BEFORE THE BOARD OF EDUCATION
ALVORD UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Reduction in Force Involving the Respondents Identified in Appendices A and B.	OAH No. 2012030950

PROPOSED DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 23, 2012, in Riverside, California.

Mark Thompson and David Robinette, Atkinson, Andelson, Loya, Ruud & Romo, represented Alvord Unified School District (District).

Dan Bartlett, Regional Uniserv Staff, California Teachers Association (CTA) represented all of the respondents who had not received precautionary layoff notices except for Dianne Luchuga and Leticia Llamas who did not request a hearing and did not appear.[1]

Donna Jefferson, CTA Emeritus Staff, represented the 12 respondents who had received precautionary layoff notices. During the hearing the District proposed rescinding those precautionary layoff notices. Based upon the findings contained herein those precautionary layoff notices are rescinded and the accusations are withdrawn

Oral and documentary evidence was received and the matter was submitted on April 23, 2012.

OVERVIEW

This case was a perfect illustration of the unpredictable nature of these proceedings. The District made an effort to enact the Board's Resolution, issuing layoff notices to respondents. The District also issued precautionary layoff notices to the 12 Teachers on Special Assignment (TOSA) and Project Specialist/Instructional Coaches (PS/IC) who were junior to respondents, anticipating that the competency criteria which maintained those 12 positions would be an issue in this hearing. Issuance of the precautionary notices was proper

[1] The District asserted that three employees represented by Mr. Bartlett, David Danks, Gregory Hunter and Karla Stanley, did not timely request a hearing, were therefore not "respondents," and were excluded from participating in this hearing.

given the nature of these proceedings. The teachers' union provided two representatives for those two groups of employees, also anticipating the competency criteria to be an issue. However, as the hearing progressed, the issue that emerged was not the competency criteria, but instead, four respondents asserted that the District's seniority list was inaccurate because the District had failed to "tack on" those employees' prior years' experience in the District as temporary employees, a completely unanticipated issue. The result of this new argument was that the District need not have issued precautionary layoff notices to the TOSA and PS/IC employees, but, instead, should have issued precautionary notices to those teachers who respondents asserted at hearing were actually junior to them. Unfortunately, because the District did not anticipate the seniority issue, it did not issue precautionary layoff notices to those employees who would have been subject to layoff once respondents' seniority arguments were affirmed. Had the District been on notice of respondents' challenges to the District's seniority list, it would have been proper for it to issue additional precautionary layoff notices.

FACTUAL FINDINGS

Jurisdiction

1. Monalisa Hasson, Ed.D., made and filed the accusation in her official capacity as the District's Assistant Superintendent, Human Resources Development.

2. Respondents are identified on Appendix A, attached hereto and by this reference incorporated herein. All respondents are certificated employees of the District.

3. Precautionary layoff notices were issued to those respondents identified in Appendix B, attached hereto and incorporated by reference. Those respondents are certificated employees of the District serving either as Teachers on Special Assignment (TOSA) or Project Specialist/Instructional Coaches (PS/IC).

4. On March 1, 2012, the Board of Education of the Alvord Unified School District (Board) adopted a Resolution which reduced particular kinds of services and directed the superintendent to give appropriate notices to certificated employees whose positions would be affected by the action. The resolution identified 15.4 FTEs to be reduced.

Layoff Determinations

5. Consistent with the Board's Resolution, the District identified certificated employees for layoff. The decision to reduce or discontinue a particular kind of service is matter reserved to the district's discretion and is not subject to second-guessing in this proceeding. (*Rutherford v. Board of Trustees of Bellflower Unified School District* (1976) 64 Cal.App.3d 167.) A school district's decision to reduce a particular kind of service must not be fraudulent, arbitrary or capricious. (*San Jose Teachers Association v. Allen* (1983) 144 Cal. App. 3d 627, 637.)

6. On or before March 15, 2012, the District timely served on Respondents a written notice that the Superintendent had recommended that their services would be terminated at the close of the current school year. The reasons for the recommendation were set forth in these preliminary layoff notices.

7. The District also issued precautionary layoff notices to ensure that it could reduce its force in sufficient numbers as ordered by the Board of Education. Given the uncertain nature of these proceedings, as it is unclear until the evidence is presented whether or not the Board's or District's decision making was arbitrary and capricious or not, as well as the ever-evolving case law, there was nothing improper in the District taking this precaution.

8. An accusation was served on each respondent. No evidence was introduced demonstrating that all prehearing jurisdictional requirements were not met.

