

BEFORE THE
GOVERNING BOARD
FONTANA UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

CERTIFICATED EMPLOYEES OF THE
FONTANA UNIFIED SCHOOL DISTRICT
LISTED ON EXHIBIT A,

OAH No. 2011031169

Respondents.

PROPOSED DECISION

On May 3, 2011, in Fontana, California, Alan S. Meth, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Melanie A. Petersen and Kelly Anne Owens, Attorneys at Law, represented the Fontana Unified School District.

Marianne Reinhold, Attorney at Law, represented the respondents set forth on Exhibit A attached hereto.

At hearing, the District withdrew the layoff notices against Kimberly Moyer and Jacqueline Rookwood Brooks.

The matter was submitted on May 3, 2011.

FACTUAL FINDINGS

1. On April 6, 2011, William W. Wu, J.D., Assistant Superintendent Human Resources, of the Fontana Unified School District (hereafter, "the District"), made and filed the accusations against respondents in his official capacity.

2. Respondents are certificated employees of the District.

3. Before March 15, 2011, pursuant to Education Code sections 44949 and 44955, Mr. Wu notified the Governing Board (hereafter, "the Board") of the District of his

recommendation that respondents be notified their services will not be required for the ensuing school year. Mr. Wu's notification to the Board set forth the reasons for the recommendation.

4. On or before March 15, 2011, each respondent was given written notice that Mr. Wu had recommended that notice be given to respondents, pursuant to Education Code sections 44949 and 44955, that their services will not be required for the ensuing year. Each written notice set forth the reasons for the recommendation. The notices satisfied the requirements of sections 44949 and 44955. *San Jose Teachers Association, Inc. v. Allen* (1983) 144 Cal.App.3d 627, 632; *Campbell Elementary Teachers Association v. Abbott* (1978) 76 Cal.App.3d 796, 803-04, distinguishing *Karbach v. Board of Education* (1974) 39 Cal.App.3d 355, 360-63.

5. Each respondent timely requested in writing a hearing to determine if there is cause for not reemploying them for the ensuing school year. Accusations were timely served on respondents, and each respondent filed a timely Notice of Defense. All pre-hearing jurisdictional requirements have been met.

6. The Board took action in a series of resolution to discontinue the following services for the 2011-12 school year:

In Resolution No. 11-13:

<u>Services</u>	<u>Number of Full-Time Equivalent Positions</u>
1. Elementary Counselor	.50 FTE
2. Elementary Instructional Support Teacher	3.40 FTE
3. Middle School Counselor	.50 FTE
4. Middle School EL Intervention Teacher	1.00 FTE
5. Middle School Computers	1.00 FTE
6. Middle School English/Language Arts	3.00 FTE
7. Middle School Mathematics	5.00 FTE
8. Middle School Physical Education	1.00 FTE
9. Middle School Science	5.00 FTE
10. Middle School Social Science	4.00 FTE
11. High School Biology	2.00 FTE
12. High School Business	2.00 FTE
13. High School Chemistry	1.00 FTE
14. High School Computer Science	2.00 FTE
15. High School Earth Science	1.00 FTE
16. High School English	5.00 FTE
17. High School Foreign Language: Spanish	1.00 FTE
18. High School Mathematics	2.00 FTE

19.	High School Physical Education	1.00 FTE
20.	High School TEAM Academy: Education	1.00 FTE
21.	High School Smaller Learning Community Coordinator	1.00 FTE
22.	Continuation High School Mathematics	1.00 FTE
23.	Head Start Teacher	2.00 FTE
24.	Infant/Toddler Teacher	2.00 FTE
25.	Early Education Program Specialist	2.00 FTE

Total Full-Time Equivalent Reductions 50.40 FTE

Also in Resolution No 11-13:

20.	High School TEAM Academy: Education	1.00 FTE
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Total Full-Time Equivalent Reductions 1.00 FTE

In Resolution No. 11-36:

1.	Adult Education Coordinator	1.0 FTE
2.	Adult Education Counselor	1.0 FTE
3.	Adult Education Special Education/SH Teacher	1.0 FTE

Total Full-Time Equivalent Reductions 3.0 FTE

In Resolution No. 11-37:

1.	Teacher-Librarian	2.0 FTE
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Total Full-Time Equivalent Reductions 2.0 FTE

In Resolution No 11-38:

1.	Alternative Education Coordinator	1.0 FTE
2.	Independent Study Teacher	2.0 FTE

Total Full-Time Equivalent Reductions 3.0 FTE

In Resolution No. 11-39:

1.	Alternative Education Coordinator	1.0 FTE
2.	Alternative Learning Center Teacher	2.0 FTE

Total Full-Time Equivalent Reductions 3.0 FTE

In Resolution No. 11-41:

1. Elementary School Counselor	6.0 FTE
2. Middle School Counselor	20.0 FTE
3. High School Counselor	38.0 FTE
4. Continuation High School Counselor	4.0 FTE
5. Child Welfare & Attendance Counselor	.5 FTE

Total Full-Time Equivalent Reductions 68.5 FTE

There were several duplications in the above resolutions. After taking them into account, the total number of full-time equivalent reductions called for by the Board's resolutions is 128.9.

