

BEFORE THE GOVERNING BOARD
CHARTER OAK UNIFIED SCHOOL DISTRICT
COUNTY OF LOS ANGELES
STATE OF CALIFORNIA

In the Matter of the Accusation Against:)	
)	
GLEND A BANGLE, et. al,)	Case No. L2004030442
)	
Respondents.)	
_____)	

PROPOSED DECISION

Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, heard this matter on April 14, 2004, in Covina, California.

Margaret A. Chidester, Attorney at Law, represented Gloria Cortez, Assistant Superintendent, Human Resources, Charter Oak Unified School District ("District").

Marianne Reinhold and Kate Phillips, Attorneys at Law, represented Respondents.

The District has determined to lay off certificated employees following its decision to reduce particular kinds of services pursuant to Education Code¹ section 44955. The District issued layoff notices to 62 individuals who hold teaching certificates in order to achieve the reductions, 18 of which notices it subsequently rescinded. The District did not issue any layoff notices to individuals employed pursuant to temporary contracts because in its view state law does not require it. Several of the temporary employees nevertheless requested hearings and 8 (Volodymyr Babczenko, Laurence Beyer, Kelly Eisenbise, Christopher Long, Kristina Paulson, Noel Lee Robertson, Christopher Rubio, and Alejandro Valenzuela) appeared at the hearing – references to "Respondents" in this decision include these 8 individuals. Respondents dispute the District's assertion that cause exists to discontinue their services for the 2004-05 school year and argue that the District's alleged failure to properly classify all certificated employees, including those serving under emergency or internship authorizations, vitiates the entire layoff.

The parties presented oral and documentary evidence, and argument, at the hearing. The record was left open for the submission of written briefs. The District filed a post-hearing supplemental brief on April 21, 2004, and a post-hearing reply brief on April 23, 2004, which documents have been marked for identification only as Exhibits 17 and 18. Respondents filed a post-hearing brief on April 22, 2004, which document has been marked as Exhibit B. The matter was therefore submitted for decision on April 23, 2004.

¹ All further references are to the Education Code.

FACTUAL FINDINGS

1. Assistant Superintendent Cortez filed the Accusations in her official capacity.
2. Respondents are certificated employees of the District.
3. In March 2004, the Superintendent of the District recommended to the Governing Board of the District ("Board") the reduction or discontinuation of particular kinds of services for the 2004-05 school year.
4. The Board adopted Resolution Number 08-03-04 on March 9, 2004, approving the Superintendent's recommendation.
5. On or about March 10, 2004, the District gave each Respondent, except Respondents Babczenko, Beyer, Eisenbise, Long, Paulson, Robertson, Rubio, and Valenzuela and other teachers working pursuant to temporary contracts, written notice of the Superintendent's recommendation that Respondents' services will not be required for the 2004-05 school year due to the reduction or elimination of particular kinds of services.
6. Respondents filed timely requests for hearing to determine if there is cause for not reemploying them for the 2004-05 school year.
7. The District filed and served an Accusation on each Respondent, except for Respondents Babczenko, Beyer, Eisenbise, Long, Paulson, Robertson, Rubio, and Valenzuela.
8. Respondents, with the exception of Respondents Babczenko, Beyer, Eisenbise, Long, Paulson, Robertson, Rubio, and Valenzuela, filed timely Notices of Defense.
9. The District did not issue layoff notices to employees working pursuant to one-year contracts, such as Respondents Babczenko, Beyer, Eisenbise, Long, Paulson, Robertson, Rubio, and Valenzuela, or serve documents required by Education Code sections 44949 and 44955 on them, because it views them as temporary employees not entitled to the protections of these sections. Seventeen of these designated temporary employees, including Respondents Babczenko, Eisenbise, Long, Paulson, Robertson, Rubio, and Valenzuela, and employees Andrea Baiseri, Teddi Breaux, Elizabeth Diaz, Amy Drake, Patricia Santiago, Teresa Seely, Shari Shultz-Salgado, Camille Strycula, Joseph Strycula, and Gregory Zampiendo, nevertheless requested a hearing. On April 1, 2004, the District wrote a letter to these employees denying their request for hearing, stating, in essence, that as temporary employees they were not entitled to a hearing. Only Respondents Babczenko, Beyer, Eisenbise, Long, Paulson, Robertson, Rubio, and Valenzuela appeared at the hearing.
10. All prehearing jurisdictional requirements have been met.