Request for Hearing Issue

9. In the layoff notices and accusation packets received by the employees, the District gave them until March 29, 2012, to file their request for hearing. Ms. Stanley filed her request for hearing the morning of the hearing, April 23, 2012. No evidence was received that Mr. Danks, Mr. Hunter, Ms. Lechuga or Ms. Llamas ever filed a request for a hearing, although as members of CTA, Mr. Danks and Mr. Hunter were represented by Mr. Bartlett.

The District asserted that because those five employees did not timely request a hearing, they were unable to participate in this proceeding. Education Code section 44949, subdivision (b), states that an employee's "failure [to timely request a hearing] shall constitute his or her waiver of his or her right to a hearing." Accordingly, Mr. Danks, Mr. Hunter, Ms. Lechuga, Ms. Llamas and Ms. Stanley have each waived their right to a hearing and are excluded from participating in this proceeding. The District may properly layoff each of them. Additionally, none of Ms. Stanley's seniority arguments may be considered in this proceeding as this court lacks jurisdiction to consider them because of her failure to timely file a request for hearing, although the District is encouraged to review those arguments in the future consistent with the findings below.

Bump Analysis

10. In its Resolution, the Board implemented a bump analysis to determine which senior employees could bump into a position being held by a junior employee. The resolution defined "competency" pursuant to Education Code sections 44955, subdivision (b), for the purposes of bumping as: "(1) possession of a valid credential or authorization in the subject matter area; (2) Highly Qualified status as authorized by the No Child Left Behind Act; (3) an appropriate authorization or possession of a BCLAD, CLAD or other equivalent English Language Learner Authorization (but not emergency authorizations) to

the extent required by the position; and (4) unique training and experience possessed by the employee to be bumped that are necessary and relevant to the position to be filled."

Maria Escalera, Anthony Gibson and Lydia Song, Teachers on Special Assignment (TOSA) testified about their extensive training and experience, including the theories of language acquisitions, cognitive coaching, EL training, Sheltered Instructional Observational Protocol (SIOP) and the classroom presentations and models they utilize. Their testimony established the unique training and experience of TIOSA and PS/IC employees. There was no evidence presented that the District's competency criterion was arbitrary or capricious. None of the respondents identified on Appendix A possessed the ability to bump any of the respondents identified on Appendix B. Accordingly, all precautionary layoff notices issued to the respondents identified on Appendix B should be rescinded and their accusations withdrawn.

Seniority Dates Issues

11. Five employees challenged their seniority dates as listed on the District's seniority list: Karla Stanley, Elizabeth Velarde, Meghan Martinez, Karynne Ishino and Andrea Coons. For the reasons stated above in Factual Finding No. 9, Ms. Stanley was not a respondent and her arguments cannot be considered. The remaining four employees who were respondents asserted that their time as temporary employees should have been "tacked on" to their seniority dates. Although Meghan Martinez and Andrea Coons were only issued precautionary layoff notices and this decision recommends those notices be withdrawn, their arguments were valid ones and are therefore being addressed.

The District stipulated that the four respondents had served for at least 75 percent of the school year during the years they were employed under temporary contracts. However, the District asserted that they were not entitled to have that time "tacked on" because they had not been offered probationary contracts at the start of the school year. The District introduced the school calendar and the contracts of each employee in support of its position. Additionally, the District asserted that any of the contracts which classified employees differently were merely "typos" which should not be held against the District. However, that argument failed to take into account the fact that, as the drafter of the contracts, any ambiguities in them are construed against the District. (*Employers Mutual Casualty Co. v. Philadelphia Indemnity Insurance Co.* (2008) 169 Cal.App.4th 340, 346.)

Under Education Code section 44917, governing boards must "classify as substitute employees those persons employed in positions requiring certification qualifications, to fill positions of regularly employed persons absent from service." Under Education Code section 44953, substitute employees may be dismissed at any time at the pleasure of the board. As noted in *California Teachers Ass'n v. Vallejo City Unified School Dist.* (2007) 149 Cal.App.4th 135, 144-145 and *Balen v. Peralta Junior College District* (1974) 11 Cal.3d 821, 826, substitute and temporary teachers fill the short range needs of a school district and may be summarily released.

In specific situations, an employee's position in something other than a probationary position may be credited retroactively as probationary employment. Thus, a certificated employee working in a temporary position as a long-term replacement teacher under Education Code section 44920 or in a categorically funded position under Education Code section 44909 may accrue credit toward permanent status under certain circumstances described in Education Code sections 44909, 44917, 44918 or 44920.

