportionment for the enrollment on a complicated full-time-student-equivalent (FTSE) standard, and from the apportionment the District receives, FIELD is paid at the rate stated in the ISA for each FTSE FIELD can document was actually delivered as instructional services provided by FIELD employees to the farmworker students.

111. Dr. Scott pointed out that District employed instructors cannot provide the ESL or Basic Skills services in their capacity as District-employed and paid instructors, because the services are delivered in the Bakersfield College service area. He testified Bakersfield College would be required to consent to have District instructional personnel deliver the ESL and Basic Skills instruction, and the Bakersfield College President has strongly implied such consent will not be forthcoming because the existing consent and approval of the ISA specifically excludes anyone but FIELD-employed instructors from delivering the services. The specific limitation in the consent/permission letter reserving to Bakersfield College the right to deliver higher level ESL and Basic Skills services to Bakersfield College employed instructional personnel strongly implies that consent would be withdrawn if the District sought to use its own certificated employees to provide the

instruction that the FIELD employed instructors now provide under the ISA. Furthering that inference is the fact that in previous years, Bakersfield College was the party entering into the ISA with FIELD for provision of FIELD-employed instructors to teach ESL and Basic Skills within its own College service territory.

112. Dr. Scott pointed out that under the ISA, respondent can only teach in the ESL and/or Basic Skills instructional programs delivered by FIELD under the ISA if he first becomes employed by FIELD to deliver that instruction. That employment is by no means a given. FIELD is under no obligation to acknowledge a District claim that respondent should be able to bump into being a FIELD employee. The ISA does not restrict FIELD's right to recruit, hire and, by necessary implication, decline to hire, by application of FIELD's own criteria, as long as those employees meet the minimum Title 5 requirements. There is no evidence that respondent would be indisputably hired by FIELD, if he applied. There is no provision in the ISA, the Addendum, or in law that requires FIELD to employ a District employee to provide services under the ISA where FIELD has contracted to employ and provide its own employees.

113. Dr. Scott acknowledged that the District does have some administrative authority as part of making sure the minimum requirements of Title 5 are satisfied, to determine who FIELD hires to provide the instructional services. He also acknowledged that the ISA requires the District to exercise oversight and supervision over the curriculum delivered in the manner in which it is offered. Dr. Scott also acknowledged that the District retains some authority in the ISA to terminate any FIELD-employed instructor in the program at any time without cause. Dr. Scott also acknowledged that there is nothing in the ISA that specifically prohibits a District instructional employee from teaching as an instructor in the FIELD delivered ESL program, as long as that person was employed by FIELD when delivering those services. But he reiterated that a District employed instructor serving in this capacity would violate the ISA because it would vitiate the limited and restricted consent given by Bakersfield College for the District to operate the contract program within the Bakersfield College's service area where the District would otherwise have no right to operate, through delivery of FIELD-employed instructors, rather than those of the District. There was no dispute that the District could not operate the program directly, staff it and/or deliver instruction with District employed personnel in the Bakersfield College service area. That is so whether that instruction is delivered by one District employed person or 100.

114. Dr. South was not aware of any provision in the ISA that permits the District to require FIELD to employ a District employee as an instructor for FIELD, but still remain a District employee. This question revealed the disingenuous nature of the claim; respondent seeks to force the District to force FIELD to enable him to provide ESL or Basic Skills services to the farm workers under the ISA, under the appearance, but avoiding the pay and benefit limitations of actually being a FIELD employee.

115. There is no bump available for respondent into the FIELD-delivered instruction under the ISA, regardless of the number of FIELD employees actually delivering

that instruction or anticipated to be doing so in the upcoming school year. Education Code section 87743 limits respondent's right to bump to displacing "any other employee with less seniority" of the District being retained. The District does not employ any person delivering the ESL and Basic Skills instruction under the ISA, and despite the interweaving of responsibilities and relationships in the ISA, one aspect of the ISA that is clear is that FIELD-employed instructors providing ESL and Basic Skills services are not employed by the District in the sense that no FIELD-employed instructor performing under the ISA is paid by the District, nor do any receive District benefits, including the benefit of the protections of the MOU and the education code regarding status, tenure and layoff protection. In fact, ISA contains a provision that is the polar opposite of the status, tenure and layoff protections enjoyed by District employees such as respondent, a provision that makes the FIELD-employed instructors at-will employees who can be terminated for any cause, or no cause at all, at any time.