11. In adopting Resolution Number 03-04, the Board took action to reduce the following services for the 2004-05 school year:

<u>Service</u>	<u>Full Time Equivalent Positions</u>
Elementary Assistant Principal	1.0
Grade level Coordinator	1.0
Assistant Principal, ROIS	1.0
Activities Director, COHS	1.0
All four grades (K-3) of Class Size Reduction classroom teachers	35.0
Reading Teachers, Badillo and Glen Oak	2.0
Itinerant Music, Drama classroom teacher	1.0
Itinerant Art classroom teacher	1.0
ROP/TC Photography and Web Design classroom teacher	.6
ROP/TC Child Care classroom teacher at COHS	.4
ROP/TC Athletic Training classroom teacher at COHS	.4
ROP/TC Accounting classroom teacher at COHS	.4
ROP/TC Stagecraft classroom teacher at COHS	.2
Counselors at COHS and Arrow	<u>2.0</u>
Total	47.0

12. The services set forth in factual finding number 11 are particular kinds of services which may be reduced or discontinued within the meaning of section 44955.

13. The District has been impacted by the state's fiscal crisis. Its anticipated funding was reduced by \$2.4 million before the 2003-04 school year and is expected to drop an additional \$1.9 million before the 2004-05 school year. The District was able to avoid certificated employee layoffs for the 2003-04 school year but has concluded it can no longer avoid them. The Board's decision to reduce or discontinue the services in light of the declining revenue is neither arbitrary nor capricious but is rather a proper exercise of its discretion.

14. The reduction 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 by 47 FTE positions as determined by the Board and its designees.

15. a. The District seeks to exempt from layoff, or "skip" in the seniority order, certain certificated employees deemed to possess special training, experience, or credentials. These individuals hold administrative, special education, language-speech-hearing, math, science, English, Spanish, or psychologist credentials or authorizations. In addition to holding the credentials or authorizations, the individuals the District seeks to exempt from layoff

worked in positions requiring the credentials or authorizations in question during the 2003-04 school year and are expected to again hold the positions during the 2004-05 school year.² As a precaution, the District has given layoff notices to the following Respondents whom it actually seeks to exempt: Glenda Bangle; Ana Bernal; Nicole Bucka; Dianne Dunne; Lani Ellington; Brett Hall; Michelle Klein; Robert Mancilla; Frank Martinez; Nancy Maynard; Nathan Nichols; Christopher Pirraglia; Michelle Ronga; and Catherine Strother.³

b. Respondents did not challenge the exempted teachers' special training, experience, or credentials, or the District's need for such experience. Nor did any Respondent establish he/she possessed the desired special training, experience or credential.

c. The District has established that it is in the interest of the District and its pupils to skip the individuals in question because they possess special training and experience to meet a District need.

16. The District has taken into account positively assured attrition since March 10, 2004 (a total of 18 full-time equivalent positions), and rescinded layoff notices issued to the following individuals: William Austin; Maria Bernal; John Boyle; Aubrey Brinegar; Jennifer Fetchik; Deborah Fillinger; Jennifer Graves; Margaret Godinez; David Hedrick; Emily Lambert; Denise Montes; Selena Patton; Stacey Burroughs Ryan; Karen Tanaka; Teresa Tiffany; Sandie Wilkerson; Scarlett Wingate; and Laurie Zernickow.

17. The Board has adopted criteria to break ties among those who first rendered paid service on the same date. Respondents have not challenged the derivation or application of the criteria.

18. It is the District's policy to hire individuals who hold emergency, pre-intern, intern, or waiver authorizations (referred collectively as provisional credentials, permits or authorizations in this Decision) pursuant to temporary employment contracts. It used four form contracts during the 2003-04 school year, one for intern credential teachers, one for pre-intern credential teachers, one for emergency permit teachers, and one for all others (referred herein as the "generic" temporary contract). The first three contracts are intended for use to employ teachers who hold provisional contracts and all four refer to employment limitations.

² Although the District has not decided which of its employees currently working pursuant to one-year contracts it will reemploy for the 2004-05 school year, 15 employees in the exempted services hold emergency or intern certificates and may be retained.

³ Also receiving "precautionary" notices but not requesting a hearing are Cindy Berglund, Lois Magdy Zaki Daow, Jennifer Evans, Sylvia Jones, Jimmy Kuo, Jennifer Maletz, Rebecca McCauley, Eileen Romero, Rosario Sabillo, Luiza Shamuradova, and Sharon Zerpoli.