The Education Code recognizes two distinct types of substitute teachers: long-term substitute teachers and day-to-day substitute teachers. Education Code section 44918 makes this distinction:

> "(a) Any employee classified as a substitute or temporary employee, who serves during one school year for at least 75 percent of the number of days the regular schools of the district were maintained in that school year and has performed the duties normally required of a certificated employee of the school district, shall be deemed to have served a complete school year as a probationary employee if employed as a probationary employee for the following school year.
>
> (b) Any such employee shall be reemployed for the following school year to fill any vacant positions in the school district unless the employee has been released pursuant to subdivision (b) of Section 44954.
>
> (c) If an employee was released pursuant to subdivision (b) of Section 44954 and has nevertheless been retained as a temporary or substitute employee by the district for two consecutive years and that employee has served for at least 75 percent of the number of days the regular schools of the district were maintained in each school year and has performed the duties normally required of a certificated employee of the school district, that employee shall receive first priority if the district fills a vacant position, at the grade level at which the employee served during either of the two years, for the subsequent school year. In the case of a departmentalized program, the employee shall have taught in the subject matter in which the vacant position occurs.
>
> (d) Those employees classified as substitutes, and who are employed to serve in an on-call status to replace absent regular employees on a day-to-day basis shall not be entitled to the benefits of this section.
>
> (e) Permanent and probationary employees subjected to a reduction in force pursuant to Section 44955 shall, during the period of preferred right to reappointment, have prior rights to any vacant position in which they are qualified to serve superior to those rights hereunder afforded to temporary and substitute personnel who have become probationary employees pursuant to this section.
>
> (f) This section shall not apply to any school district in which the average daily attendance is in excess of 400,000."

Education Code section 44909 authorizes the District to hire temporary employees and outlines the rights of those employees. Most notably, the code section specifically provides that it does not apply "to any regularly credentialed employee who has been employed in the regular educational programs of the school district as a probationary employee before being subsequently assigned to any one of these programs."

Education Code section 44918 outlines the rights of temporary employees but specifically holds that "permanent and probationary employees subjected to a reduction in force pursuant to Section 44955 shall, during the period of preferred right to reappointment, have prior rights to any vacant position in which they are qualified to serve superior to those rights hereunder afforded to temporary and substitute personnel who have become probationary employees pursuant to this section."

Education Code section 44954 authorizes Districts to release temporary employees.

Evidence Code section 44956 establishes the rights of permanent employees whose services are terminated. For 39 months, those employees have a preferred right of re-employment "in the order of original employment…if the number of employees is increased or the discontinued service is reestablished, with no requirements that were not imposed upon other employees who continued in service; provided, that no probationary or other employee with less seniority shall be employed to render a service which said employee is certificated and competent to render." An employee may waive that right for and a district may deviate from re-employing in order of seniority if it "demonstrates a specific need" or to maintain or achieve "compliance with constitutional requirements."

Section 44956 further provides that when the employee is reappointed, "the period of his absence shall be treated as a leave of absence and shall not be considered as a break in the continuity of his service, he shall retain the classification and order of employment he had when his services were terminated, and credit for prior service under any state or district retirement system shall not be affected by such termination, but the period of his absence shall not count as a part of the service required for retirement." An employee may be hired as a substitute teacher but the substitute service shall not affect his previous classification and rights.

Taken together, these provisions show that the Legislature recognized that districts may need to hire and release temporary teachers, that those employees have various rights to re-employment and seniority status, but specifically distinguished those temporary employees from teachers who were formerly permanent or probationary employees of the district laid off during a reduction in force proceeding and then re-hired by the district. Former employees have rights superior to those of temporary or substitute teachers who were not formerly employed as permanent or probationary employees.

The District asserted that it properly labeled the employees as temporary employees. However, *Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 339, 407, citing to *Martin v. Kentfield School Dist.* (1983) 35 Cal.3d 294, 300, held that the

California Supreme Court has determined that "the legislative intent underlying section 44956 is to provide terminated employees with the same employment rights they would have enjoyed had they been retained by the school district. (*Poppers*, *supra* at p. 405.) As between the reappointment rights of a senior terminated teacher vis-a-vis a junior teacher certificated and competent to perform the same services for the district, the senior teacher prevails. (*Poppers*, *Id*. at p. 407.)