116. California Code of Regulations, title 5, section 58058, subdivision (b) provides that the District may contract for instruction to be provided by a different agency, and, "an individual employed will continue to be an employee of a public or private agency, while at the same time qualifying as an employee of the District." What this provision does not say is as important as what it does say; the provision does not create an employment relationship through the ISA contract that provides the same sort of employment protections a directly employed District employee such as respondent enjoys. It does not provide that a contract employee automatically becomes a District employee for the purposes of pay, benefits, status, tenure or layoff rights, so the portion of the regulation referring to, "qualifying as an employee of the District," is far more limited and restrictive in scope and benefit provided than the manner in which respondent is using the term "District employed" in his contentions and argument here. The ISA's contractual creation of an at-will employment relationship for FIELD employees is the antithesis of the nature of employment that provides the protections of which respondent avails himself in this action. It is inconceivable that a FIELD employee terminated for, as the ISA provides, any reason or no reason at all, would be able to enforce the right to the layoff procedures that are invoked here.

117. The FIELD-employed instructors under the EISA are not District employees in the sense that section 87743 requires for the invocation and exercise of the right to bump an "other employee with less security." Thus, no FIELD-employed instructor under the ISA is subject to being bumped by respondent. Neither the ALJ, nor any provision, or combination of provisions in the ISA contractual and consent arrangements between the parties, or in any provision of law pointed out by the parties or found by the ALJ provides legal authority for the ALJ or the District in its final decision in this matter to order FIELD to hire a District employee to bump a contract employee of FIELD, while still remaining a District employee for the purposes of pay and benefits.

Junior employee Steve Reynolds' position, FIELD ISA Coordinator, Program Review Chair

118. Respondent contends that he can bump into the FIELD ISA Coordinator position, the Accreditation Liaison or Program Review Chair positions for the upcoming school year. None of these claims have any merit. The FIELD ISA Coordinator position in the upcoming school year will consist primarily of evaluation of FIELD-employed instructors delivering services under the ISA. Full-time faculty members evaluate part-time faculty members as part of their regular duties, and when full-time faculty members perform such evaluation, they are paid a stipend. At the time of the evidentiary hearing on the layoff, District personnel testified that there is no course load assignment committed for a FIELD ISA Coordinator yet in place, and the District had not yet decided whether or how much of any load at all will exist in the upcoming school year. Dr. South testified at the June reopening hearing that the District intended to have the FIELD ISE coordinator duties performed by an administrator, most likely himself. Therefore, there is no position as a FIELD ISA Coordinator now in existence into which respondent can bump.

119. Dr. Scott testified at both hearings that he will be performing the duties of the Accreditation Liaison position, which is in and of itself a temporary position, in the upcoming school year. Dr. Scott is an administrator and respondent cannot bump him. Respondent's claim through the former layoff procedure that the District was required to reorganize Accreditation Liaison services, so that he could bump into the position, sought to compel the District to change the manner in which those services were provided. Such a contention has no legal support. The District may, in its discretion, change or reorganize the loads of existing employees without having to conduct a layoff, and if any review at all is to take place, that is a matter of internal relations between administration and faculty, perhaps involving the Academic Senate, and/or negotiations between the faculty's bargaining unit and administration.

120. The Program Review Chair respondent claims he can bump into is presently under review and is likely not to be a position in the upcoming school year. Program Review Chair has been appointed by the Academic Senate in the past, but there is no evidence of a consistent and mandatory process for the appointment to this position. The position is not necessarily a paid faculty position into which respondent can bump, and there was no evidence that it was a given that the position will exist and be staffed by a certificated employee in the upcoming school year.

## LEGAL CONCLUSIONS

1. Section 87743 reads:

No tenured employee shall be deprived of his or her position for causes other than those specified in Sections 87453, 87467, and 87484, and Sections 87732 to 87739, inclusive, and no



probationary employee shall be deprived of his or her position for cause other than as specified in Section 87740 except in accordance with the provisions of Section 87463 and Sections 87743 to 87762, inclusive.

[¶] ... [¶]

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 either of these conditions to decrease the number of tenured employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the employees of the district, tenured as well as probationary, at the close of the school year. However, the services of no tenured employee may be terminated under this section while any probationary employee, or any other employee with less seniority, is retained to render a service in a faculty service area in which the records of the district maintained pursuant to Section 87743.4 reflect that the tenured employee possesses the minimum qualifications prescribed by the board of governors and is competent to serve under district competency criteria.

[¶] ... [¶]

The board shall make assignments and reassignments in a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render.