The intern temporary contract states that "Pursuant to the provisions of Ed. Code Section 44466, service by a person on an Intern credential shall not acquire tenure" and provides that employment may be terminate at any time. The pre-intern contract states that "Pursuant to the provisions of Ed.Code Section 44911, service by a person as a temporary teacher (pre-intern certificate) does not provide status toward tenure" and that "employment is on a day to day basis and subject to termination during the school year at any time." The emergency permit teacher contract contains the same tenure limitation quoted with respect to the pre-intern teacher contract, except that the reference is to emergency permit teachers. The generic temporary employment contract also provides that "employment is on a day-to-day basis and subject to termination during the school year" and contains the following language:

"The Governing Board of the Charter Oak Unified School District of Los Angeles County, California offers you employment as a temporary certificated employee due to one or more of the following circumstances: 1) It has been determined that a need exists for additional certificated employees during the 2003-2004 school year; 2) certificated employees have been granted leaves of absence; 3) or there is a need to fill a categorically funded assignment or; 4) the District expects a reduction in student enrollment during the second semester...." (Emphasis in original)

The generic temporary contracts contain the following statement:

"A credential must be on file with the Office of the Superintendent of Schools for Los Angeles County prior to your first day of service. However, if you serve at least 75% of a complete school year and if you are then reemployed for the following school year in a vacant position requiring certification, you will be given credit for one year of probationary service." (Emphasis in original)

19. During the 2003-04 school year, the District hired 49 certificated employees to temporary contracts -three others previously hired as temporary employees were on leave during the school year. Respondents Babczenko, Beyer, Eisenbise, Long, Paulson, Robertson, Rubio, and Valenzuela signed their employment contracts in June 2003, prior to the start of the 2003-04 school year and prior to performing work for the District for the 2003-04 school year. Respondents Babczenko, Long, and Rubio entered into temporary (intern credential) teacher contracts and Respondent Robertson entered into a temporary (emergency permit teacher) contract. Respondents Beyer, Eisenbise, Paulson, and Valenzuela entered into generic temporary contracts, despite holding intern (Valenzuela) or emergency permits (Beyer, Eisenbise, and Paulson). All 8 contracts were for full time employment.

20. a. Some of the temporary employees hired for the 2003-04 school year, including Respondents Babczenko, Beyer, Eisenbise, Long, Paulson, Robertson, Rubio, and Valenzuela, had worked in prior consecutive school years. Respondents have the following hire dates: Babczenko (August 28, 2002); Beyer (August 27 1997); Eisenbise (August 30, 1996); Long (September 19, 2001); Paulson (August 30, 2000); Robertson (August 30, 2000); Rubio (September 1, 1999); and Valenzuela (September 1, 1999).

b. Respondent Babczenko holds a single subject (business) intern authorization. Respondents Beyer, Eisenbise, and Paulson hold emergency multiple subject permits. Respondent Long holds a single subject (art) intern authorization. Respondent Robertson holds a single subject (Spanish) emergency permit. Respondents Rubio and Valenzuela hold multiple subject intern credentials.

c. The District employed these eight Respondents in regular teaching assignments. Thus, Respondent Babczenko taught high school business; Respondents Beyer, Eisenbise, Paulson, and Valenzuela taught in elementary school self-contained classrooms; Respondent Rubio taught in intermediate school; Respondent Long taught high school art; and Respondent Robertson taught high school Spanish.

21. Respondent Babczenko is the junior teacher holding a single subject authorization in business.

22. Respondent Beyer was first hired on August 27, 1997 and has taught elementary education each school year since then. At the start of the 2003-04 school year, Respondent Beyer held an emergency multiple subject permit, which expired December 2003. His credential school submitted an application for a preliminary credential in July 2003, which was received by the Commission of Teacher Credentialing ("CTC") on July 23, 2003. The CTC issued a preliminary multiple subject credential in December 2003, but the credential has not been provided to the District or registered with the Los Angeles County Department of Education.

23. Respondent Long is the junior teacher holding a single subject authorization in art.

24. The district does not include service performed pursuant to a temporary contract in its seniority calculations. Thus, the employees set forth in factual finding number 20 have a "hire date" but no "seniority date." Also, employees who obtain a preliminary or clear credential during the school year are not reclassified as probationary or obtain a seniority date consistent with acquisition of the new credential. Rather, if retained for the following school year, the certificated employee is offered a probationary contract at that time and the hire date at the start of the new school year is deemed the seniority date.

25. The District's practice not to extend mid-term contracts or reclassify employees who obtain preliminary or clear credentials during the school year impacts Respondents Cavasoz, Cooper, Cushman, Guevara, Swanson, and Whittington, all of whom were continuously employed on a full-time basis in positions requiring certification since their date of hire.

26. Respondent Cavasoz was hired on August 30, 2000. She obtained a preliminary multiple subject credential on May 1, 2002, and entered into a probationary employee contract on August 28, 2002.

27. Respondent Cooper was first hired on September 1, 1999. She worked pursuant to an emergency multiple subject permit for the 1999-00 and 2001-02 school years. She obtained a clear multiple subject credential on November 29, 2001, but continued working under a temporary contract through the 2001-02 school year. She returned for the following school year and received a probationary employee contract with a seniority date of August 28, 2002.