Consistent with the Education Code and case law, any previously laid off employee had re-employment rights and when re-hired was entitled to be re-instated as though he or she had not been laid off. Offering only "temporary contracts" to previously laid off employees not only violates the clear Legislative intent of the Education Code but would lead to the unjust result that an employee re-employed for 40 months as a temporary employee would lose his rights of re-hire, despite being re-employed each year.

Moreover, Education Code section 44918, subdivision (a), merely provides that the temporary employee who serves 75 percent of the preceding school year and is employed as a probationary employee "for the following school year" "shall be deemed to have served a complete school year as a probationary employee." The section is silent as to when during "the following school year" the employee must be offered the probationary position. Thus, there is no support in the statute for the District's assertion that because the respondents were offered a probationary contract after the school year began they are not entitled to have the preceding year "tacked on." As Elizabeth Velarde, Meghan Martinez, Karynne Ishino, and Andrea Coons were each offered probationary contracts "the following school year" after having worked 75 percent of the preceding school year as temporary employees, they were entitled to have their temporary year "tacked on" for seniority purposes. The District must revise each of their seniority dates as follows:

Elizabeth Velarde's contracts indicated the following: She signed a "Temporary Intern" contract to be employed as a temporary intern from October 2, 2008, until June 30, 2009, she signed a "Temporary" contract to be employed from July 1, 2009, until June 30, 2010, classified as a "temporary status" for a "Leave Replacement;" she signed a "Temporary" contract to be employed from August 2, 2010, until June 30, 2011, classified as a "temporary status" for a "Leave Replacement; she signed a "Probationary" contract to be employed as a "second year probationary" employee from January 10, 2011, until June 30, 2011; she signed an "Amended Probationary" contract to be employed as a "second year Probationary" employee from November 2, 2010, until June 30, 2011; she signed a "Temporary" contract to be employed from July 1, 2011, until June 30, 2012, as a "Leave Replacement;" and she signed a "Probationary" contract to be employed as a "second year probationary" employee from November 28, 2011, until June 30, 2012. Because she was offered a probationary contract the "following school year" after working 75 percent of the preceding year as a temporary employee, Elizabeth Velarde's seniority date should be August 2, 2010. Moreover, consistent with case law and the Education Code, because she had previously been a probationary employee, she had all of her previous employment rights when offered the temporary contract in 2011.

Meghan Martinez' contracts indicated the following: she signed a "Temporary Contract Intern" on July 9, 2007, to be employed during the 2007-2008 school year; she signed a "Temporary" contract for "continuing employment" to be employed from July 1, 2008, until June 30, 2009; she signed a "Temporary" contract to be employed from August 7, 2009, until June 30, 2010, as a "Leave Replacement;" she signed a "Credentialed Certificated Employee In A Categorical Position" contract to work as a Project Specialist/Instructional Coach (PS/IC) from September 24, 2010, until June 30, 2011, and was classified as a "Second year probationary" employee; and she was again employed during the 2011-2012 school year as PS/IC and identified on the seniority list as "Tenured," although at hearing the District asserted this was incorrect and she should be listed as "Probationary 2." Because she was offered a probationary contract the "following school year" after working 75 percent of the preceding year as a temporary employee, Meghan Martinez' seniority date should be August 7, 2009.

Karynne Ishino 's contracts indicated that she signed a "Temporary" contract to work as a "Leave Replacement" from September 17, 2010, until June 30, 2011; that she signed a "Temporary" contract to work as a "Leave Replacement" from July 1, 2011, until June 30, 2012; and that she signed a "Probationary" employee classifying her as a "first year probationary" employee with a "Date of Hire" of March 26, 2012, through June 30, 2012. Because she was offered a probationary contract the "following school year" after working 75 percent of the preceding year as a temporary employee, Karynne Ishino's seniority date should be July 1, 2011.

Andrea Coons' contracts indicated that she signed a "Temporary" contract to be employed from August 21, 2008, until June 30, 2009; that she signed a "Temporary" contract to be employed as a "Leave Replacement" from November 30, 2009, until June 30, 2010; that she signed a "Temporary" contract to be employed as a "Leave Replacement" from September 27, 2010, until June 30, 2011; and that she signed a Probationary Credentialed Certificated Employee" contract which classified her as a "second year probationary" employee to work as a Project Specialist/Instructional Coach (PS/IC) from September 6, 2011, until June 30, 2012. Because she was offered a probationary contract the "following school year" after working 75 percent of the preceding year as a temporary employee, Andrea Coons' seniority date should be September 27, 2010.