2. The District complied with all notice and jurisdictional requirements set forth in sections 87740 and 87743.

### *PKS Reduction Issue*

3. Spanish Instructor services identified in the PKS Resolution is a particular kind of service that may be reduced or discontinued under section 87743. The Governing Board's decision to reduce or discontinue Spanish was neither arbitrary nor capricious, and was a proper exercise of its discretion, as set forth in the Factual Findings. Cause for the reduction or discontinuance of these services relates solely to the welfare of the District's college and its students, within the meaning of section 87740.

4. The Governing Board's Resolution reflects a reduction of 1.0 FTE (175-day Spanish Instructor), or whatever amount of that 1.0 FTE remains after the resolution of the pending writ proceedings. The Superior Court's decision affirmed Judge Engeman's 2015

decision that the actual reduction in Spanish was .7 FTE, leaving .3 FTE remaining for 2015-2016. Respondent actually taught a .33 FTE, which was the load of the single Spanish 1 class in the fall of 2015 and the Spanish II class in the spring of 2016. Since respondent's approximately .3 FTE survived the 2015 layoff process following the Superior Court's review, the "corresponding percentage" of employees that may be noticed for the upcoming 2016-2017 school year is either .3 FTE or .33 FTE.<sup>8</sup>

5. Respondent challenges the District's claim that the discontinuance of Spanish is for reasons that relate solely to the welfare of the District's college and its students, within the meaning of section 87740. Respondent argues that the evidence does not show the declining enrollment the District claimed in Spanish classes, and that the evidence is at best ambiguous regarding how much enrollment is required for the classes to be cost-effective for the District offer them. Declining enrollment is a conclusion that varies depending on how one looks at the statistical evidence presented by the District. In a very short-term sense, enrollment is approximately flat, but over a longer term, enrollment has markedly declined, likely the product of the fact pointed out by one of the District's witnesses that most high school students entering the college now have their foreign language requirements completely satisfied from high school classes, and do not need foreign language at the community college level to meet any continuation requirements.

6. Counsel is correct that the enrollment statistics do not show a large drop-off in Spanish enrollment in the most recent two or three years. But longer term, the evidence confirms a steady and significant enrollment decline over a period of years. The evidence also showed that there are a great number of factors that go into the equation of how the District determines whether any class offering is a cost-effective proposition. The District has concluded from the evidence showing a long-term year-over-year pattern of decline in Spanish enrollment over a several year period that continuing to offer Spanish in any form is not in the best interests of the District and its students, and that continuing to do so in any form is a marginal at best, and not a cost-effective proposition. Respondent directly experienced the effects of Spanish enrollment decline in 2014-2015 to the extent that he was required to spend part of his load in that school year in the Critical Skills Lab, because there was not enough enrollment to sustain his full 1.0 FTE of Spanish teaching.

7. It was not disputed that there are no mandatorily required Spanish courses that must be offered to satisfy transfer or major requirements or state mandates. Therefore, offering Spanish is entirely within the District's discretion, as is not offering it.

8. Furthermore, the determination of whether any particular course is a cost-effective proposition is not merely a matter of only numerical enrollment, as respondent's contentions suggested, but as the District witnesses refuted. Cost-effectiveness determinations are complex, multi-faceted propositions that vary from class to class, in

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<sup>8</sup> The .3 FTEF was the District's rough approximation of the portion of the respondent's Spanish Instructor assignment that will remain with a single Spanish course taught in each of the fall (Spanish I) and spring (Spanish II) semesters next academic year.

which the District exercises its discretion in a way that may be different for a Spanish class than an English, math or an engineering class. The District concluded that even at the reenrollment level that respondent taught in the two remaining Spanish classes in 2015-2016, one in each semester, that the enrollment level did not sustain offering the classes again in 2016-2017. The final removal of the last two remaining Spanish classes at the entry level finishes the process begun in 2015-2016, when the upper-level Spanish classes were discontinued, and the .7 FTE assigned to those classes was discontinued and that discontinuance was upheld. A not insignificant portion of that .7 FTE in 2015-2016 was spent using respondent as a placeholder in the Critical Skills Lab, rather than delivering Spanish instruction to meet District student demand, because that demand simply did not exist.

9. Counsel's claims seek to invade the province of the District's discretion and compel the District to exercise its discretion in a fashion favorable to respondent. The District's exercise of its discretion can only be overturned in the presence of substantial and persuasive evidence that the District decision is arbitrary, capricious, or fraudulent, in the sense of being overwhelmingly contrary to the evidence.<sup>9</sup> There is no evidence in this record that supports such a conclusion, as set forth in the Factual Findings. The elimination of Spanish teaching is well within the exercise of the District's discretion, and the reasons presented for the exercise of that discretion in this evidence are satisfactory under the legal standards in place that govern the evaluation.