28. Respondent Cushman started working on January 4, 1999 and received her preliminary multiple subject credential on August 29, 2002. She had worked pursuant to waiver and emergency permits until obtaining a probationary contract on August 29, 2002.

29. Respondent Guevara was first hired on August 30, 2000. He obtained a clear multiple subject credential on March 20, 2002. He was signed a probationary employee contract on August 28, 2002, his assigned seniority date.

30. Respondent Swanson was first hired on September 1, 1999, holding an emergency long term teaching permit. She worked pursuant to pre-intern certificate during the 2000-01 school year and pursuant to an emergency permit during the 2001-02 school year. She obtained a preliminary multiple subject credential with a supplemental authorization in English on June 2, 2002. She was hired for the next school year as a probationary employee and assigned a seniority date of August 8, 2002.

31. Respondent Whittington, who was hired on August 29, 2001, has been assigned a seniority date of August 28, 2002. He received a preliminary multiple subject credential on June 28, 2002.

32. Respondents Hadan, Jensen, McGhyghy, Moore, Seagle, Simpson-Harris, and Somerville hold preliminary or clear multiple subject credentials and were hired on August 28, 2002, as probationary employees. No certificated employee junior to these Respondents was retained to render services these Respondents are certificated and competent to render.

33. The least senior probationary employees retained by the District, all of whom hold clear multiple subjects credentials, are: Laurie Zernickow, who has a seniority date of October 15, 2001; Stacy Burroughs Ryan, who has a seniority date of September 14, 2001; and Selena Patton, who has a seniority date of August 29, 2001. Burroughs Ryan works .2 FTE and Patton was on leave during the 2003-04 school year. Zernickow and Burroughs Ryan were hired on August 30, 2000 and worked during the 2000-01 school year. The type of credential held by these two employees during their first year of employment or the type of assignment was not established at the hearing. Therefore, it was not established that Zernickow or Burroughs Ryan worked as probationary employees during the 2000-01 school year and, therefore, their seniority dates are those assigned by the District.

34. Respondent Dougherty, who holds a single subject (Business) credential, was hired on September 23, 2002. No junior employee was retained to perform a service Respondent Dougherty is certificated and competent to render.

35. Respondent Geibel, a permanent employee, and Michelle Kaplowitz, an undisputed probationary employee who did not request a hearing, have seniority dates of August 1, 2001, and August 28, 2002, respectively, and are the least senior counselors.

36. Respondent Lynch, a permanent employee, is the least senior teacher certificated to teach in the computer applications, computer repair, and real estate designated subjects.

LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists pursuant to sections 44949 and 44955, by reason of factual finding numbers 1 through 10.

2. The services listed in factual finding number 11 are each determined to be a particular kind of service within the meaning of section 44955, by reason of factual finding numbers 11 and 12.

3. Cause exists to reduce the number of certificated employees of the District by 47 FTE positions for the 2004-05 school year due to the reduction of the services described in factual finding number 11, by reason of factual finding numbers 11, 12, and 13. The number of actual certificated employees to be terminated has been reduced to 29 FTE positions because of positively assured attrition, by reason of factual finding number 16.

4. Cause for the reduction of the services set forth in factual finding number 11 relates to the welfare of the District's schools and pupils within the meaning of section 44949, by reason of actual finding numbers 11 through 14, and legal conclusion numbers 1 through 3.

5. Section 44955 directs that certificated permanent and probationary employees are to be laid off by seniority, consistent with their qualifications and status. Thus, subsection (c) provides, in pertinent part, that "the governing board shall make assignments and reassignments in such manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render." The statute, in subsection (b), gives preference to permanent employees: "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." Districts are permitted to disregard seniority in two specific instances:

"(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 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."

The parties disagree about the type of service that can be considered in determining seniority. District maintains that only time served in a status that can be counted toward tenure can be considered. Respondents argue that any time served in a probationary capacity should be counted for the purpose of sections 44949 and 44955. Further disagreement exists regarding the definition of probationary status. District states that only those employees earning credit toward tenure can be considered probationary. Respondents counter that any certificated employee not classified as temporary, substitute, or permanent must be classified as probationary.

These arguments are initially addressed in order to determine the seniority of Respondents.

6. The Education Code establishes four possible classifications for certificated employees: permanent; probationary; temporary; and substitute. Kavanaugh v. West Sonoma County Union High School District, 29 Cal.4th 911, 916 (2003); Fine v. Los Angeles Unified School District, 116 Cal.App.4th 1070, 1077, fn 6 (2004).

