

BEFORE THE
BOARD OF TRUSTEES OF THE
JOHNSTONVILLE ELEMENTARY SCHOOL DISTRICT
COUNTY OF LASSEN
STATE OF CALIFORNIA

In the Matter of the Accusation for Layoff of
Certificated Employees Against:

MEGHAN BROWNELL and
LISA URQUIZU,

Respondents.

OAH No. N2006030666

PROPOSED DECISION

Catherine B. Frink, Administrative Law Judge, State of California, Office of Administrative Hearings, heard this matter in Johnstonville, California on April 18, 2006.

John A. Hudak, Attorney at Law, 25 Orinda Way, Suite 303, Orinda, California 94563, represented the Johnstonville Elementary School District.

Donald A. Selke, Attorney at Law, Wells, Small & Selke, 292 Hemsted Drive, Second Floor, P.O. Box 991828, Redding, CA 96099-1828, represented respondents.

The matter was submitted on April 18, 2006.

FACTUAL FINDINGS

1. Dave Urbanac, Superintendent/Principal of the Johnstonville Elementary School District (District), filed the Accusation in his official capacity.

2. Lisa Urquizu (1.0 FTE¹), and Meghan Brownell (1.0 FTE) (respondents) were at all times mentioned herein and now are permanent, certificated employees of the District. They each first rendered paid service to the District on August 21, 2002. They each attained permanent status effective July 1, 2004, by having been employed for two complete, consecutive school years (2002-2003 and 2003-2004), in which the District's average daily

¹ Full-Time Equivalent.

attendance (ADA) was 250 or more, and being reelected for the succeeding school year.² Respondents are the District's least senior employees.

3. On February 15, 2006, the District's Board of Trustees (Board) adopted Resolution No. 2005/2006-02-06-01 (Resolution) in which the Board resolved to terminate the services of 2.0 FTE certificated employees, based upon the following determination:

(1) The following particular kinds of services shall be reduced or discontinued, as specified below, not later than the beginning of the following school year, 2006/2007:

Services to be Reduced Or Discontinued	Grade Level	FTE Reduced/ Discontinued
Classroom Teaching	Grades K-8	2.0 Reduction

(2) In the opinion of the Board it is necessary, by reason of the above reduction and discontinuance of particular kinds of services, to decrease the number of certificated employees of the District, at the close of the 2005/2006 school year.

(3) In determining that it is necessary to reduce or discontinue particular kinds of services and to decrease the number of certificated employees of the District, the Board has considered any positively assured attrition that may occur before the start of the 2006/2007 school year.

4. The Resolution further stated that, "[a]s between employees who first rendered paid service to the District on the same date, the order of termination shall be determined solely on the basis of needs of the District and the students thereof, as provided in Education Code section 44846."

5. The services identified in the Resolution are particular kinds of services that could be reduced or discontinued under Education Code section 44955. The Board's decisions to reduce or discontinue the identified services were neither arbitrary nor capricious, and were a proper exercise of its discretion. The decisions were based on the welfare of the District and its pupils.

6. On February 17, 2006, the superintendent gave written notice to respondents that it had been recommended that notice be given them that their services would not be required for the 2006-2007 school year (Notice). Respondents filed timely requests for hearing. On April 3, 2006, the superintendent issued the Accusations against respondents in

² Education Code section 44929.21, subdivision (b).

this matter. Respondents filed timely notices of defense. The parties stipulated that all jurisdictional requirements of Education Code sections 44949 and 44955 have been met.