### *Bumping Issues*

#### Critical Skills Lab

10. Next year, no full time faculty are or will be assigned to the Critical Skills Lab. Respondent's rights to continued employment are potentially superior to temporary part-time instructors who will continue to be employed in the lab.<sup>10</sup> Respondent's right to occupy positions held by one or more of any part-timer or temporary employee assigned to Critical Skills for 2016-2017, to retain his .3 or .33 FTE position, depends upon whether he meets the minimum qualifications specified for the given faculty service area District and section 53415 criteria. Those standards are evaluated by section 53415 of title 5, as set forth in the Factual Findings, and as confirmed by the Superior Court, due to the fact that the District has and will continue in the upcoming school year to claim apportionment for attendance in Critical Skills.

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<sup>9</sup> *California School Employees Assn v. Pasadena Unified School District* (1977) 71 Cal.App.3d 318, 322; *Campbell Elementary Teacher's Association v. Abbott* (1978) 76 Cal.App.3d 796, 808.

<sup>10</sup> *Daniels v. Shasta-Tehama-Trinity J. Community College Dist.* (1989) 212 Cal. App.3d 910, 920.

11. Respondent does not meet the section 53415 minimum qualifications for Critical Skills Lab, as set forth in the Factual Findings, there is, at this time, no one retained junior to him he can bump, and it is not even certain the service will be offered in the upcoming school year. Respondent thus has no bump into any EDUC 670 position.

#### Men's and Women's Head Soccer Positions

12. Respondent has not permitted vetting his qualifications to the faculty EQC, because he has not presented evidence of his claimed qualifying experience. His claim that meets the district minimum qualifications to coach either the men's or women's soccer team, or both, remain unproved. Respondent's claim that it was the District's obligation to appraise respondent's qualifications to coach the team under the circumstances set forth in the Factual Findings lack factual and legal merit. Respondent indisputably does not meet the minimum qualifications for the entire position, in that he lacks qualifications to teach kinesiology, which is more than half the FTE of the position. In order to permit respondent to bump into the soccer coaching position, the District would have to split a full-time 1.0 FTE position and allow respondent, a part-time employee, to exercise a "partial bump,"<sup>11</sup> as well as go back and embrace, without an faculty ERC qualifications evaluation, and reward him for his lack of diligence in pursuing the position and obtaining the qualifications review in the more than one year that has passed since the position that now is occupied by Mr. Kephart was first advertised. Respondent does not meet minimum qualifications to bump into the soccer coaching position, and the District is under no legal obligation to split the position and permit respondent a partial bump into the coaching portion respondent claims he is qualified to occupy, despite the fact that Mr. Kephart is junior to respondent.

#### *Field ISE Coordinator/Accreditation Liaison/Program Review Chair*

13. A District may provide a service in a different manner without eliminating it as PKS. Cases interpreting section 44955, the analogous statutory provision for layoffs in school districts, have held that school districts have the discretion to determine particular kinds of services that will be eliminated, even though a service continues to be performed or provided in a different manner by the District.<sup>12</sup>

14. Next year, the District will staff these positions with either an administrator (Accreditation Liaison and/or Program Review Chair), or with a full-time faculty member paid a stipend for the extra duty of serving as a FIELD ISE coordinator evaluating the

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<sup>11</sup> Specific case authority directly on point provides that the District is under no legal obligation to split a 1.0 FTE position in order to provide a bump to a part-time employee, even if that part-time employee is senior to the person occupying the 1.0 FTE position into which the part-timers seeks to bump. *Hildebrand, supra*, page 342.

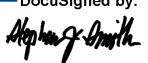
<sup>12</sup> *Campbell Elementary Teachers Association, Inc. v. Abbott* (1978) 76 Cal.App.3d 796, 812, *Hildebrandt v. St. Helena Unified School District* (2009) 172 Cal. App.4th 334, 343.

services of the FIELD employees teaching ESL in the Bakersfield area. The District is also at liberty to not offer one or more of these positions, combine them, have them staffed administratively, or have them staffed through the Academic Senate, as has occasionally occurred, although that is improbable in the case of the FIELD ISE coordinator, all as set forth in the Factual Findings. To the extent that any of these positions will exist in the upcoming school year, no position will be held by a junior faculty member which respondent could bump by virtue of his seniority.

#### RECOMMENDED DISPOSITION

The District may give Final Notice to respondent Juan Roberto Mazariegos that the remaining approximately .33 FTE of his services as a Spanish Instructor will not be required for the 2016-2017 academic year.

DATED: June 29, 2016

DocuSigned by:  
  
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STEPHEN J SMITH  
Administrative Law Judge  
Office of Administrative Hearings