In pertinent part, a permanent employee is one who, "after having been employed by the district for two complete consecutive school years in a position requiring certification qualifications, is reelected for the next succeeding school year to a position requiring certification qualifications" Section 44929.21(b). Section 44001, in turn, defines "positions requiring certification qualifications" to include "every type of service for which certification qualifications are established by or pursuant to Sections 44000 to 44012, inclusive, Section 44065 and [Sections 44200 to 44374]."

Service pursuant to certain credentials may not be counted toward permanent status. Thus, section 44911 provides, in pertinent part: "Service under a provisional credential shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee of a school district." The Court in Summerfield v. Windsor Unified School District, 95 Cal.App.4th 1026 (2002), held that emergency permits are provisional credentials within the meaning of this section.

Section 44915 provides: "Governing boards of school districts shall classify as probationary employees, those persons employed in positions requiring certification qualifications for the school year, who have not been classified as permanent employees or as substitute employees."

Substitute employees as "those persons employed in positions requiring certification qualifications, to fill positions of regularly employed persons absent from service." Section 44917.

Temporary employees are those not hired as substitute employees to serve on a day to day basis in temporary classes (section 44919). A district may also employ temporary employees to fill positions of certificated employees who are absent because of a leave of absence or long-term illness (Section 44920). No statutory provision defines temporary employees in terms of the type of credential held.

In interpreting statutes it is essential to ascertain the intent of the Legislature so as to effectuate the purpose of the law. California Teachers Association v. Governing Board of Rialto Unified School District, 14 Cal.4th 627, 632 (1997); People v. Hull, 1 Cal.4th 266, 271 (1991); Steketee v. Lintz, Williams & Rothberg, 38 Cal.3d 46, 51 (1985). In determining intent, courts first look to the words contained in the statute, giving them their plain meaning. Kavanaugh, supra, at p.919; Hull, supra at p. 271; Steketee, supra at pp. 51-52; Welch v. Oakland Unified School District, 91 Cal.App.4th 1421, 1430-31 (2002). If necessary, canons of statutory construction can assist in discerning the correct interpretation of statutory language. Thus, "[a] statute must be construed in the context of the entire statutory system of which it is a part, in order to achieve harmony among the parts [Citations]." Hull, supra at p. 272; Kavanaugh, supra at p. 919.

Section 44915 must be read with the foregoing principles in mind. Thus, the statute classifies as probationary employees those "employed in [a] position requiring certification qualifications" not classified as "permanent" or "substitute." Section 44915 refers to the positions held by the employee in question, not to the type of credential held. Section 44001, in turn, broadly defines the positions to include all those for which CTC issues a certificate or permit. There is no dispute that all Respondents, including those holding emergency permits or intern credentials, worked in positions requiring certification qualifications; they in fact discharged their duties while holding credentials, permits, and authorizations issued by CTC. Nor is there disagreement that Respondents did not work as substitutes or as permanent employees. Accordingly, giving the words of section 44915 their plain meaning requires classification of Respondents as probationary employees.

District argues a literal construction of section 41915 is inappropriate. In Golden Valley, 98 Cal.App.4th 369 (2002), however, an appellate court similarly construed the plain meaning of section 44915 with respect to emergency permit teachers in an analogous context. In so doing, the court reviewed the history and context of section 44915 and provisions pertaining to emergency credentials.

In Golden Valley, a teacher who had worked pursuant to an emergency permit during the 1998-99 school year entered into a probationary contract for the 1999-00 school year. On August 3, 1999, after the start of the 1999-00 school year, the successor district, Golden Valley Unified School District, terminated the teacher for failing to have a preliminary or clear credential. The court held that the teacher was a probationary employee under section 44915 entitled to the protections against mid-term termination such status confers. In so holding, the court rejected the argument that the teacher was not a probationary employee, and thus not entitled to protection from midyear dismissals, because she held an emergency permit.

The court in Golden Valley traced the inception of emergency credentials to the World War II period, when the war effort created a shortage of qualified teachers. At the time, a statute required employment "in positions requiring certification qualifications" for an employee to be classified as substitute, probationary or permanent. The Legislature enacted a provision in 1943 in order to prevent service under an emergency credential from counting towards attainment of permanent status. As the Golden Valley court observed, enactment of the exclusion was "necessary only if the Legislature believed that service under an emergency credential could include employment 'in position[s] requiring certification qualifications.'" Golden Valley, supra at p. 380. The court noted that the tenure exclusion was the only one enacted and that the Legislature did not exclude teachers with emergency credentials from the provisions concerning classification as probationary employees, dismissal, or minimum salary requirements.