If these corrected seniority dates makes Velarde and Ishino senior to any employee with less seniority whose service these respondents are certificated and competent to render, the layoff notice issued to them must be rescinded and the accusation withdrawn. The same would also be true for Martinez and Coons, but it has already been recommended that their notices be rescinded and their accusations withdrawn consistent with Finding of Fact No. 10.

Other Seniority List Issues

12. Song also testified about her difficulties getting the District to correctly identify her credentials on the Seniority List and her concerns about being identified for precautionary layoff. She received an April 18, 2012, e-mail from the District's Credential

technician, Kim Monnig, advising Ms. Song that her "Intro Math" credential would be added to the District's seniority list. However, it was still not on that document at the time of this hearing. The District stipulated that the seniority list would be amended to include that information.

Final Layoff List

13. Except for respondents Elizabeth Velarde, Meghan Martinez, Karynne Ishino, and Andrea Coons, no evidence which this court had jurisdiction to consider was presented that the District was retaining any employee with less seniority to perform a service that any other respondent is certificated and competent to render.

LEGAL CONCLUSIONS

1. Jurisdiction for this proceeding exists pursuant to sections 44949 and 44955, and all notices and other requirements of those sections have been provided as required.

2. A district may reduce services within the meaning of section 44955, subdivision (b), "either by determining that a certain type of service to students shall not, thereafter, be performed at all by anyone, or it may 'reduce services' by determining that proffered services shall be reduced in extent because fewer employees are made available to deal with the pupils involved." (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)

3. The decision to reduce or discontinue a particular kind of service is matter reserved to the district's discretion and is not subject to second-guessing in this proceeding. (*Rutherford v. Board of Trustees of Bellflower Unified School District* (1976) 64 Cal.App.3d 167.)

4. Because of the reduction of particular kinds of services, cause exists pursuant to Education Code section 44955 to give notice to respondents that their services will not be required for the 2012-2013 school year. The cause relates solely to the financial welfare of the schools and the pupils thereof within the meaning of Education Code section 44949. The District has identified the certificated employees who are providing the particular kinds of services that the Board directed be reduced or discontinued. It is recommended that the Board give respondents notice before May 15, 2012, that their services will not be required by the District for the school year 2012-13.

RECOMMENDATION

It is recommended that the Board give notice to the respondents whose names are set forth below in Appendix A, except for respondents Elizabeth Velarde and Karynne Ishino,

that their employment will be terminated at the close of the current school year and that their services will not be needed for the 2012-2013 school year.

It is recommended that pursuant to the Findings of Fact No. 11, that the Board direct that the District's seniority list be amended to show that Elizabeth Velarde's seniority date is August 2, 2010; that Meghan Martinez' seniority date is August 7, 2009; that Karynne Ishino seniority date is July 1, 2011, and that Andrea Coons seniority date is September 27, 2010.

It is recommended that if respondent Elizabeth Velarde is certificated, competent and senior to a certificated employee who was not laid off, then she was improperly noticed, her notice should be rescinded, her accusation withdrawn, and she should be retained.

It is recommended that if respondent Karynne Ishino is certificated, competent and senior to a certificated employee who was not laid off, then she was improperly noticed, her notice should be rescinded, her accusation withdrawn, and she should be retained.

It is recommended that the District amend its seniority list to reflect the fact that Lydia Song also has an Intro Math credential.

The precautionary layoff notices issued to those respondents identified in Appendix B should be rescinded and the accusations dismissed.

DATED: May 2, 2012

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MARY AGNES MATYSZEWSKI
Administrative Law Judge
Office of Administrative Hearings

Appendix A

LAST	FIRST	FTE
Aguirre	Roxanna	1.0
Bouts-Bohannan	Francoise	0.6
Cevallos	Michele	1.0
Danks	David	0.2
Fraire	Adrienne	0.6
Gutierrez	Monica	0.4
Hunter	Gregory	1.0
Ishino	Karynne	1.0
Johnson	Amanda	1.0
Lechuga	Dianne	1.0
Llamas	Leticia	1.0
Stanley	Karla	1.0
Thrasher	Mary	0.6
Velarde	Elizabeth	1.0

Appendix B

LAST	FIRST
Askier	Erin
Coons	Andrea
Escalera	Maria
Gibson	Anthony
Howard	Michelle
Koh	Yun
Ladner	Oghwa
Lenertz	Michele
Long	Jennifer
Martinez	Meghan
Mims	Victoria
Song	Lydia