The services set forth above are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 44955. *California Teachers Association v. Board of Trustees of the Goleta Union School District* (1982) 132 Cal.App.3d 32, 34-37 and cases cited therein. See also *San Jose Teachers Association v. Allen, supra* at 635-38, in which the court specifically rejected the reasoning of *Burgess v. Board of Education* (1974) 41 Cal.App.3d 571; *Zalac v. Governing Board* (2002) 98 Cal.App.4th 838, 853-54.

Furthermore, these services may be reduced because of budgetary difficulties. *Zalac v. Governing Board, supra*, and cases cited therein. The decision to reduce or discontinue the services is neither arbitrary nor capricious but rather a proper exercise of the District's discretion.

7. No certificated employee junior to any respondent is retained to perform services which any respondent is certificated and competent to render.

8. The reduction or discontinuation of services is related to the welfare of the District and its pupils, and it has become necessary to decrease the number of certificated employees of the District as determined by the Board.

9. The Board considered all known attrition, resignations, retirements and requests for transfer in determining the actual number of necessary layoff notices to be delivered to its employees.

10. The Board established a tie-breaker rating system for determining the relative seniority of certificated employees who first rendered paid service on the same date. The Board provided the order of termination shall be based on the needs of the District and its students. The system provided:

“A. Total Number of Credentials, Subject Matter Authorizations and Supplemental Authorizations

B. Credential Status (Clear, Preliminary, Intern, Permit)

C. Total Number of Years of Teaching Experience in the Fontana Unified School District

D. Total Number of Verified Years of Teaching Experience post Bachelor's Degree

TIE-BREAKING PROCEDURE

In the event that common day hires have equal qualifications based on application of the above criteria, the District will then break ties by utilizing a lottery.”

11. The District created a Seniority List which contains employees' seniority dates (first date of paid service), status, location, position description, EL authorization, credential term, credential title, subject, supplemental authorizations and credentials, and notes. The District determined whether senior employees held credentials in another area and were entitled to “bump” other employees.

12. The District intends to eliminate the entire counselor program, and allowed senior counselors with teaching credentials to bump into teaching positions if the counselor had an authorization of some form to each English Learners (EL). In the District's view, allowing a teacher to teach in the classroom, without an appropriate EL authorization, given the large number of Hispanic students and EL students, would constitute a misassignment and a violation of Federal law, and subject the District to sanctions.

13. Eduardo Valencia (seniority date of 3/21/2003) is a counselor and works at two elementary schools. He has a clear PPS credential. He testified at the hearing that he can perform the functions of an ASB director because in the last five years, he has been in charge of ASB functions at the elementary school level. Those activities include attending pep rallies, assisting teachers, supervising career days, field trips and so forth. In addition, he has helped ASB keep track of the funds it raises from banquets and sales, and in the past, when he has worked at a high school in another school district, worked at the student store as well as coaching sports and assisting various clubs. He testified that he teaches leadership skills and he meets with students during lunch or after school.

Mr. Valencia pointed to the job Gary Gonzalez (seniority date of 8/18/10) held and testified he could perform that job. Mr. Gonzalez holds a single subject teaching credential in social science with a Crosscultural, Language, and Academic Development (CLAD), a supplemental in math, and an administrative services credential. He teaches at Fontana High School and his assignment is ASB. He is the full time ASB director and is responsible for funds that have been raised and the student store and all ASB activities at the school. He also teaches leadership.

Joan Fields has worked in human resources for the District for 13 years, has been involved in this and other layoffs, and is familiar with classroom assignments and the requirements of the California Commission on Teacher Credentialing (CTC). She pointed to the Administrator's Assignment Manual, C-11, revised in 2007, published by the CTC. The manual provides that where there is an elective class and no credential exists that authorizes the curriculum, then the District is required to select "the credentialed teacher whose knowledge and training best fulfills the needs of the students...Title 5 §80005(b) allows an employing agency to select an individual that holds a credential based on a bachelor's degree and a teacher preparation program including student teaching and approved subject area knowledge and training."

Ms. Fields testified that the District determined that the position of ASB director at the high school level required a teacher to be able to teacher leadership, and therefore required a teaching credential. Mr. Gonzalez works as the ASB director under his teaching credential. Mr. Valencia does not hold a teaching credential but rather a PPS credential. Ms. Fields testified he serves as a counselor at the elementary school and his work relating to ASB takes place outside the regular school day and is on a smaller scale than the position at the high school which is a full-time teaching position.