7. On June 16, 1992, the Board adopted Board Policy #4135, Certificated Services—Order of Termination and Reemployment (tiebreaker criteria), in order to establish the “the specific criteria to be used in determining the order of termination and reemployment of certificated employees who first rendered paid service in a probationary position on the same date....” The tiebreaker criteria stated that the order of termination would be determined based on the following criteria, in the order listed:

1. California credentials held, in the following order:
 - a. General Elementary, Standard Elementary with a specialization in elementary teaching, or Elementary Multiple Subject
 - b. General Secondary, or Standard Secondary, authorizing to teach multiple elementary grades and subjects
 - c. Single subject credential
 - d. Emergency credential
 - e. Other
2. Teacher evaluations and formal observation reports based on services within Johnstonville Elementary School District, which are on file.
3. Number of years of teaching experience acceptable for initial salary schedule placement or salary schedule advancement in the Johnstonville Elementary School District.
4. Number of units acceptable for initial salary schedule placement or salary schedule advancement in the Johnstonville Elementary School District.

8. The certificated salary schedule for District employees specifies different salary levels for teachers based upon the number of units obtained beyond a bachelor's degree (BA). The levels, also referred to as “columns,” are “BA + 15” (Column I), “BA + 30” (Column II), “BA + 45” (Column III), and “BA + 60” (Column IV).

9. On October 15, 1984,³ the District adopted Article XVIII, PROFESSIONAL GROWTH PROCEDURES, as part of the collective bargaining agreement between the Johnstonville Elementary School District and the Johnstonville Teachers' Association,

³ Amended October 22, 1987, January 26, 1996, and June 20, 2000.

CTA/NEA (CBA). Section 18.1 of the CBA, Professional Growth Procedures, addresses the circumstances under which courses completed by teachers can be submitted for reimbursement in a given calendar year. Section 18.1.1 states:

There shall be a limit of 12 semester units, which shall have prior Superintendent/Board approval, and which may be acceptable for reimbursement in any one calendar year.

- a. The definition of a calendar year for this purpose shall be July 1 to June 30 of the following year.
- b. There shall be a limit of 9 units which may be completed in any college semester.
- c. All units must be submitted on official transcripts or other official verification to the Superintendent for tentative approval and/or reimbursement **prior to September 21 of each calendar year.** (emphasis supplied)

10. Section 18.1.2 of the CBA sets forth the criteria for acceptance of credits for reimbursement. Subsection 18.1.2.f. states that, “[f]or an employee to advance on the **salary columns**, the appropriate units indicated on the salary schedule must be completed with a passing grade from an accredited university/college.” (emphasis supplied)

11. According to the testimony of Mr. Urbanac, the District has not insisted on strict compliance with the September 21 deadline to determine salary schedule placement at the start of the school year. If a teacher informed the District that he or she had additional units, but did not submit documentary evidence by September 21, the District’s practice was to move the teacher up on the salary schedule, with the understanding that the transcript was “on the way.” According to Mr. Urbanac, the paperwork for salary adjustments was typically submitted by mid-October.

12. Respondents were each initially hired in 2002 with salary placement at Column II, Step 1, based on units beyond their BA of at least 30, but less than 45.

13. Susan Junette, a District employee, sent an e-mail to District certificated employees, dated January 14, 2005, which stated:

Dear Staff,

The week of 1-18-05, I will be working on a seniority list, including credits beyond a Bachelors [sic] degree. If you would like to help me with this by providing me with a current transcript, I would certainly appreciate it.

I will provide everyone with a copy when I am done. If you have any questions regarding the list, please let me know immediately.

Thank you for your help.
Susie

14. On January 28, 2005, the District generated a Certificated Seniority List, which showed respondent Urquizu as having greater seniority than respondent Brownell, as follows:

Last Name	First Name	Service Date	Credential No.	Expir.	Units Beyond BA	Credential
**Urquizu	Lisa	8-21-02	20082815	2-1-07	68	Clear
Brownell	Meghan	8-21-02	20162119	6-1-07	43 (Need transcripts)	Preliminary??

**Tie Breaker

15. Respondent Brownell submitted additional information to the District, and Ms. Junette generated Draft #2 Certificated Seniority List/February 17, 2005. The document stated, "[i]f you believe there is an error, please let me know by February 22, 2005." The February 17, 2005 seniority list contained the following notations for respondents:

Last Name	First Name	Outside Paid Experience to Determine Salary Placement	Paid Start Date	Credential No.	Cred.	Exp.	Units Beyond BA	Add'l Cred. Auth.
Urquizu	Lisa	0	8-21-02	20082815	Clear	2-1-07	68	Eng. Soc. Studies CLAD
Brownell	Meghan	0	8-21-02	20162119	Prelim.	6-1-07	57.5	

16. Ms. Junette prepared another certificated seniority list, dated March 4, 2005, which requested corrections by March 5, 2005. The information for respondents was unchanged on the March 4, 2005 seniority list.

17. In anticipation of certificated employee layoffs in the spring of 2005, the District prepared an Order of Employment Analysis for each respondent, in order to apply the District's tiebreaker criteria. In the Order of Employment Analysis for respondent Urquizu, dated March 3, 2005, the District noted respondent Urquizu's salary schedule

placement, as of August 19, 2004, at "Class IV, step III (3 years)."⁴ The District further determined that respondent Urquizu had 68 units beyond BA for salary schedule advancement. The District prepared a similar Order of Employment Analysis for respondent Brownell, dated March 7, 2005, in which it noted respondent Brownell's salary schedule placement, as of September 3, 2004, at "Class III, Step 3,"⁵ with 57.5 units beyond BA.

18. The District applied the tiebreaker criteria in March of 2005, to determine the order of seniority between respondent Urquizu and respondent Brownell. The District determined that both respondents had equivalent credentials (Criteria 1); both had the same number of excellent teacher evaluations (Criteria 2); and both had the same number of years of teaching experience acceptable for initial salary schedule placement (0) or salary schedule advancement (3) in the District (Criteria 3). In applying Criteria 4, the District determined that respondent Urquizu had more units acceptable for salary schedule advancement in the District (BA + 68) than did respondent Brownell (BA + 57.5). On that basis, respondent Urquizu was determined to have greater seniority than respondent Brownell.

19. During the spring of 2005, respondent Brownell was enrolled in courses at Lassen Community College, and was also taking additional units in a correspondence course through UCLA. Respondent Brownell appeared before the Board in March of 2005, in an attempt to persuade the District to give her credit for work in progress, which she anticipated completing by the end of spring 2005. She was told she needed to complete the courses and have transcripts submitted "by the date of the Board taking action" in order to receive credit for courses taken.

20. Respondent Brownell completed 9 units of coursework at Lassen Community College in the spring of 2005. She submitted supporting paperwork to the District, and was categorized at Column IV, Step 4⁶ on the certificated salary schedule for the 2005-06 school year. Respondent Urquizu likewise received placement on the certificated salary schedule for the 2005-06 school year at Column IV, Step 4.

21. Respondent Brownell completed 5.32 units of coursework on or before July 15, 2005, in a program sponsored by UCLA. The District did not have a transcript verifying completion of this course as of January 2006.

22. On January 6, 2006, the District generated a Certificated Seniority List, which was e-mailed to certificated employees of the District. The January 6, 2006, seniority list contained the following notations for respondents:

⁴ This notation refers to Column IV, step 3 (denoting BA + 60, with 3 years of teaching experience).

⁵ This notation refers to Column III, step 3 (denoting BA + 45, with 3 years of teaching experience)

⁶ Denoting BA + 60, with 4 years of teaching experience.

Last Name (yrs @ JO)	First Name	Outside Paid Experience	Paid Start Date	Credential No.	Cred.	Exp.	Units Beyond BA	Add'l Cred. Auth.
Urquizu (3)	Lisa	0	8-21-02	20082815	Clear	2-1-07	68	Eng. Soc. Studies CLAD
Brownell (3)	Meghan	0	8-21-02	20162119	Clear.	6-1-07	66.5	CLAD

23. On January 9, 2006,⁷ the District issued Draft #2 of the Certificated Seniority List. The document states, "[p]lease advise the office of any concerns by January 13, 2006. The information pertaining to respondent is identical to the January 6, 2006, Certificated Seniority List, except that the January 9, 2006 Certificated Seniority List indicated that both respondents had four years of teaching experience with the District. Both the January 6, 2006 and January 9, 2006 seniority lists showed respondent Urquizu as having greater seniority than respondent Brownell.

24. Immediately after receiving the January 6, 2006 Certificated Seniority List, respondent Brownell met with Mr. Urbanac concerning the additional units of credit she had earned by completing the UCLA correspondence course. Mr. Urbanac told her to request and official transcript and submit it to "Susie," i.e., Ms. Junette. Respondent Brownell placed a "rush" request for the transcript, and submitted it to the District on or before February 15, 2006.

25. Based upon the documentation presented by respondent Brownell, the District generated a Certificated Seniority List, dated February 15, 2006, which listed respondent Brownell as having greater seniority than respondent Urquizu, as follows:

Last Name (yrs @ JO)	First Name	Outside Paid Experience	Paid Start Date	Credential No.	Cred.	Exp.	Units Beyond BA	Add'l Cred. Auth.
Brownell (4)	Meghan	0	8-21-02	20162119	Clear.	6-1-2007	71.98	CLAD
Urquizu (4)	Lisa	0	8-21-02	20082815	Clear	2-1-2007	68	Eng. Soc. Studies CLAD

⁷ Erroneously dated "January 9, 2005."

26. The Board met on February 15, 2006 to adopt the Resolution authorizing the reduction of 2.0 FTE classroom teaching positions. The Resolution further "authorized and directed [the Superintendent/Principal] to give written notice of recommendation of non-reemployment no later than March 15, 2006, pursuant to Education Code sections 44949 and 44955, to the Board of Trustees and to all employees whose positions may be affected by this action." The Notice sent by Mr. Urbanac to respondents on February 17, 2006, included a copy of the Resolution, as well as a copy of the February 15, 2006, Certificated Seniority List, showing respondent Brownell as having greater seniority than respondent Urquizu.

27. On February 27, 2006, respondent Urquizu sent an e-mail message to Mr. Urbanac that stated:

Dear Mr. Urbanac,

Since I have completed the units for the AB466 training and I am eligible to receive 8 units for attending I am going to go ahead and get those units. This will move me on the seniority list.

Thanks, Lisa

Despite her assertion in the February 27, 2006 e-mail, respondent Urquizu did not pay for the additional 8 units, and did not provide any documentation of completion of these additional units to the District.

28. After Mr. Urbanac received the e-mail from respondent Urquizu, he re-examined Criteria 4 of the tiebreaker criteria, which specified consideration of the "number of units acceptable for initial salary schedule placement or salary schedule advancement in the Johnstonville Elementary School District." He also reviewed Section 18.1 of the CBA, which addressed the acceptance of credits for reimbursement completed by a teacher in a calendar year, and which required that, "[a]ll units must be submitted on official transcripts or other official verification to the Superintendent for tentative approval and/or reimbursement prior to September 21 of each calendar year." Mr. Urbanac thereafter recommended to the Board that it apply the September 21 deadline for submitting credits for employees to advance on the salary column to the tiebreaker criteria. At hearing, Mr. Urbanac testified that he had given the CBA a "more liberal interpretation" in the past, and wanted to take a "more narrow view" in recognition of the fact that "more issues might arise in the future."

29. On March 24, 2006, the District issued Draft #3 of the Certificated Seniority List, which showed respondent Urquizu as having greater seniority than respondent Brownell:

Last Name (yrs @ JO)	First Name	Outside Paid Experience	Paid Start Date	Credential No.	Cred.	Exp.	Units Beyond BA	Add'l Cred. Auth.
Urquizu (4)	Lisa	0	8-21-02	20082815	Clear	2-1-2007	68	Eng. Soc. Studies CLAD
Brownell (4)	Meghan	0	8-21-02	20162119	Clear.	6-1-2007	66.66	CLAD

30. After respondent Brownell received the March 24, 2006 Certificated Seniority List, she immediately met with Mr. Urbanac to discuss why she was not given credit for the 5.32 additional units she had previously documented. Mr. Urbanac told respondent Brownell that the District "was no longer accepting credits after September 21."

31. On April 6, 2006, three days after the Accusations were served by mail on respondents, the Board adopted Resolution No. 2005/2006-03-27-06 (Tiebreaker Resolution), in which it reiterated the tiebreaker criteria set forth in Board Policy #4135, and stated:

WHEREAS, the Board has applied the above criteria under Board Policy #4135 to determine the order of termination and reemployment of certificated employees who first rendered paid service to the District on the same date, and has determined the order of termination and reemployment under those criteria to be as set forth in attached Appendix A, on the basis of the needs of the District and the students thereof;

NOW, THEREFORE, BE IT RESOLVED by the Board of Trustees of the Johnstonville Elementary School District that as between employees who first rendered paid service to the District on the same date, the order of termination and reemployment on the basis of needs of the District and the students thereof is set forth in attached Appendix A.

Appendix A listed respondent Urquizu as having greater seniority than respondent Brownell:

Last Name (yrs @ JO)	First Name	Outside Paid Experience	Paid Start Date	Credential No.	Cred.	Exp.	Units Beyond BA	Add'l Cred. Auth.
Urquizu (4)	Lisa	0	8-21-02	20082815	Clear	2-1-2007	68	Eng. Soc. Studies CLAD
Brownell (4)	Meghan	0	8-21-02	20162119	Clear.	5-1-2010	66.66	CLAD

32. Respondent Brownell relied on the past practice of the District in accepting proof of additional units earned after September 21 for purposes of determining seniority and application of the tiebreaker criteria. She stated that her units were on file in a timely manner under the past practice of the District, but now, without prior notice to her, the District has imposed a deadline that precludes consideration of those additional units. Because she did not anticipate the change in the District's interpretation of the tiebreaker criteria, she did not provide the District with a transcript of the additional units earned prior to September 21, 2005; she could have done so, had she known the District would require early notification, since the coursework was completed prior to July 2005.

33. Respondent Urquizu asserted her belief that she had greater seniority than respondent Brownell because, when the tiebreaker criteria were applied in the spring of 2005, she was determined to have greater seniority. She was surprised to receive the February 15, 2006 Certificated Seniority List showing respondent Brownell to have greater seniority based on additional units beyond a BA. She "did not realize seniority could be fluid," and she noted that the District's tiebreaker criteria created a situation where employees would need to "compete" with one another by taking additional classes to change their seniority. She "looked into" obtaining credit for additional units in order to keep her job. Respondent Urquizu had not paid for professional development units above the 68 she had previously earned, because it did not help her to further advance on the District's salary scale.

LEGAL CONCLUSIONS

Applicable Statutes and Case Law – Layoffs

1. Education Code section 44846 provides in relevant part:

The following general provisions shall apply regardless of date of employment:

As between two or more employees who first rendered paid service to the district on the same date, and who, following the termination of services, have a statutory preference to reappointment in the order of original employment, the governing board shall determine the order of reemployment solely on the basis of the needs of the district and the students thereof. Any terminated employee subject to the conditions of this section shall, upon request, be furnished in writing, no later than 15 days following such request, the reasons and basis of the needs of the district and the students thereof utilized by the governing board in determining which employee or employees shall be reappointed. This requirement that the governing board provide, on request, a written statement of reasons for determining the order of reappointment shall not be interpreted to give affected employees any legal right or interest that would not exist without such a requirement.

Records showing date of employment, whether kept by the district or by the county, shall be accessible, on demand, to any certificated employee of the district or to his designated representative.

[¶]...[¶]

The order of employment in all districts, when required, shall be determined as prescribed by Sections 44830 to 44855, inclusive.

The governing board shall have power and it shall be its duty to correct any errors discovered from time to time in its records showing the order of employment.

2. Education Code section 44949 provides in relevant part:

(a) No later than March 15 and before an employee is given notice by the governing board that his or her services will not be required for the ensuing year for the reasons specified in Section 44955, the governing board and the employee shall be given written notice by the superintendent of the district or his or her designee, or in the case of a district which has no superintendent by the clerk or secretary of the governing board, that it has been recommended that the notice be given to the employee, and stating the reasons therefor.

[¶]...[¶]

(b) The employee may request a hearing to determine if there is cause

for not reemploying him or her for the ensuing year. A request for a hearing shall be in writing and shall be delivered to the person who sent the notice pursuant to subdivision (a), on or before a date specified in that subdivision, which shall not be less than seven days after the date on which the notice is served upon the employee. If an employee fails to request a hearing on or before the date specified, his or her failure to do so shall constitute his or her waiver of his or her right to a hearing. The notice provided for in subdivision (a) shall advise the employee of the provisions of this subdivision.

(c) In the event a hearing is requested by the employee, the proceeding shall be conducted and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code and the governing board shall have all the power granted to an agency therein, except that all of the following shall apply:

[¶]...[¶]

(3) The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof. The proposed decision shall be prepared for the governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition. None of the findings, recommendations, or determinations contained in the proposed decision prepared by the administrative law judge shall be binding on the governing board. Nonsubstantive procedural errors committed by the school district or governing board of the school district shall not constitute cause for dismissing the charges unless the errors are prejudicial errors. Copies of the proposed decision shall be submitted to the governing board and to the employee on or before May 7 of the year in which the proceeding is commenced. All expenses of the hearing, including the cost of the administrative law judge, shall be paid by the governing board from the district funds.

The board may adopt from time to time such rules and procedures not inconsistent with provisions of this section as may be necessary to effectuate this section.

[¶]...[¶]

3. Education Code section 44955 provides in relevant part:

(a) No permanent employee shall be deprived of his or her position for causes other than those specified in Sections 44907 and 44923, and Sections 44932 to 44947, inclusive, and no probationary employee shall be deprived of his or her position for cause other than as specified in Sections 44948 to 44949, inclusive.

(b) Whenever in any school year the average daily attendance in all of the schools of a district for the first six months in which school is in session shall have declined below the corresponding period of either of the previous two school years, whenever the governing board determines that attendance in a district will decline in the following year as a result of the termination of an interdistrict tuition agreement as defined in Section 46304, whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, or whenever the amendment of state law requires the modification of curriculum, and when in the opinion of the governing board of the district it shall have become necessary by reason of any of these conditions 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) Notice of such termination of services shall be given before the 15th of May in the manner prescribed in Section 44949, and services of such employees shall be terminated in the inverse of the order in which they were employed, as determined by the board in accordance with the provisions of Sections 44844 and 44845. In the event that a permanent or probationary employee is not given the notices and a right to a hearing as provided for in Section 44949, he or she shall be deemed reemployed for the ensuing school year.

[¶]...[¶]

4. Education Code section 44956, subdivision (a)(1), provides:

(a) Any permanent employee whose services have been terminated as provided in Section 44955 shall have the following rights:

(1) For the period of 39 months from the date of such termination, any employee who in the meantime has not attained the age of 65 years shall have the preferred right to reappointment, in the order of original employment as determined by the board in accordance with the provisions of Sections 44831 to 44855, inclusive, if the number of employees is increased or the discontinued service is reestablished, with no requirements that were not imposed upon other employees who continued in service; provided, that no probationary or other employee with less seniority shall be employed to render a service which said employee is certificated and competent to render. However, prior to reappointing any employee to teach a subject which he or she has not previously taught, and for which he or she does not have a teaching credential or which is not within the employee's major area of postsecondary study or the equivalent thereof, the governing board shall require the employee to pass a subject matter competency test in the appropriate subject.

5. As among employees who first rendered service on the same date, a school board must determine the order of termination of employment solely on the basis of the needs of the district and the students. *Moreland Teachers Assn. v. Kurze* (1980) 109 Cal.App.3d 648, 656; *Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831, 844-845.

Application of the District's Tiebreaker Criteria

6. Respondents first rendered paid service to the District on the same date, August 21, 2002. Under the District's tiebreaker criteria, respondents remain "tied" when Criteria 1 through 3 are applied, in that they have equivalent credentials under Criteria 1; they have

equally laudatory teacher evaluations and formal observation reports on file with the District; and they have the same number of years of teaching experience acceptable for initial salary placement and salary advancement in the District.

7. Criteria 4 of the tiebreaker criteria states that the order of termination shall be based on, "[the] number of units acceptable for initial salary schedule placement or salary schedule advancement in the Johnstonville Elementary School District." The tiebreaker criteria does not contain a cutoff date by which teachers must provide information to the District concerning the number of units attained beyond a BA.

8. Article XVIII of the CBA, Professional Growth Procedures, establishes a cutoff date of September 21 of each calendar year⁸ for teachers to provide transcripts or other documentation of units "for reimbursement," i.e., advancement on the salary columns, for that school year. Mr. Urbanac conceded that the District has not strictly enforced the cutoff date in Article XVIII in allowing teachers to receive a higher salary for a given calendar year, so long as required documentation was subsequently provided. The District has never, prior to March of 2006, applied the September 21 cutoff date to the tiebreaker criteria.

On the contrary, the District's past practice of allowing teachers to provide transcripts substantiating additional units after September 21 was well documented. For the 2004-2005 school year, the District sent out an e-mail on January 14, 2005, soliciting current transcripts for "credits beyond a Bachelors [sic] degree" in order to prepare a seniority list. Respondent Brownell was told that she needed to provide transcripts of units completed by the date the Board took action in order to receive credit, implying that she would receive credit for the units if she provided documentation before the Board took action. Both respondents were aware of the tiebreaker criteria, since it had been applied to them in the previous year to create the seniority list for the 2004-2005 school year.

9. As of September 21, 2005, respondent Urquizu had provided to the District transcripts or other documents substantiating 68 units beyond her BA, while respondent Brownell had provided documentation to substantiate 66.66 units beyond her BA.

10. The District prepared a preliminary Certificated Seniority List in January 2006, which showed respondent Urquizu as having greater seniority than respondent Brownell, based upon the tiebreaker criteria. On or before February 15, 2006, after further information was solicited by the District, respondent Brownell provided transcripts to the District substantiating an additional 5.32 units, for a total of 71.98 units beyond her BA. Respondent Urquizu did not provide documentation to the District of any additional units beyond the 68 on file with the District. Based on the information provided by respondent Brownell, the District prepared a Certificated Seniority List dated February 15, 2006, which showed respondent Brownell as having greater seniority than respondent Urquizu, after application of Criteria 4 of the tiebreaker criteria.

⁸ Defined as July 1 to June 30.

11. After the February 15, 2006, Certificated Seniority List was distributed to the teachers, respondent Urquizu informed Mr. Urbanac that she was eligible to receive eight units for attending "AB 466 training," and was "going to go ahead and get those units," to "move [her] on the seniority list." Mr. Urbanac, foreseeing the need for a cutoff date for teachers to provide documentation of additional units beyond a BA for purposes of the tiebreaker criteria, recommended to the Board, and the Board adopted, a retroactive cutoff date of September 21, 2005, for the 2005-2006 school year. The Certificated Seniority List adopted by the Board on April 6, 2006, showed respondent Urquizu as having greater seniority (BA + 68) than respondent Brownell (BA + 66.66).

12. Respondent Brownell contends that she relied on the past practice of the District, in allowing teachers to submit transcripts after September 21 to substantiate units completed, for purposes of determining seniority under the District's tiebreaker criteria. Respondent Brownell earned the additional 5.32 units on or before July 15, 2005. Had she known the District would require proof of completion of these units prior to September 21, 2005 for them to be considered in application of the tiebreaker criteria, she could have taken action to provide that information by the September 21 deadline.

13. Respondent Brownell's argument impliedly raised the issue of equitable estoppel. This doctrine generally requires the establishment of four elements: (1) the party being estopped must be apprised of the facts; (2) the party must intend or reasonably believe that their conduct will be acted upon; (3) the party asserting the estoppel must be ignorant of the true state of facts; and (4) the party asserting the estoppel must actually rely upon the other party's conduct to their detriment. Equitable estoppel may only be applied against a governmental agency "where justice and right require it," and it will not be applied against the government where it would effectively nullify a rule of public policy. *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, at 493; *Barrett v. Stanislaus County Employees Retirement Assn.* (1987) 189 Cal.App.3d 1593, 1607; *Crumpler v. Board of Administration, PERS* (1973) 32 Cal.App.3d 567, 582.

14. In this case, the elements of equitable estoppel were established, namely that the District knew about the September 21 cutoff date in the CBA; the District gave incorrect information to respondent Brownell, in that it gave her the opportunity to provide documentation of additional units earned prior to February 15, 2006; respondent Brownell was unaware of the true facts, namely that the District intended to retroactively apply the September 21 cutoff date; and she relied on the District's action to her detriment, in that she did not provide the documentation, which otherwise could have been made available, prior to September 21, 2005. There is no public policy that would be nullified if respondent Brownell were to be awarded greater seniority than respondent Urquizu by application of the tiebreaker criteria. The District could have imposed a deadline after February 15, 2006, but prior to the date of hearing, for respondents to provide transcripts to substantiate units beyond a BA for purposes of application of the tiebreaker criteria. With proper notice to certificated employees, it may henceforth apply the September 21 cutoff date to units deemed "acceptable" for consideration under Criteria 4 of the tiebreaker criteria. "Justice and right" require the application of estoppel

against the District, and the District is estopped from applying a retroactive cutoff date of September 21, 2005, for the 2005-2006 school year.

15. Respondent Brownell has 71.98 units acceptable for salary schedule advancement with the District, whereas respondent Urquizu has 68 units. Therefore, applying the tiebreaker criteria to respondents, respondent Brownell is entitled to greater seniority for the 2005-2006 school year.

Conclusion

16. Jurisdiction for the subject proceeding exists pursuant to Education Code sections 44949 and 44955. All notices and other jurisdictional requirements of those sections have been met.

17. Cause exists for the reduction or discontinuation of the particular kinds of services and of 2.0 FTE certificated positions at the end of the 2005-2006 school year, pursuant to Education Code sections 44949 and 44955. Therefore, cause exists pursuant to Education Code sections 44949 and 44955 to give notice to respondents that their services will not be required for the ensuing school year, 2006-2007.

18. Cause for the reduction or discontinuation of services relates solely to the welfare of the District's school(s) and pupils within the meaning of Education Code section 44949.

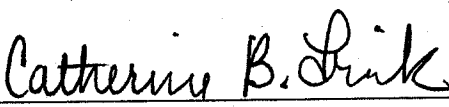
19. No employee with less seniority than either respondent is being retained to render a service that either respondent is certificated and competent to render.

ORDER

1. Pursuant to Legal Conclusion 15, the District shall amend its Certificated Seniority List to reflect that respondent Meghan Brownell has 71.98 units beyond BA, and is entitled to greater seniority than respondent Lisa Urquizu, who has 68 units beyond BA.

2. Notice shall be given to respondents that their services will not be required for the 2006-2007 school year because of the reduction or discontinuation of particular kinds of services. Notice shall be given to respondents in inverse order of seniority.

DATED: 5-2-06



CATHERINE B. FRINK
Administrative Law Judge
Office of Administrative Hearings