Provisional credentials were authorized in 1947 to give persons teaching under emergency credentials the opportunity to qualify for regular credentials. At the same time, the Legislature enacted the predecessor to section 44911, again excluding service under a provisional credential from counting toward tenure, but not imposing limitations on classification as probationary employees, unauthorized dismissal, or minimum salary entitlement.

The Legislature amended minimum salary provisions in 1951 to set a different minimum annual salary "for persons employed 'full time in a position requiring certification qualifications and serving under other than an emergency credential or provisional credential.'" Golden Valley, supra at p. 381, quoting from Stats. 1951, ch. 1157, sections 1, 2, pp. 2939-2940. The court stated, at p. 381:

"These amendments are further recognition by the Legislature that teachers serving under an emergency credential or provisional credential were subject to the rules generally applicable to teachers employed in 'positions requiring certification qualifications,' unless a specific exclusion was enacted. Again, no provision was enacted to exclude teachers serving under an emergency or provisional credential from classification as a probationary teacher or from benefiting from the restrictions on dismissal of probationary teachers."

The language in present section 44915 has remained the same despite reenactment of the Education Code in 1959. Likewise, while present section 44911 underwent amendment in 1959, the exclusion language quoted above has remained unchanged. The court concluded:

"Accordingly, we construe section 44915 to allow a teacher serving under an emergency permit to be classified as a probationary employee. This construction harmonizes section 44915 with sections 44911 and 44929.21 rather than rendering section 44911 superfluous. As a consequence of this construction, teachers serving under an emergency permit who satisfy the requirements of section 44915 are entitled to the statutory protections governing the dismissal of a probationary employee."

Golden Valley, supra at p. 383.

Analogously, just as the Legislature did not exclude teachers holding emergency permits from the midyear dismissal protections probationary teachers enjoy, it did not exclude these or other provisionally-credentialed teachers from the yearend layoff protections afforded by sections 44949 and 44955. Thus, giving the words of section 44915 their plain meaning is consistent with the statutory system of which it is a part, is consistent with Legislative treatment

of teachers holding provisional credentials, harmonizes sections 44911, 44915, 44949 and 44955, and is in accord with the only published appellate decision to have construed section 44915.

7. By subsequent, more specific statute, the Legislature denied layoff protections to a group of individuals holding provisional credentials, namely, those holding internship credentials pursuant to sections 44450 through 44468. These individuals are typically called "university interns" to distinguish them from "district interns." The District only employs university interns, including Respondents Babczenko, Long, Rubio, and Valenzuela. Section 44464 provides, in pertinent part, that "the rights provided by Sections 44948 and 44949 shall not be afforded to interns."⁴ Inasmuch as section 44464 is a more specific statute, it must be construed as also modifying section 44915 with respect to the layoff rights of interns. See: San Francisco Taxpayers Association v. Board of Supervisors, 2 Cal.4th 571, 577 (1992); In re Michael G., 44 Cal 3d 283, 293 (1988); In re Misener, 38 Cal.3d 543, 553, fn 4 (1985); Bailey v. Superior Court, 19 Cal.3d 970, 976-977, fn 8 (1977). By analogy, those holding pre-intern certificates pursuant to section 44305 et seq. who are working toward an internship certificate should be excluded from the protections of the layoff statutes. Therefore, Respondents Babczenko, Long, Rubio, and Valenzuela, are not entitled to the protection of section 44949, and Respondents who provided services in a certificated position under intern or pre-intern certificates may not receive credit for such service for the purpose of layoff seniority.

8. The parties also disagree regarding the impact of the most recent reported appellate case pertaining to the status of certificated employees, Fine, supra. District argues that Fine held that emergency-permitted teachers are not probationary employees. Respondents, on the other hand, argue that Fine affirms the holding in Golden Valley that emergency permit holders are entitled to the benefits of probationary classification except for service credit toward seniority. However, Fine did not involve classification of probationary employees for layoff purposes and is not as helpful as the parties maintain.

In Fine, an employee working pursuant to an emergency permit received a preliminary credential in late February 2000, which was valid from August 27, 1999 to September 1, 2004. She provided the credential to the district on March 8, 2000, and signed a probationary employee contract on that date. The employee had been working pursuant to a one-year contract as a provisional teacher. On March 14, 2002, the district issued a notice of non-re-election pursuant to section 44921.21(b). The teacher argued that the notice was untimely as she had worked in a probationary, or alternatively, temporary capacity from the effective date of her credential; in either case, Fine argued, she had worked as a probationary employee for almost 3 years and had, in effect, become a permanent employee. The court stated that the matter involved construction of section 44911 and, in particular, whether service between August 27, 1999, and March 8, 2000, was service "under a provisional credential" not entitled

⁴ This case does not involve District interns under 44830.3. Cf: Welch, supra.

to tenure credit under the section. The court answered the question in the affirmative and denied tenure credit. The instant matter, however, involves seniority for layoff purposes, not seniority for tenure purposes. Further, Respondents do not claim they are permanent employees or otherwise entitled to credit toward permanent status for service under a provisional credential.