Based upon the administrative manual and Ms. Fields' testimony, the District established that it had the authority to determine that the position of ASB director at the high school level required a teaching credential, and that determination was not an arbitrary one but rather a reasonable one. Accordingly, the District established the Mr. Valencia was not competent to serve in that position, and he has no right to bump Mr. Gonzalez.

14. Cheryl Gonzales (seniority date of 3/21/2003) is a counselor at Fontana High School and holds a PPS Credential in school counseling. She also holds a PPS credential in school psychology and has two masters degrees, including one in educational psychology. Ms. Gonzales testified at the hearing that she worked as an intern in school psychology for the District for three months during the 2003-04 school year, and while in that position, tested students, wrote report, attended IEP meetings, presented information, and worked under the supervision of the school psychologist. She believes she can perform the duties of a school psychologist.

Richard Crane (seniority date 3/9/1987) is a counselor at AB Miller High School and holds a Basic PPS credential and a school psychology credential. He has a masters and Ph. D. He testified at the hearing that he interacts with the school psychologist daily and believes he could perform the functions of a school psychologist based on his training. He does not believe that the position of school psychologist is "management" because it is not part of a management team and there are no supervisory responsibilities such as evaluating teachers or staff.

Maria Burciaga (seniority date 2/20/2007) is a counselor at Citrus Continuation High School and holds PPS credentials in school counseling and school psychology. She has a masters degree in psychology. She performed her school psychology internship during the

summer of 2009 when she worked for the District evaluating and interviewing students, writing reports and evaluations, reviewing records including medical records, attending IEP meetings, working with the school psychologist, and so forth.

There are more than three school psychologists with the District who are less senior than Ms. Gonzales, Mr. Crane, and Ms. Burciaga. The less senior school psychologists have PPS credentials in school psychology and no other credentials.

The District did not contend that these counselors did not have the credentials necessary to serve as school psychologists.

15. The District considers the position of school psychologist a “management position.” In its July 19, 2010 “Job Vacancy” posting, the District described the position. It required a PPS credential authorizing school psychology and a masters degree. In its description of the position, the District indicated: “Utilize specialized training and diagnostic skills to provide psycho educational evaluations, consultations to staff and parents, and counseling support.” The posting contains a list of essential functions and additional qualifications. In none of the listed essential functions or qualifications is there a requirement that a candidate for the position have what would typically be considered managerial or administrative training or experience.

In the District’s view, school psychologists have been treated as management employees for many years and they are recruited and hired as management. As such, the District believes that others do not have the right to bump into this position.

16. Mark Quick (seniority date of 7/31/1989) has a PPS credential and a multiple subject teaching credential. He currently serves as a counselor, but worked as a teacher in the District for seven years, from 1989 to 1996. He does not have a CLAD but is working on it and expects to complete his coursework and take the examination in June. He began taking classes a week after the Board meeting in early March and informed his principal that he had begun taking classes.

Mr. Quick testified at the hearing that he was concerned about the elimination of all the counseling position and believed it would be illegal. He felt that the Board’s action would violate the No Child Left Behind Act of 2001 (Public Law 107-110) as well as other state and federal laws, and laws requiring the counselors perform certain services.

Mr. Wu testified at the hearing that there was no law that required a school district to employ counselors and that No Child Left Behind required that services be provided, but not necessarily by counselors. He testified the District expects to provide the requisite services in other ways, although the Board had not yet determined how.

17. Diana Rasmussen (seniority date of 8/30/89) is a counselor at Kaiser High School. In addition to a Basic PPS, she has a standard secondary teaching credential in history and English and taught English from 1989 to 1995. She testified at the hearing that

she has completed 42 hours of continuing education in preparation for taking the examination that, if she passed, would give her a CLAD authorization. The test is scheduled for June. She also testified that she met with Mr. Wu shortly before she received her layoff notice and asked him for an emergency waiver so she could return to the teaching pool. She testified he told her that was not possible.

In June 2010, the District obtained an emergency CLAD for Julie Emma Watanabe. Ms. Watanabe obtained a clear CLAD in September 2010 and is teaching this school year under the clear authorization. According to Mr. Wu, the District has the discretion whether to apply for an emergency CLAD and it has decided it will not apply for them for counselors with teaching credentials.

Ms. Fields explained that Ms. Watanabe had been teaching high school English with an ESL supplement but without a CLAD and she believed that was appropriate, but she was informed by the County Department of Education that it was a misassignment. As a result of that information, the District obtained the emergency CLAD

18. Rekha Bakshi (seniority date of April 27, 1998) is an elementary school counselor and also holds a multiple subject credential and a special education credential. She taught three years in special education starting in 1998 and then became a counselor. She completed her CLAD coursework on March 17 and received a CLAD authorization on March 24, 2011.

19. Amy Keeling (seniority date of 8/7/2008) has a single subject credential in English and teaches English at Kaiser High School. She received a layoff notice. There are two other teachers with the same seniority date who have similar credentials who were not laid off. The tie among them was broken on the basis of the tiebreaker criterion that ranks a clear credential higher than a preliminary credential. The District's records indicated that Ms. Keeling had a preliminary credential at the time the layoffs were made.

Ms. Keeling testified at the hearing that she completed the coursework necessary to obtain a clear credential in May 2010 and that upon completion of the program, the Beginning Teacher Support and Assistance (BTSA) office was supposed to submit a certain form to the human resources department showing completion of the program which in turn would submit the form to the state so that she could obtain her clear credential. Ms. Keeling testified that she did not know that the paperwork had not been properly submitted until after she received the layoff notice. In early April 2011, she went to the BTSA coordinator, showed her the information, the information was submitted to human resources, and on April 16, 2011, she obtained a clear credential. She indicated the process took 12 days.

Ms. Keeling received a draft of the seniority list in January 2011 and was asked, along with all other certificated employees of the District, to submit any information that might change the information contained on the list. Ms. Keeling did not submit any additional information. The draft seniority list indicates a seniority date of August 7, 2008

and under the heading “Cred Term” there is an entry of “P5” which indicates a five-year preliminary credential.

20. Lynn Evans (seniority date of 8/23/2010) teaches pre-school part-time. She has a multiple subject teaching credential. She also works as a substitute teacher for the District. By letter dated April 26, 2011, the District informed her that she had a reasonable assurance of returning to work in the 2011-12 school year in her usual capacity.

21. Sammy Montiel (seniority date of July 26, 2004) has a single subject teaching credential in biological science. He is a member of the California National Guard and has been serving on active duty intermittently since he was hired. According to the District’s records, he is considered a probationary employee and the District proposes to lay him off. Ms. Fields compiled a list of all the days Mr. Montiel worked as a teacher for the District and the periods of time he was on military leave of absence. The records show that he worked 21 days during the 2004-05 school year, 91 days during the 2005-06 school year, 79 days during the 2006-07 school year, 169 in paid status during the 2008-09 school year, and 41 days during the 2010-11 school year.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter relating to the elimination of 84.2 full-time equivalent positions exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied.

2. Education Code section 44955 provides in relevant part:

...

“(b) [W]henever 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 . . . to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render. . . As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof. Upon the request of any employee whose order of termination is so determined, the governing board shall furnish in writing no later than five days prior to the commencement of the hearing held in accordance with Section 44949, a statement of the specific criteria used in determining the order of termination and the application of the criteria in ranking each

employee relative to the other employees in the group. This requirement that the governing board provide, on request, a written statement of reasons for determining the order of termination shall not be interpreted to give affected employees any legal right or interest that would not exist without such a requirement.

(c) . . .

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

. . .

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

(1) The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess.

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

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

3. There are three counselors, Ms. Gonzales, Mr. Crane, and Ms. Burciaga, who are certificated and competent to fill the position of school psychologist for the District. Each has the same credential as junior school psychologists, and each satisfies the requirements for the job set forth by the District in its job vacancy posting. The District does not dispute that they hold the necessary credential to perform the job. Factual Findings 14 and 15.

The District argues that the seniority rules of section 44955, subdivision (b) should not apply because school psychologists are considered management employees and have been so considered for many years. As such, the District argues, others do not have the right to bump into this administrative position.

It is well established that a school district has broad discretion in defining positions and establishing requirements for employment, and this includes determining the training and experience necessary for particular positions. *Hidlebrand v. St. Helena Unified School District* (2009) 172 Cal. App. 4th 334, 343 and cases cited therein. But this discretion afforded to school districts is limited by the terms of section 44955, subdivision (b), which provides that “Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render....”

There is nothing in the District’s posted job description of school psychologist to suggest it is a position other than or more than a school psychologist. The credential required by the District is a PPS authorizing school psychology and the education required is a masters degree. There is no management component to this job, as shown on the posted vacancy, and the District offered no evidence to show that it was an administrative position or required administrative training or skills. On the contrary, Ms. Gonzales, Mr. Crane, and Ms. Burciaga all testified they knew the job and two of them had performed it as interns, they had contact with school psychologists, and knew of nothing in the job that made it a management or administrative position. It is not enough to put a label on a position and thereby shield it from the plain language of section 44955, subdivision (b). The District offered no authority to support its view that by calling the position of school psychologist a “management position,” the seniority provisions of section 44955, subdivision (b) did not apply. It is concluded that Ms. Gonzales, Mr. Crane, and Ms. Burciaga were certificated and competent to render the services of a school psychologist for the District and the District erroneously prevented them from bumping junior employees employed as school psychologists. Therefore, the layoffs of Ms. Gonzales, Mr. Crane, and Ms. Burciaga must be set aside and the accusations against them dismissed.

4. The District has chosen to eliminate all its counseling positions, and Mr. Wu testified that the District intends to provide the requisite services in ways other than through the use of employed counselors. Factual Finding 16. As noted in *Hidlebrand v. St. Helena Unified School District, supra*, “Similarly, 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.”

Mr. Wu’s testimony that there was no law which required a school district to employ counselors was more persuasive than the contrary testimony of Mr. Quick. Based upon Mr. Wu’s representation that the Board would provide the counseling services currently provided by its own employees, Mr. Quick’s argument is rejected.

5. It is well established that in considering a teacher's credentials and qualifications in a layoff proceeding, a District may ignore credentials acquired by an employee or registered by an employee after the March 15 deadline for issuing layoff notices. *Duax v. Kern Community College District* (1987) 196 Cal. App. 3rd 555, 567-68; *Campbell Elementary Teachers Assn. v. Abbott* (1978) 76 Cal. App. 3rd 796, 815.

Mr. Quick, Ms. Rasmussen, and Ms. Bakshi (Factual Findings 16, 17, and 18) seek to avoid the consequences of this rule for various reasons, but ultimately, their efforts must be rejected. The District was not required to obtain emergency CLADs for them, although it had the discretion to do so. The District was not required to hold open a teaching position for any counselor on the chance that some might obtain a CLAD. The District was not required to extend a helping hand to any of its counselors, even though some had worked for the District for more than 20 years. The layoffs of Mr. Quick, Ms. Rasmussen, and Ms. Bakshi must therefore be upheld.

Ms. Keeling (Factual Finding 19) is in a different position but the decision regarding her plight must be the same as the counselors. It appears that both she and the District are at fault for the negligent manner in which they handled her credential. Ms. Keeling cannot pass on the responsibility for the failure when she was notified by the District in the draft seniority list circulated in January that her credential was preliminary. If she had any questions, she could have asked at that time. The cases clearly place the burden on the teacher to ensure that the District is aware of all of his or her credentials and authorizations, and the failure to do so is placed on the teacher. Ms. Keeling's layoff must be upheld.

6. Mr. Montiel argues that the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. sections 4313 et. seq., and the regulations implementing the Act, require the District to treat him as a permanent employee, not probationary, and if he were treated as a permanent employee, he would be senior to other employees with similar credentials who were not laid off. He argues that under USERRA, and in particular, sections 4313 and 4316, he should be treated as if he were not deployed, and if he were not deployed, he would have acquired tenure and would not be subject to layoff.

38 U.S.C. section 4313 provides in part:

“(a) Subject to subsection (b) (in the case of any employee) ... a person entitled to reemployment under section 4312, upon completion of a period of service in the uniformed services, shall be promptly reemployed in a position of employment in accordance with the following order of priority:

...

(2) Except as provided in paragraphs (3) and (4), in the case of a person whose period of service in the uniformed services was for more than 90 days--

(A) in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform....”

38 U.S.C. section 4316 provides in part:

“(a) A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.

(b)(1) Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be--

(A) deemed to be on furlough or leave of absence while performing such service; and

(B) entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.”

20 C.F.R. section 1002.210 provides:

“1002.210 What seniority rights does an employee have when reemployed following a period of uniformed service?”

The employee is entitled to the seniority and seniority-based rights and benefits that he or she had on the date the uniformed service began, plus any seniority and seniority-based rights and benefits that the employee would have attained if he or she had remained continuously employed. In determining entitlement to seniority and seniority-based rights and benefits, the period of absence from employment due to or necessitated by uniformed service is not considered a break in employment. The rights and benefits protected by USERRA upon reemployment include those provided by the employer and those required by statute. For example, under USERRA, a reemployed service member would be eligible for leave under the Family and Medical Leave Act of 1993, 29 U.S.C. 2601-2654 (FMLA), if the number of months and the number of hours of work for which the service member was employed by the civilian employer, together with the number of months and the number of hours of work for which the service member would have been employed by the civilian employer during the period of uniformed service, meet FMLA's eligibility requirements. In the event that a service member is denied FMLA leave for failing to

satisfy the FMLA's hours of work requirement due to absence from employment necessitated by uniformed service, the service member may have a cause of action under USERRA but not under the FMLA.”

20 C.F.R. section 1002.7 provides in part:

“§ 1002.7 How does USERRA relate to other laws, public and private contracts, and employer practices?”

(a) USERRA establishes a floor, not a ceiling, for the employment and reemployment rights and benefits of those it protects. In other words, an employer may provide greater rights and benefits than USERRA requires, but no employer can refuse to provide any right or benefit guaranteed by USERRA.

(b) USERRA supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by USERRA, including the establishment of additional prerequisites to the exercise of any USERRA right or the receipt of any USERRA benefit. For example, an employment contract that determines seniority based only on actual days of work in the place of employment would be superseded by USERRA, which requires that seniority credit be given for periods of absence from work due to service in the uniformed services.”

The District points to the following relevant regulations contained in 20 C.F.R. in support of its position that Mr. Montiel should not be granted tenure:

“§ 1002.149 What is the employee's status with his or her civilian employer while performing service in the uniformed services?”

During a period of service in the uniformed services, the employee is deemed to be on furlough or leave of absence from the civilian employer. In this status, the employee is entitled to the non-seniority rights and benefits generally provided by the employer to other employees with similar seniority, status, and pay that are on furlough or leave of absence. Entitlement to these non-seniority rights and benefits is not dependent on how the employer characterizes the employee's status during a period of service. For example, if the employer characterizes the employee as “terminated” during the period of uniformed service, this characterization cannot be used to avoid USERRA's requirement that the employee be deemed on furlough or leave of absence, and therefore entitled to the non-seniority rights and benefits generally provided to employees on furlough or leave of absence.”

“§ 1002.150 Which non-seniority rights and benefits is the employee entitled to during a period of service?”

(a) The non-seniority rights and benefits to which an employee is entitled during a period of service are those that the employer provides to similarly situated employees by an employment contract, agreement, policy, practice, or plan in effect at the employee's workplace. These rights and benefits include those in effect at the beginning of the employee's employment and those established after employment began. They also include those rights and benefits that become effective during the employee's period of service and that are provided to similarly situated employees on furlough or leave of absence.

(b) If the non-seniority benefits to which employees on furlough or leave of absence are entitled vary according to the type of leave, the employee must be given the most favorable treatment accorded to any comparable form of leave when he or she performs service in the uniformed services. In order to determine whether any two types of leave are comparable, the duration of the leave may be the most significant factor to compare. For instance, a two-day funeral leave will not be "comparable" to an extended leave for service in the uniformed service. In addition to comparing the duration of the absences, other factors such as the purpose of the leave and the ability of the employee to choose when to take the leave should also be considered.

(c) As a general matter, accrual of vacation leave is considered to be a non-seniority benefit that must be provided by an employer to an employee on a military leave of absence only if the employer provides that benefit to similarly situated employees on comparable leaves of absence."

"§ 1002.151 If the employer provides full or partial pay to the employee while he or she is on military leave, is the employer required to also provide the non-seniority rights and benefits ordinarily granted to similarly situated employees on furlough or leave of absence?"

Yes. If the employer provides additional benefits such as full or partial pay when the employee performs service, the employer is not excused from providing other rights and benefits to which the employee is entitled under the Act."

In addition, the District points to Education Code section 44929.21 which provides in part:

"(b) Every employee of a school district of any type or class having an average daily attendance of 250 or more who, after having been employed by the district for two complete consecutive school years in a position or positions requiring certification qualifications, is reelected for the next succeeding school year to a position requiring certification qualifications shall, at the commencement of the succeeding school year be classified as and become a permanent employee of the district.

The governing board shall notify the employee, on or before March 15 of the employee's second complete consecutive school year of employment by the district in

a position or positions requiring certification qualifications, of the decision to reelect or not reelect the employee for the next succeeding school year to the position. In the event that the governing board does not give notice pursuant to this section on or before March 15, the employee shall be deemed reelected for the next succeeding school year.

This subdivision shall apply only to probationary employees whose probationary period commenced during the 1983-84 fiscal year or any fiscal year thereafter.”

Finally, Education Code section 44975 provides:

“No leave of absence when granted to a probationary employee shall be construed as a break in the continuity of service required for the classification of the employee as permanent. The time during which the leave of absence is taken shall not be considered as employment within the meaning of Sections 44882 to 44891, inclusive, Sections 44893 to 44900, inclusive, Sections 44901 to 44906, inclusive, and Sections 44908 to 44919, inclusive.”

USERRA is a many-faceted effort by Congress to prevent employment discrimination based upon military service. As it relates to this case, section 4316 is the most relevant, and in particular, the provision that grants a service member seniority and other rights and benefits, “...plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.” Section 1002.210 of the regulations makes the same point. In addition, the provision in section 1002.210 that the period of absence from employment for to uniformed service is not considered a break in employment is consistent with Education Code section 44975.

In terms of Mr. Montiel’s seniority, the District satisfied the provisions of USERRA. His seniority date of July 26, 2004 is presumably his first date of paid service in a probationary position, and that has not changed despite the several leaves of absence that occurred as a result of his military service. The question presented in this case is whether USERRA requires that Mr. Montiel be considered a permanent employee, and that question is separate from seniority.

A probationary teacher in order to acquire tenure must first have worked a sufficient amount of time. *See generally Griego v. Los Angeles Unified School Dist.* (1994), 28 Cal. App. 4th 515 as to how Education Code sections 44929.21 and 44975 interact. Mr. Montiel, based upon the interaction of those two statutes, plus section 1002.210 of the federal regulations, satisfies the time component for the acquisition of tenure.

However, there is a performance component of tenure that vests in school districts the discretion to decide whether to reelect a probationary employee. As the court observed in *Summerfield v. Windsor Unified School Dist.* (2002) 95 Cal. App. 4th 1026, 1029:

“School districts have complete discretion regarding the reelection of probationary

employees. They may choose not to reelect a second-year probationary teacher without any showing of cause or statement of reasons, so long as they notify the teacher no later than March 15 of the teacher's second year of the decision not to reelect. (*Board of Education v. Round Valley Teachers Assn.* (1996) 13 Cal.4th 269, 279, 52 Cal.Rptr.2d 115, 914 P.2d 193; § 44929.21, subd. (b).) Any employee not given notice of non-reelection by March 15 “shall be deemed reelected for the next succeeding school year.” (§ 44929.21, subd. (b).)”

In order for a school district to properly exercise its discretion and determine whether to re-elect probationary teachers, it must have the ability to observe that teacher’s work in the classroom. The statutes give a school district two years to determine whether it will allow a teacher to achieve permanent status, and the district has opportunities at the end of the first probationary year and at the end of the second probationary year to make that decision.

In Mr. Montiel’s case, the District has not had two years to observe his work as a teacher nor has it exercised its discretion and decided whether to reelect him or not. If Mr. Montiel were given permanent status based on the amount of work he has performed as a teacher for the District in conjunction with USERRA, the effect would be that Mr. Montiel would not have been subjected to the scrutiny that other probationary teachers were subjected to and the District’s ability to decide whether to reelect him or not would have been circumvented. He would thus be in a better position for having worked less for the District than a teacher who did not serve in the military. USERRA contemplates that an employee serving in the military receive equal treatment, not be treated better than other employees.

Equality is particularly important in a layoff proceeding. Mr. Montiel’s status as a probationary or a permanent employee effects not only him and his relationship to his employer, it could have a direct bearing on whether another employee will keep his or her position. Giving Mr. Montiel tenure would place him far higher on the seniority list than he deserves. It is one thing to insure that an employee who serves intermittently in the military is accorded all the rights and benefits that employee would receive and would attain had he or she not served in the military, but it is quite another to accord that employee additional rights and benefits to which the employee is not entitled and which negatively impact another employee. Accordingly, it is concluded that Mr. Montiel has not achieved permanent status as a teacher for the District.

7. Any additional arguments offered by respondents have been considered and are rejected.

8. Cause exists under Education Code sections 44949 and 44955 for the District to discontinue particular kinds of services relating to 128.9 full-time equivalent positions. The cause for the reduction or discontinuation of particular kinds of services related solely to the welfare of the schools and the pupils thereof. A preponderance of the evidence sustained

the charges set forth in the Accusation. It is recommended that the Board give respondents notice before May 15, 2011, that their services will no longer be required by the District.

ORDER

1. The Accusation served on respondents Kimberly Moyer and Jacqueline Rookwood Brooks are dismissed.

2. The Accusations served on respondents Cheryl Gonzales, Richard Crane, and Maria Burciaga are dismissed.

3. The Accusations served on the respondents listed on Exhibit A are sustained. Notice shall be given to each respondent before May 15, 2011 that his or her services will not be required for the 2011-12 school year pursuant to the Board's resolution because of the reduction of particular kinds of services.

Notice shall be given in inverse order of seniority.

DATED: May 5, 2011

ALAN S. METH
Administrative Law Judge
Office of Administrative Hearings

EXHIBIT “A”

FONTANA UNIFIED SCHOOL DISTRICT

FINAL LAYOFF LIST

The following certificated personnel will receive a final layoff notice:

LAST NAME	FIRST NAME	TEACHER/ COUNSELOR
AGUILAR	CRIS	TEACHER
ARROYO	DEBORAH	TEACHER
BAHLING	JESSICA	TEACHER
BAKSHI	REKHA	COUNSELOR
BRADSHAW	JESSICA	TEACHER
BRISTEL	RENEE	TEACHER
BRONGERSMA	ALBERT	TEACHER
BRUST	REGINA	COUNSELOR
BUNTEN	MICHAEL	TEACHER
BUOYE	DIANA	COUNSELOR
CALLANTA	ANNA	COUNSELOR
CAMACHO	WENDY	TEACHER
CAMPBELL	KATHRYN	TEACHER
CARDOSI	WILLIAM	TEACHER
CHERNISS	REBEKAH	TEACHER
CIFELLI	JESSICA	COUNSELOR
CIPRIAN	ERENDIRA	COUNSELOR
CLARIDGE-WEBER	CYNTHIA	COUNSELOR
CRANE	JONATHAN	TEACHER
CRISWELL-FISHER	KEYA	COUNSELOR
DE LA ROSA	EMMANUEL	TEACHER
DEGRAFFENREID	STEPHANIE	TEACHER
DEL CASTILLO-GARCIA	ANEL	TEACHER
DELA-PAUL	NINA	COUNSELOR
DERNE	JANICE	COUNSELOR
DICAMILLO	KIMBERLY	COUNSELOR
DRAGNA	DESIREE	TEACHER
DUFFIELD	ALLISON	TEACHER
EACRET	MEGAN	TEACHER
ECHAVARRIA	JOANN	TEACHER
EVANS	LYNN	TEACHER

EWERS	TRAVIS	TEACHER
FULLER	KRISTEN	TEACHER
GALDAMEZ	LILIANA	TEACHER
GALLARDO	RICHARD	TEACHER
GAXIOLA	REUBEN	TEACHER
GAY	AMBER	TEACHER
GEETER	LEDINA	TEACHER
GEPFORD	TIMOTHY	TEACHER
GONZALES	JESSICA	COUNSELOR
GOTTE	MARY	TEACHER
GROENHEIM	RUSSELL	COUNSELOR
HARRIGER	SUZANNE	COUNSELOR
HASENAUER-LOPEZ	REBECCA	TEACHER
HERRERA	GABRIEL	COUNSELOR
HICKE	HOLLY	TEACHER
HOMME	DOUGLAS	COUNSELOR
HORNADAY	DEBRA	COUNSELOR
HUTCHINGS	JENNY	TEACHER
IBARRA	MARCO	COUNSELOR
JOHNSON	MATTHEW	TEACHER
KAVIANIAN	REZA	TEACHER
KEELING	AMY	TEACHER
KIGGINS	MELIA	COUNSELOR
KING	LATEEFAH	TEACHER
KNOTT	JAMES	COUNSELOR
KOEHLERBROOKS	JANET	COUNSELOR
KOOLIS	STACIE	COUNSELOR
LASSONDE	KRISTIN	TEACHER
LEACH	CHRISTOPHER	TEACHER
LOPEZ	NICK	TEACHER
LUSZECK	REID	TEACHER
MAKKAWI	JIHAD	TEACHER
MARROQUIN	ERICK	TEACHER
MARTIN	DESIREE	COUNSELOR
MC CONNELL	BEVERLY	COUNSELOR
MONTIEL	SAMMY	TEACHER
MOORE	KENT	COUNSELOR
MORIN	ELIZABETH	TEACHER
MURILLO	ALBERT	COUNSELOR
NAVA	ROBERT	COUNSELOR
NEGOSE	LAVERN	COUNSELOR

PACHOT	TABATHA	COUNSELOR
PARKER	ANNETTE	COUNSELOR
PASCUAL	EDWARD	TEACHER
PEREZ ZAMORA	NADINE	COUNSELOR
PILGRIM	JOANNE	COUNSELOR
QUICK	MARK	COUNSELOR
RANNIS	DINO	TEACHER
RASMUSSEN	DIANA	COUNSELOR
RENTERIA	SANDRA	TEACHER
RICKS	SHAUNA	COUNSELOR
RILEY	LORI	COUNSELOR
ROJAS	MELISSA	TEACHER
SAHL	ERIC	TEACHER
SALAZAR	CELENA	TEACHER
SALAZAR	ROSALIE	COUNSELOR
SAMSON	HEATHER	TEACHER
SANCHEZ RAYGOZA	EDGAR	COUNSELOR
SANFORD	LAPRICE	COUNSELOR
SARREAL	RACHEL	TEACHER
SCHUSTER	JILL	TEACHER
SIMNJANOVSKI	RISTE	TEACHER
SIMPSON	SAMANTHA	TEACHER
ST ANDRE	VIRGINIA	TEACHER
SULLENGER	AMANDA	TEACHER
TOPOR	EMILY	COUNSELOR
TUTTLE	MICHELE	COUNSELOR
VALDEZ-FLYNN	VERONICA	COUNSELOR
VALENCIA	EDUARDO	COUNSELOR
VEDO	MICHAEL	TEACHER
WHITCOMB	KRISTI	TEACHER
YUMORI	NICOLE	TEACHER