The court in Fine quoted section 44915 and stated: "Thus, while Fine served under her emergency permit, she was apparently entitled to classification as a probationary employee, for purposes other than attaining tenure. One court, construing section 44915, has so held." The court thereafter cited Golden Valley and discussed its reasoning. The Fine court did not adopt or reject the Golden Valley holding, neither of which was required for resolution of the tenure issue before it.

9. The District argues that only employees whose probationary service counts toward tenure can be considered probationary. It relies on section 44911 and on a recent decision construing the section, Summerfield v. Windsor Unified School District, 95 Cal.App.4th 1026 (2002), which clearly hold that service under a provisional credential, including an emergency permit, cannot be included in computing the time required for classification as a permanent employee. Respondents do not dispute the import of 44911 or Summerfield, but maintain that inability to accrue credit for tenure does not prevent the accrual of seniority for other purposes, such as layoff under sections 44949 and 44955.

The Court in Golden Valley noted that probationary classification provides two primary benefits: employees generally receive credit toward the two-year probationary period required before an employee is classified as permanent; and districts are restricted in the ways they may end the employment of a probationary employee. The Court held that termination protections were available to emergency-permitted employees even if the other primary benefit of probationary status, service credit toward tenure, was not. In so holding, the Golden Valley court properly distinguished Summerfield on the basis that it involved a different benefit of probationary classification. As in Golden Valley, this case involves other benefits of probationary status, namely, certain protections in the event of termination by layoff.⁵ Neither section 44911 nor Summerfield preclude probationary classification pursuant to 44915 or layoff protection pursuant to 44949 and 44955 for teachers holding non-intern provisional credentials.

10. Respondents were not hired under any of the provisions specifically authorizing temporary employees. Thus, Respondents were not hired for temporary classes, as section 44919 permits or as temporary replacements for certificated employees on leave of absence or on long term illness leave, as section 44920 permits. Rather, Respondents worked full time assignments in regular classrooms. Therefore, they are not temporary employees.

⁵ While the termination benefit involved in Golden Valley was not exactly the same as that in this case, i.e., mid-year termination for cause instead of layoffs at the end of the year, this difference is not material. Both cases involve rights of probationary employees in the event of termination.

The court in Fine reached a similar conclusion in addressing the teacher's alternative argument. The employee argued that even if her 1999-00 service was deemed under a provisional credential, she was nevertheless a temporary employee, whose status was changed by operation of law upon retention as a probationary employee for the 2000-01 school year. The court reasoned that sections 44917, 44918, 44919, and 44920 specifically define temporary employees and that Fine, as a teacher working under a provisional credential, was not covered by, or specifically employed pursuant to, any of these statutes.

11. The District nevertheless argues that Respondents may properly be designated as temporary employees by contract, a classification they accepted by entering into the contracts. However, a contract may not be used to abrogate a clear legislative mandate. Fine, supra at 1079; Santa Barbara Federation of Teachers v. Santa Barbara High School District, 76 Cal.App.3d 223, 227-228 (1977). In this case, as set forth in legal conclusion number 6, section 44915 requires classification of Respondents as probationary employees, which legislative mandate is clear and may not be contractually abrogated.

12. The District argues that granting probationary status to those teaching pursuant to emergency permits would lead to the anomalous result of retaining these individuals over less senior, but fully-credentialed teachers. This would be the case has the Legislature chosen to define probationary employees in terms of type of credential held instead of type of work performed. Given the language used in section 44915, and the lack of exception with respect to layoff proceedings, it is not anomalous for the Legislature to permit districts to lay off certain employees who have yet to attain permanent status on the basis of seniority, and the experience it implies, regardless of whether the credential is provisional, preliminary, or clear.

13. Respondents Beyer, Eisenbise, Paulson, and Robertson, who hold emergency permits, are therefore probationary employees entitled to the protection of sections 44949 and 44955, by reason of factual finding numbers 18 through 31 and legal conclusion numbers 6, 9, 10, 11, and 12. Similarly, Respondents Cavasoz, Cooper, Cushman, Guevara, Lynch, Swanson, and Whittington, were improperly classified as temporary employees during a portion of their employment with the District.

14. Respondents Cavasoz, Cooper, Cushman, Guevara, Swanson, and Whittington, who are presently recognized by the District as probationary employees, are entitled to receive credit as for service as probationary employees, for the purpose of layoff seniority, for time served under the incorrect classification, by reason of factual finding numbers 18 through 31 and legal conclusion numbers 6, 9, 10, 11, and 12. Proper classification requires recalculation of these Respondents' seniority dates. Giving them credit for probationary service under waiver or emergency permits results in the following new seniority dates: Cooper (September 1, 1999); Cushman (January 4, 1999); and Swanson (September 1, 2000). Respondent Swanson did not

receive credit for one year worked under a pre-intern credential.⁶

15. Respondents Cooper, Cushman, and Swanson are more senior than Zernickow and Burroughs Ryan, teachers retained to perform services these Respondents are certificated and competent to render. Therefore, cause does not exist to terminate the services of these Respondents, by reason of factual finding numbers 24, 25, 26, 27, 28, 30, and 33 and legal conclusion numbers 6, 9, 10, 11, 12, 13, and 14.

16. Respondents Beyer, Eisenbise, Paulson, and Robertson, who were incorrectly classified as temporary employees, shall have their hire dates as their seniority dates, as follows: Beyer (August 27, 1997); Eisenbise (August 30, 1996); Paulson (August 30, 2000); and Robertson (August 30, 2000).

17. As set forth in legal conclusion number 5 above, qualifications must be considered along with seniority. Section 44955 generally refers to "qualifications" in subsection (c), but more specifically to "certificated and competent" in subsection (b). In this case, the District did not establish specific criteria for defining competence in a particular assignment.

In Campbell Elementary Teachers Association, Inc. v. Abbott, 76 Cal.App3d 796, 814-15 (1978), the court held the district was not required to recognize a certificate unless it had been recorded with the county board of education prior to March 15th, the date the district had to issue preliminary layoff notices. In this case, Respondent Beyer did not provide the District with his preliminary credential prior to March 15, 2004. Likewise, Respondents Eisenbise, Paulson and Robertson, have not established that prior to March 15, 2004 they held a credential, permit or authorization that would enable them to teach during the 2004-05 school year; on the contrary, their provisional credentials are subject to renewal on a yearly basis based on a demonstration of need by the District, which need issues have not been addressed by the District or CTC for the 2004-05 school year.

18. The District has established that it is in the interest of the District and its pupils not to lay off the following individuals because they possess special training and experience to meet a District need: Glenda Bangle; Ana Bernal; Nicole Bucka; Dianne Dunne; Lani Ellington; Brett Hall; Michelle Klein; Robert Mancilla; Frank Martinez; Nancy Maynard; Nathan Nichols; Christopher Pirraglia; Michelle Ronga; and Catherine Strother.

19. With the exception of Respondents Cooper, Cushman, and Swanson, no certificated employee junior to any Respondent was retained to render a service for which the Respondent is certificated and competent to render.

⁶Although Respondents Cavasoz, Guevara, and Whittington have earlier hire dates, it was not established at the hearing that this service was pursuant to an emergency or waiver permit, as opposed to intern or pre-intern credentials.

20. Cause exists to terminate the services of Respondents Babczenko, Beyer, Cavasoz, Dougherty, Eisenbise, Geibel, Guevara, Hadan, Jensen, Long, Lynch, McGhyghy, Moore, Paulson, Robertson, Rubio, Seagle, Simpson-Harris, Somerville, Valenzuela, and Whittington, by reason of factual finding numbers 20, 21, 22, 23, 26, 29, 31, 32, 34, 35, and 36 and legal conclusion numbers 7, 16, 17, and 19.

21. Respondents argue that the District's failure to properly classify its employees has resulted in such a flawed seniority list that the only fair and equitable result is to dismiss the Accusations. Respondents seek an extraordinary remedy, namely, the invalidation of a layoff that is otherwise lawful because of errors in ranking certain certificated employees by seniority. However, they have presented no authority for such broad remedy. Such remedy is unwarranted where, as here, Respondents have had the opportunity to adjust their seniority date at the hearing and to show that less senior employees were retained to perform services the employee was certificated and competent to render. The request is therefore denied.

ORDER

1. The Accusations against the Respondents Babczenko, Beyer, Cavasoz, Dougherty, Eisenbise, Geibel, Guevara, Hadan, Jensen, Long, Lynch, McGhyghy, Moore, Paulson, Robertson, Rubio, Seagle, Simpson-Harris, Somerville, Valenzuela, and Whittington are sustained and the District may notify them that their services will not be needed during the 2004-05 school year due to the reduction of particular kinds of services.

2. The Accusations against the Respondents Cooper, Cushman, and Swanson are not sustained and the District may not terminate their services for the 2004-05 school year due to the reduction of particular kinds of services.

DATED: _____

SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings