Teacher Layoffs in California: An Update

Nancy B. Ozsogomonyan
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By Nancy B. Ozsoyomany*

The number of school districts resorting to layoff statutes to reduce their certificated staffs is steadily growing as a result of the continuing decline in enrollment and increasing economic difficulties. Primarily as a result of economic uncertainty from the threat of Proposition 13, in 1978 there was a 100% increase over the preceding year in the number of California districts requesting state-conducted layoff hearings.

* B.A., 1965, Drew University; J.D., 1977, University of California, Hastings College of the Law. Member, California State Bar.

1. Certificated employees include, for example, teachers, counselors, librarians, and administrators. See CAL. EDUC. CODE §§ 44001, 44006, 87001, 87006 (West 1978). As of April 30, 1977, the Education Code was reorganized and renumbered. Cal. Stat. 1976, ch. 1010. As part of the reorganization, provisions governing community college districts were segregated from those applicable to elementary and secondary school districts. Sections that previously had applied to both community college districts and kindergarten-to-grade-12 (K-12) districts were codified twice in the reorganized Code. Thus, for example, § 12902 became §§ 44001 (K-12) and 87001 (community colleges). Similarly, § 13447, which governed layoffs, was made §§ 44955 and 87743.

2. Enrollment statewide in grades K-8 declined 2.3% between 1976 and 1977, as compared to 1.7% in the previous year. High school (grades 9-12) enrollment declined 0.8% between 1976 and 1977, as compared with an increase of 0.1% between 1975 and 1976. BUREAU OF SCHOOL APPORTIONMENTS AND REPORTS, CALIF. DEP'T OF EDUCATION, ENROLLMENT AND STAFF DATA 1 (1978). Between 1977 and 1978 the decline was 3.1% in grades K-8 and 2.1% in high school. Adult education ADA, sharply curtailed in post-proposition 13 budgets, declined by 39% between 1977 and 1978, compared to .7% in the previous year. Palo Alto Times, May 5, 1979, citing report issued May 4, 1979, by the State Department of Education.

3. Proposition 13, passed on June 6, 1978, added art. XIII-A to the California Constitution, which limited real property taxes, with some exceptions, to one percent of the assessed valuation of the property reflected on the 1975-76 tax bill. Because property taxes had been a major source of revenue for public school districts, and because Proposition 13 provided no mechanism for replacing lost revenues, districts had no way of estimating the amount of funding they could expect for 1978-79. Absent remedial legislation, Proposition 13 would have resulted in a loss of $3.691 billion to California public education. ASSEMBLY REVENUE AND TAXATION COMMITTEE, FACTS ABOUT PROPOSITION 13: THE JARVIS/GANN INITIATIVE 49 (Pub. No. 659, rev. ed. Feb. 21, 1978). It was not until June 24, 1978, that the governor signed S.B. 154, which provided some relief from the effects of Proposition 13 through increased state funding. Cal. Stat. 1978, ch. 292, §§ 1, 13.

4. The 249 requests for hearings in 1978 represented a 100% increase over the number
In a 1976 law review note, this author described the difficulties of using the layoff statutes, difficulties caused in large part by statutory ambiguities and a lack of adequate judicial interpretation. The note identified areas needing remedial legislation or judicial interpretation and suggested possible resolutions. Since 1976, appellate courts have clarified some of the important issues of teacher layoffs, but other questions remain unanswered. This Article will review recent court decisions and analyze issues yet to be resolved. The analysis will be made in light of proposed 1978 decisions of administrative law judges (hereinafter at times referred to as ALJs). Study of the proposed decisions shows that, although ALJs agree on most issues, important differences in interpretation exist in areas in which neither the legislature nor the courts have yet provided guidance.

**Layoffs Motivated by Economic Uncertainty**

When economic concerns dictate a reduction in certificated staff, a district must act under the provisions of Education Code section 44955 (section 87743 for community colleges). The sections authorize layoffs only when there has been a decline in average daily attendance (ADA) or a reduction or discontinuance of a particular kind of service. If one

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6. Although ALJs submit proposed decisions, the final decision is that of the governing board of the district. A board may reject a proposed decision and render its own decision after reviewing the record, including the transcript of the hearing. Cal. Gov't Code § 11517 (c) (West Supp. 1978). The board's decision may be appealed to the superior court by writ of mandate. Id. § 11523. The proposed decisions cited in this Article may have been rejected by the governing boards and/or appealed to superior courts. In other cases, districts may have decided not to implement favorable decisions because financial difficulties were resolved. Attention is given to the proposed decisions because they are helpful in charting the trends in layoff law.

7. Cal. Educ. Code §§ 44955, 87743 (West 1978). General state financial support for school districts and community college districts is based upon their average daily attendance (ADA). In general, the ADA of K-12 school districts represents the average number of pupils actually attending classes on school days, rather than the number listed on enrollment records. See Cal. Educ. Code §§ 46300-46392 (West 1978). Community college ADA is determined by attendance during two "census weeks" each semester, rather than by actual
of these conditions exists, the fact that the motivation is economic is immaterial as long as the layoff decision is not arbitrary or capricious.\textsuperscript{8}

In \textit{Campbell Elementary Teachers Association v. Abbott},\textsuperscript{9} the court expressly upheld the right of a school board faced with financial uncertainties to reduce services because of budgetary considerations. The district's financial posture was uncertain due in part to the failure of a tax-revenue ballot measure. Although the district hoped to reinstate some services, it was compelled to make its initial decision and send preliminary notices of dismissal by March 15.\textsuperscript{10} The court held that as long as a decision to reduce or discontinue services is reasonable, the motivation is not open to challenge. Further, it was held reasonable for a district faced with economic uncertainties to reduce services in order "to allow the district maximum flexibility in determining staffing for the ensuing school year in light of both available resources and needs."\textsuperscript{11}

In spring, 1978, many districts initiated layoff procedures as a response to financial uncertainties created by the possible passage of Proposition 13.\textsuperscript{12} In the ensuing layoff hearings, teachers contended that reductions in services based solely on anticipated passage of the proposition were arbitrary and capricious.\textsuperscript{13} ALJs rejected these contentions, finding that the financial uncertainties raised by Proposition 13 made the districts' actions reasonable.\textsuperscript{14} Moreover, the fact that the funding of certain programs would not be affected by Proposition 13

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\textsuperscript{9} 76 Cal. App. 3d 796, 143 Cal. Rptr. 281 (1978).


\textsuperscript{11} 76 Cal. App. 3d at 808, 143 Cal. Rptr. at 288-89.

\textsuperscript{12} See note 3 supra.

\textsuperscript{13} See, e.g., Mary Sonderegger, No. L-16440, at 5 (Glendale Unified School Dist., July 7, 1978) (Geftakys, ALJ); Lucian G. Bonnafoux, No. L-16535, at 9 (San Dieguito Union High School Dist., May 10, 1978). In this Article, proposed decisions are cited by the name of the first respondent listed in the caption of the decision followed in parentheses by the name of the school district and the name of the ALJ rendering the decision. Copies of proposed decisions cited are on file with \textit{The Hastings Law Journal}.

\textsuperscript{14} See, e.g., Mary Sonderegger, No. L-16440, at 5 (Glendale Certified School Dist., July 7, 1978) (Geftakys, ALJ); Lucian G. Bonnafoux, No. L-16535, at 9 (San Dieguito Union High School Dist., May 10, 1978) (Britt, ALJ); Earl Alexander, No. N-11241, at 7 (Menlo Park City School Dist., Apr. 26, 1978) (Judson, ALJ); Mary Kemmerer, No. N-
did not preclude a district from reducing those programs.\textsuperscript{15} The only standard applicable to reductions in service is one of reasonableness, and reducing services unaffected by Proposition 13 presumably enabled the district to make fewer reductions in other areas.\textsuperscript{16}

Unfortunately, because preliminary notices of dismissal must be served on or before March 15,\textsuperscript{17} districts often must anticipate reduced services before they know whether the economic situation in the ensuing school year will actually require such reductions. The layoffs motivated by the possible passage of Proposition 13\textsuperscript{18} are particularly illustrative of such premature reductions. When districts give layoff notices, conduct hearings, and send final termination notices, only to rescind them when the anticipated financial difficulties do not occur, teachers are understandably upset. For the sake of efficiency and consideration for the teachers, the yet unresolved factors relating to teacher layoffs must be realistically examined.

\textsuperscript{11}293, at 3, and Memorandum Opinion at 3 (Piner-Olivet Union School Dist., Apr. 24, 1978) (Doyle, ALJ).


\textsuperscript{16} In one case, Proposition 13-related layoffs were found to be arbitrary and capricious for reasons apparently unrelated to the district’s economic motivation. R. Pisicotta, No. L-16413, at 4-5 (South Bay Union High School Dist., May 5, 1978) (Chapman, ALJ). The district had resolved to reduce or discontinue certain services and had put a number of employees on notice. The employees to be affected by the decision were identified solely by their places on the district’s seniority list without regard to whether they were performing a service to be eliminated. The district’s failure to consider the credentials and qualifications of the noticed employees rendered its decision arbitrary and capricious. See notes 136-50 & accompanying text \textit{infra}.

\textsuperscript{17} See note 10 \textit{supra}. Children’s center employees are an exception. They may be laid off at any time during the school year for lack of district funds or lack of work. In such cases, employees are not entitled to the notice and hearing provisions of 44949 or 87740. \textsc{Cal. Educ. Code} § 8366 (West 1978); \textit{California Teachers Ass'n v. Pasadena Unified School Dist.}, 79 Cal. App. 3d 556, 563-64, Cal. Rptr. 100, 103-4 (1978). Persons hired under contract with an outside agency or for a categorically funded project are entitled to March 15 notice and subsequent hearing unless the reason for their termination is the expiration of the contract or specially funded project. \textit{Hart Fed’n of Teachers v. William S. Hart Union High School Dist.}, 73 Cal. App. 3d 211, 215-16, 141 Cal. Rptr. 817, 818-19 (1977). March 15 notices are required by law to give teachers fair warning that they may not be retained. \textit{Karbach v. Board of Educ.}, 39 Cal. App. 3d 355, 362, 114 Cal. Rptr. 84, 88 (1974). Districts’ decisions must be based on conditions as they are known at that date. See \textit{Lewin v. Board of Trustees}, 62 Cal. App. 3d 977, 982, 133 Cal. Rptr. 385, 388 (1976).

\textsuperscript{18} See note 3 \textit{supra}. In 1978, the legislature failed to pass two bills to extend the March 15 deadline to cure the uncertainties caused by Proposition 13. \textit{A.B. 2554} (1978); \textit{S.B. 1520} (1978).
Issues Related to Layoffs for Decline in Average Daily Attendance

Computing ADA for the First Six Months of the School Year

A district is permitted each year to lay off a percentage of its employees corresponding to the decline it has suffered in ADA. The percentage is computed by comparing ADA of the first six months of the current school year with the first six months of either of the two preceding years. In *Campbell Elementary Teachers Association v. Abbott*, teachers contended that the district should have compared the ADA of only the sixth month of the years in question, but the court upheld use of the average of the figures for each of the first six months. The court did not specify whether a district must use calendar months or "school months."

A school month is a four-week period used for reporting ADA to the state and usually varies from calendar months. In hearings held in spring 1978, administrative law judges rejected contentions that the statute requires the use of calendar months. This conclusion seems sound because section 37201 requires use of "school months" in computing ADA for attendance purposes, and section 44955 does not specify that calendar months must be used in computing the same ADA for layoffs.

Although the school year legally begins on July 1, the six months generally used for ADA comparison begin with the commencement of the fall semester in September. ALJs have found the use of summer school ADA figures inappropriate because summer school may vary widely from year to year by reason of optional attendance and changes.

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21. Id. at 809-10, 143 Cal. Rptr. at 289.
ADA accounting presents special problems for community colleges. Colleges compute attendance on the basis of weekly student contact hours during two “census weeks” per semester, rather than on actual daily or monthly attendance. The first six months of the college year may extend into the second semester but end before the first spring semester census is taken. Thus, use of the “first six months” comparison standard becomes impossible in that no way exists to reliably account for ADA during the short period between the beginning of the second semester and the end of the sixth month.

The only reasonable way to compare community college ADA for two different years is to use only the first-semester ADA. Until the legislature amends section 87743 to permit community colleges to use semesters as a comparison period, however, districts probably will prefer to base their layoffs on reduction or elimination of services.

Accounting for Attrition in ADA Cases

In *Burgess v. Board of Education*, the court held that a school district must consider attrition when determining the number of employees to be laid off because of a decline in ADA. The court did not reach the question of what evidence of attrition, past or future, the district must consider.

Two years later *Lewin v. Board of Trustees* partially resolved the issue, holding that in sending March 15 notices, a district must consider only “positively assured attrition, such as that which has already occurred in the computation period and mandatory retirements.” That


28. 41 Cal. App. 3d 571, 116 Cal. Rptr. 183 (1974); see *Teacher Dismissals*, supra note 5, at 1405. Attrition refers to the number of employees who have left the employment of the district during a particular period of time.


30. *Id.* at 982, 133 Cal. Rptr. at 388. A resignation should not be counted as assured attrition until accepted by the governing board, see *Cal. Educ. Code* §§ 44930, 87730 (West 1978), because unless otherwise provided an employee may withdraw the resignation “if she or he does so (1) before its effective date, (2) before it has been accepted, and (3) before the appointing power acts in reliance on the resignation.” Armistead v. State Personnel Bd., 22 Cal. 3d 198, 206, 583 P.2d 744, 748, 149 Cal. Rptr. 1, 5 (1978). See also *Leithliter v. Board of Trustees*, 12 Cal. App. 3d 1095, 1098-99, 91 Cal. Rptr. 215, 217-18 (1970); Shade v. Board of Trustees, 21 Cal. App. 2d 725, 727, 70 P.2d 490, 491 (1937). If, however, the
is, in determining how many teachers can be laid off due to declining enrollment, the district must first consider how many teachers will not be returning due to death, retirement, or resignation. The district need not account for potential or anticipated attrition. The court recognized that

[b]efore 15 March of each year the board must make its preliminary determination of the number of permanent employees not to be re-employed for the following year. Board members are not soothsayers. Voluntary retirements, resignations, and deaths may occur—and they may not. Certificated employees cannot have it both ways: they cannot expect to receive early notice of termination and also to limit that notice by yet unknown later events.\(^3\)

Assured attrition no longer includes mandatory retirements because teachers now have the right to continued employment after normal retirement age, upon certification of competency by the governing board.\(^2\) Also excluded from attrition are teachers temporarily absent on leave.\(^3\)

There are at least two other circumstances in which attrition should not be considered. If no employee is credentialed and competent to perform the service of a resigned or retired employee, the district should not be required to count the latter’s departure as attrition.\(^3\) In such a case, the “attrition” has not reduced the number of layoffs made necessary by the decline in ADA. Attrition also should not include a teacher’s resignation or retirement when the resulting vacancy is filled by an administrator displaced from a newly eliminated administrative position.\(^3\)

A question not yet fully answered is whether districts must account for attrition taking place between March 15 and the date when layoff board had delayed unnecessarily in order to avoid the necessity of counting the resignation as attrition, the result would be different.

31. 62 Cal. App. 3d at 982, 133 Cal. Rptr. at 388.
32. CAL. EDUC. CODE § 23922 (West 1978); CAL. GOV'T CODE § 7508 (West Supp. 1979).
decisions become final, usually May 15. Appellate courts have not yet addressed this issue directly.\textsuperscript{36} Administrative law judges sometimes direct districts to reduce the number of layoffs by assured attrition occurring prior to May 15.\textsuperscript{37} Apparently, this direction is on the ground that, because layoffs are limited by statute to the number "made necessary" by the decline in ADA, attrition occurring prior to May 15 reduces the number of necessary layoffs.\textsuperscript{38} Because districts cannot increase the number of layoffs to reflect the ADA that has declined after March 15, however, it is more reasonable to require consideration only of attrition known to the district on March 15. The statute speaks in terms of necessary layoffs but does not dictate a date at which the necessity should be measured. At least two superior court judges have held that districts need not consider attrition occurring after March 15.\textsuperscript{39}

Another unanswered question is whether employees laid off in one year must be counted as attrition, reducing the number of ADA-related layoffs permitted the next year. Administrative law judges addressing this question in 1978 were not always in accord,\textsuperscript{40} and no appellate

\textsuperscript{36} In the cases involving ADA-related layoffs decided thus far, the attrition at issue was that which took place during the computation period and was known to the district on March 15. See Campbell Elementary Teachers Ass'n v. Abbott, 76 Cal. App. 3d 796, 809-10, 143 Cal. Rptr. 281, 289-90 (1978); Lewin v. Board of Educ., 62 Cal. App. 3d 977, 982-83, 133 Cal. Rptr. 385, 388 (1976); Burgess v. Board of Trustees, 41 Cal. App. 3d 571, 578-79, 116 Cal. Rptr. 183, 188 (1974). This was also true in Degener v. Governing Bd., 67 Cal. App. 3d 689, 699, 136 Cal. Rptr. 801, 806 (1977), a case involving layoffs for reduction in service and not decline in ADA. In the above cases, the courts recognized the inability of districts to increase the number of layoffs after March 15 and in Degener and Campbell used this fact to limit the districts' responsibility for considering credentials filed after that date. The same rationale could apply to consideration of attrition. In another case involving only reduction-in-service layoffs, the court held that an employee being laid off has the right to be reassigned to a vacancy that occurred before the termination of her employment. Wellbaum v. Oakdale Joint Union School Dist., 70 Cal. App. 3d 93, 99, 138 Cal. Rptr. 553, 557 (1977). The court does not even mention the term "attrition," and, in fact, the district had decided to fill the vacancy caused by the resignation by hiring an applicant from outside. \textit{Id.} at 96, 138 Cal. Rptr. at 554. The issue was whether the teacher being laid off had reassignment rights entitling her to the position.


\textsuperscript{38} See CAL. EDUC. CODE \S\S 44955, 87743 (West 1978); Teacher Dismissals, supra note 5, at 1406.


\textsuperscript{40} See Sheila DeWoskin, No. L-16518, at 3 (Warner Union School Dist., Apr. 19, 1978) (Willd, ALJ) (reduction of positions in 1977 not considered as natural attrition when computing layoffs permitted in 1978). \textit{But see} Gail Loucks, No. N-11134, at 3 (Fairfax
court has considered the matter. In establishing the present rule—that attrition must be considered so that layoffs will not exceed the number made necessary by decline in ADA—courts have spoken in terms of normal or natural attrition resulting from resignations or retirements.41 Additionally, only assured attrition need be considered.42 Although prior layoffs may reduce the layoffs made necessary by the next year’s decline in enrollment, the prior layoffs are surely not normal or natural attrition, nor are they, in a sense, assured, for laid-off teachers have preferential rights to reemployment.43 Moreover, the economic salvation resulting from use of the discretionary power to reduce services will be canceled if teachers laid off for reduction in services must be counted as attrition in the following year’s ADA calculations.44 Thus,

43. CAL. EDUC. CODE §§ 44956, 44957, 87744, 87745 (West 1978).
44. Teacher Dismissals, supra note 5, at 1413 n.90. Whether prior ADA-related layoffs should be considered is an important question. Assume, for example, that in year one there were 500 teachers employed and an ADA of 10,000 with no layoffs in year one or the past year. The next year, year two, ADA declined 10% to 9,000 because there were no resignations or retirements. The number of teachers remained at 500. Application of the regularly used formula and using year one as the base year results in 50 layoffs. See Teacher Dismissals, supra note 5, at 1404-05. After the year two layoff, there is a ratio of 450 teachers to 9000 ADA, the same ratio as 500 teachers to 10,000 ADA in year one. Suppose, now, that in year three there is a further 10% decline in ADA from 9,000 to 8,100. The district may now compare its 8,100 ADA with that of either of the past two years to determine the number of layoffs.

Using year one as the base year, we see that there has been a 19% decline in ADA between year one and year three. Taking 19% of 500 teachers employed in year one we obtain 95, which subtracted from 500 gives the number of teachers to which the district can reduce its staff: 405. Assuming again for the sake of simplicity that there have been no resignations or retirements, we consider the fact that attrition resulting from layoffs in year two has already reduced the staff to 450. Subtracting 405 from 450, we obtain the number of permissible layoffs: 45. This gives a teacher/student ratio of 405:8100, which is the same as the 500:10,000 ratio that existed in year one.

If we use year two as the base year, the result may be startlingly different if attrition from layoffs in year one must be considered. If we apply the 10% decline between year two and year three to the 500 teachers employed in year two, we obtain the number 50, which when subtracted from 500 gives the number to which the staff can be reduced: 450. Since, however, the layoffs effective at the end of year two already reduced the staff to 450, apparently no further layoffs are permitted despite the fact that there has been an additional 10% decline in ADA. This result is erroneous since it ignores the fact that the reduction in staff from 500 to 450 occurred as a result of the ADA decline between year one and year two.

Consideration of attrition caused by the 50 layoffs in year two should not be required in
both statutory and policy reasons favor not counting such prior layoffs as attrition.

**Issues Related to Reduction or Discontinuance of Particular Kinds of Services**

**Definition of a Particular Kind of Service**

Prior to 1977, one of the greatest difficulties in using the layoff statutes was the different interpretations given to *Burgess v. Board of Education* in determining what was a particular kind of service. In *Burgess*, the court interpreted the term “particular kind of service” to refer only to services that could be completely eliminated. It concluded that if a service could not be discontinued, it could not be reduced.

Given this interpretation, the court was compelled to find that an increase in class size, which was characterized as “teaching in general,” was not a particular kind of service because teaching could not be totally eliminated. The court in *Degener* clearly rejected the faulty premise on which *Burgess* was based by adopting a standard permitting the reduction of services that could not be totally eliminated, so long as the service was not reduced below the level required by law. Thus, there is no reason why “teaching in general” may not be reduced if statutory minimums are maintained. Doing so would permit districts to identify “classroom teaching” as a particular kind of service that could be reduced to justify teacher layoffs.

Year three because that attrition does not reduce the number of layoffs made necessary by the decline in ADA between year two and year three.

An appropriate formula would use 450 as the number of teachers in the base year two, rather than 500. Applying the 10% decline in ADA to 450 would allow the district to lay off 45 teachers in year three, minus any normal and assured attrition resulting from resignations or retirements during the computation period.

From the above, a general rule may be derived. The number of certificated employees in the base year should be adjusted to reflect the number of employees laid off during that year. The percentage of decline in ADA should then be applied against the adjusted base year figure. Thus, in the hypothetical, we would take 10% of 450, which is 45. The present staff could be reduced to 405 (405-45). Any attrition resulting from retirement or resignations would further decrease the number of layoffs from 45.

47. See *id.*
49. Class size is a subject of negotiation under the collective bargaining statutes appli-
nity colleges, which can readily identify particular course offerings, have little difficulty in designating services to be reduced. Elementary schools, however, often have only a few special services in addition to general classroom teaching. Permitting reductions in "teaching in general" would give elementary schools more than token financial flexibility and would bring them to parity with high school and community college districts.

In 1976, this author argued that Burgess was being improperly applied to prohibit dismissals as a result of reductions in particular course offerings. In 1977, the appellate court that decided Burgess adopted the suggested standard and held in Degener v. Governing Board that "as long as a district does not reduce its offerings in a code mandated course below the level required by law, that reduction should be considered a reduction of a particular kind of service. . . ." The standard announced in Degener applies also to services other than the teaching of particular courses. In Campbell Elementary Teachers Association v. Abbott, the following were found to be particular kinds of services: reading specialists, consultants, nurses, counselors, instrumental music teachers, master teachers, traveling librarians, learning assistant teachers, psychologists, speech therapists, and Title I specialists. The court held that "[p]articular services provided by the district in excess of the minimum mandated by statute are subject to discretionary reduction under section 13447." Although the courts in both Campbell and Degener distinguished the Burgess decision, it may be argued that Burgess has been effectively overruled.

In actual cases, administrative law judges now consistently permit layoffs based on reductions in mandated and elective courses. There

cable to California teachers. Cal. Gov't Code § 3543.2 (West Supp. 1979). In one 1978 layoff hearing, teachers contended that the proposed layoffs should be invalidated because they might violate provisions of the collective bargaining agreement concerning student-teacher ratios. The ALJ rejected this contention, stating that the hearing was not the place for consideration of the bargaining contract. In this case, the alleged contract violation did not deprive employees of any rights guaranteed by the layoff statutes. Kathleen Allen, No. L-16514, at 6 (Laguna Beach Unified School Dist., June 16, 1978) (Willd, ALJ). In contrast, when a violation of the collective bargaining agreement adversely affected statutorily guaranteed seniority rights, the layoffs were invalidated. Christine Shimizu, No. L-16507, at 3 (Huntington Beach City School Dist., Apr. 12, 1978) (Maron, ALJ).

50. Teacher Dismissals, supra note 3, at 1411.
52. Id. at 695, 136 Cal. Rptr. at 804.
54. Id. at 811, 143 Cal. Rptr. at 290.
55. Id.
continue to be differences, however, concerning whether reducing the number of classroom teachers, increasing class size, decreasing the length of the school day, and reducing or eliminating preparation periods and study halls constitute the reduction of particular kinds of services. At layoff hearings, those representing teachers argue, citing Burgess, that these subjects relate to "teaching in general" rather than particular kinds of services, and, therefore, their reduction cannot justify layoffs. Districts contend that under the Degener and Campbell decisions any service may be reduced.

The proposed decisions of ALJs in 1978 show a variety of results. At least two ALJs concluded that a reduction in the number of classroom teachers involved a particular kind of service.\(^{56}\) One case involved a small district that had no services it could reduce other than classroom teaching.\(^{57}\) The ALJ noted that the impact of Burgess has been lessened by Campbell and Degener and that logic dictates that a district should be able to reduce its only service so long as teaching services do not fall below the state-mandated minimum.\(^{58}\) In other cases, ALJs found that a reduction in classroom teachers by reason of an increase in class size was not a reduction of a particular kind of service.\(^{59}\) One ALJ held that reducing the number of periods from seven to six did not involve a particular kind of service,\(^{60}\) but another found that reducing the instructional program to the state's minimum day was a reduction of a particular kind of service.\(^{61}\) One ALJ held that elimination of teacher preparation periods would not justify layoffs,\(^{62}\) but another found that study halls were a particular kind of service.\(^{63}\)

An appellate court must face directly the issue of whether Burgess


\(^{57}\) Margaret Capell, No. N-11290 (Dunham School Dist., Apr. 19, 1978) (Hanley, ALJ).

\(^{58}\) Id. at 3.


\(^{60}\) Gerald Johnson, No. L-16743, at 4 (Manhattan Beach City School Dist., May 4, 1978) (Chapman, ALJ).


\(^{63}\) Nancy Bechtel, No. L-16547, at 6 (Seal Beach School Dist., May 1, 1978) (Nelson, ALJ).
has been effectively overruled. Until that occurs, or until a court more clearly distinguishes particular kinds of services from "teaching in general," the conflicting interpretations given by administrative law judges can be expected to continue.

Reductions Below State-Mandated Levels

Services reduced below the level mandated by law are not "particular kinds of services" under section 44955 or section 87743 of the Education Code. When teachers raise this issue, some administrative law judges seem to place on the district the burden of establishing that the reductions will not impair the district's ability to meet statutory obligations. For example, in 1978, ALJs found in several cases that districts had not shown that after implementing layoffs they would be able to meet the requirements of state-mandated bilingual programs. Where the legality of the reductions in services was not directly challenged, however, ALJs presumed that the districts would act lawfully in maintaining services at legally required levels.

In some cases, teachers argued that reductions in required health services and in teaching of the educationally and physically handicapped reduced these mandated services below legal levels. Although certain health services and services for the handicapped are mandated, a district may eliminate the performance of those services by district employees and contract for them with a public or private agency. If a

district establishes that the service can be provided on a contract basis and asserts that the district intends to do so, the layoffs are allowed.\textsuperscript{70} Arguments that the contracting agencies will not meet legally required standards should be rejected as premature. The ALJs are not in a position in April to judge whether the new manner of providing services in the ensuing school year will meet legal requirements.

**Specificity with which Particular Court Offerings Must be Identified**

A community college district planning layoffs in 1978 identified the services to be reduced or discontinued by divisions, such as humanities, rather than specifying particular departments, such as English, or particular courses, such as twentieth-century American poetry.\textsuperscript{71} The administrative law judge held that this procedure complies with statutory requirements and perhaps is the only practical method when large-scale reductions must be achieved.\textsuperscript{72} On the other hand, another ALJ held in a case involving a large unified district that a service described as three full-time-equivalent positions in vocational education was not identified with sufficient specificity.\textsuperscript{73} Although vocational education does not appear to be a distinguishably less specific term than humanities, it may be that the individuals to be affected were readily identifiable from the description in the former but not the latter case. In any event, districts should attempt to define services as specifically as possible to enable employees to assess the probability of their nonretention.\textsuperscript{74} Identification by department should be sufficient to achieve that purpose.

**Accounting for Attrition in Reduction-in-Service Cases**

There was an almost even split of opinion among administrative law judges in 1978 on whether districts must account for attrition in cases involving reduction in services.\textsuperscript{75} Some ALJs may feel that Dege-

\textsuperscript{70} See cases cited note 68 supra.

\textsuperscript{71} J. Barkley, No. N-11277, at 2-3 (State Center Community College Dist., May 3, 1978) (Coffman, ALJ).

\textsuperscript{72} Id. at 3.

\textsuperscript{73} In re Non-Rehiring of 62 Certificated Employees, No. N-11162, at 3 (Berkeley Unified School Dist., May 1, 1978) (Doyle, ALJ).

\textsuperscript{74} Cf. Karbach v. Board of Educ., 39 Cal. App. 3d 355, 362, 114 Cal. Rptr. 84, 88 (1974) (notice should provide the basis on which teacher can assess probability of reemployment).

\textsuperscript{75} Cases in which the ALJ held that consideration of attrition was not required include Carol Terzakis, No. L-16549, at 4 (Encinitas Union School Dist., June 21, 1978) (Mevis, ALJ); Linda Nichols, No. N-11331, at 3 (Campbell Union School Dist., May 4, 1978) (Hanley, ALJ); Janet Hunter, No. N-11372, at 4 (Burlingame Elementary School
ner v. Governing Board\textsuperscript{76} requires consideration of attrition. In that case, which involved only reduction in services, the district had considered assured attrition, but teachers contended that potential attrition also should have been considered.\textsuperscript{77} The court in Degener quoted Lewin v. Board of Trustees\textsuperscript{78} for its holding that only assured attrition and not potential attrition need be considered. Because Lewin involved layoffs based on a decline in ADA as well as reduction of services, the decision is not necessarily applicable where there has been only a reduction of services. Moreover, the court in Lewin relied on Burgess v. Board of Education,\textsuperscript{79} in which the layoffs were based solely on decline in ADA. In Degener, the court did not directly address the issue of attrition in reduction-in-service cases because the district had already accounted for assured attrition. Because the court did not even recognize the possibility that reduction-in-service cases might be distinguishable from those in which ADA is a factor, its decision should not be considered determinative of the issue.

The code authorizes only layoffs made necessary by a decline in ADA or a determination to reduce or discontinue services.\textsuperscript{80} In ADA cases, attrition occurring during the period in which the ADA decline is measured must be taken into account to reduce the number of layoffs otherwise necessary.\textsuperscript{81} This requirement ensures that employee reductions and losses will not be proportionately greater than pupil losses. Reductions are thus governed by ADA losses. The number of dismissals made necessary by a reduction in services, however, is governed by the district's decision as to how many services to reduce and is not tied to any statistical computation.\textsuperscript{82} References in Degener\textsuperscript{83} and Lewin\textsuperscript{84}
to attrition occurring during the "computation period" thus have no application to reduction-in-service layoffs because the number of necessary layoffs is not determined until the time of the decision to reduce services. Even if ADA is increasing and additional teachers are needed in some areas, a district may decide to reduce services. The only constraint is that the decision not be arbitrary or capricious or result in the district's inability to comply with minimum statutory requirements.

The only attrition that could even arguably reduce the number of layoffs made necessary by a reduction in services is that occurring after the decision to reduce services has been made. Suppose, for example, that a counseling position is eliminated, and the least senior counselor can exercise bumping rights over a teacher of English. The English teacher's layoff, originally made necessary by the district's decision to reduce counseling services, would not be necessary if, after the counseling decision was made, another English teacher resigned. Nevertheless, because the district's ability to reduce services ceases on March 15 regardless of any compelling need that might arise thereafter, consideration of attrition occurring after that date should not be required.

**Issues Related to Seniority**

**Determining Seniority**

Employees whose services are terminated pursuant to section 44955 or section 87743 must be dismissed "in the inverse of the order in which they were employed," with seniority measured from the first date on which the employee rendered paid service in a probationary status. Issues involving employees' correct seniority dates often arise in layoff hearings. Questions frequently concern the seniority dates of

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87. Attrition in positions for which the English teacher was not credentialed, and thus not competent to fill, would not make the layoff unnecessary.

88. See text accompanying notes 37-39 supra. The filling of vacancies occurring after March 15 would be governed by the statutes which provide preferential rehiring rights for teachers. See CAL. EDUC. CODE §§ 44956-44957, 87744-87745 (West 1978).

89. CAL. EDUC. CODE §§ 44955, 87743 (West 1978).

90. Id. §§ 44845, 87414; see Teacher Dismissals, supra note 5, at 1421. The seniority date of employees hired before July 1, 1947 is the date on which they accepted employment in a probationary position (the date they signed their contract) rather than the first date of paid service under the contract. CAL. EDUC. CODE §§ 44844, 87413 (West 1978). Probationary employees in community colleges are called "contract employees." Id. § 87602.
teachers hired as temporary who later became permanent employees and of those who resigned or took leaves of absence but later returned to service. If a teacher who served at least seventy-five percent of a school year as a long-term substitute or temporary employee is rehired the next year in a probationary status, the year of temporary employment is considered as though it had been probationary, at least for purposes of acquiring tenure. In such cases, administrative law judges consistently determine, at least in K-12 cases, that the year of temporary employment is to be considered probationary for purposes of seniority as well as tenure. The seniority date of a teacher who resigns and returns is the first date of paid service after reemployment, but employees on paid or unpaid leave retain their original seniority dates.

91. Cal. Educ. Code §§ 44918, 44920, 87478, 87481 (West 1978). Section 44918 does not limit the purposes for which the year of temporary employment may be considered probationary, but other sections pertaining to K-12 employees and all sections involving community college teachers apply only to attaining permanent status.


But see Cal. Educ. Code §§ 44914, 87475 (West 1978) (district may count such a year as one full year of probationary employment for purposes of determining permanent status).

93. Cal. Educ. Code §§ 44848, 87417 (West 1978). An argument can be made that permanent teachers resigning and returning within 39 months retain their original seniority date, but the statutes do not clearly confirm that exception. Sections 44848 and 87417 allow employees to retain their original seniority dates when their services have been interrupted “in a manner declared by law not to constitute a break in service.” Sections 44931 and 87731 direct governing boards to disregard the breaks in service of permanent employees who resign and are reemployed within 39 months and to restore the rights of permanent employees except as otherwise provided. Whether or not §§ 44848 and 87417 provide otherwise with respect to seniority may depend on whether a direction to disregard a break in service is interpreted as a declaration that the absence did not constitute a break in service. Unlike, for example, §§ 44957-44958, § 44931 does not actually declare that the absence does not constitute a break in service. At least one ALJ has held that § 44848, not § 44931, determines the date of seniority as the first date of paid service after re-employment. Lucian G. Bonnafoux, No. L-16535, at 7 (San Dieguito Union High School Dist., May 10, 1978) (Britt, ALJ). When there is any doubt about a teacher's seniority date, the district must protect itself by sending the employee a March 15 notice. Such notice will prevent application of a domino effect invalidating dismissals other than that of the employee in question should the ALJ disagree with the district's interpretation of §§ 44848 and 44931. See text accompanying notes 160-66 infra.
because leaves do not constitute a break in service.94

Teachers working as coaches often assert seniority dates based on their first date of paid service as a coach, which may be earlier than the beginning of classes. When coaching is an extra-duty assignment for which an additional stipend is paid, it is not considered in determining seniority.95 If, however, as a part of a regular assignment a teacher is required to report early for coaching or other duties, the early reporting date is the first date of paid service for seniority purposes.96 The seniority dates of teachers who have reached sixty-five years of age also have been an issue in layoff hearings. Although teachers no longer must retire at age sixty-five,97 the legislature failed to repeal the statute that makes permanent and probationary classification cease at that age.98 Administrative law judges consistently have held that teachers retain seniority rights independent of classification.99 Moreover, the attorney general has concluded that the statute changing mandatory retirement laws effectively repealed the laws providing for loss of classification at age sixty-five.100

If a district has made errors in the relative order of seniority of employees receiving March 15 notices, the errors generally may be corrected at the layoff hearing.101 A failure to notice an employee because of a mistake in determining the seniority date, however, cannot be remedied after March 15.102 One way to minimize seniority errors is to

97. CAL. EDUC. CODE § 23922 (West 1978); CAL. GOV'T CODE § 7508 (West Supp. 1979). The age 70 minimum retirement age for community college teachers and others serving under contracts of unlimited tenure or similar arrangements in institutions of higher education does not become effective until July 1, 1982. Section 7508 exempts persons whose earlier mandatory retirement is permitted under federal law, and higher education teachers are exempted by the Age Discrimination in Employment Act amendments of 1978, Pub. L. No. 95-256, § 3(a), 92 Stat. 189 (1978) (amending 29 U.S.C. § 631 (1967)).
98. CAL. EDUC. CODE §§ 44906, 87466 (West 1978). In January, 1978, A.B. 2327 was introduced to remedy that situation, but it died in committee.
distribute the seniority list before notices are sent out, asking employees to inform the personnel office of errors. A failure to contest the district’s determination until after the March 15 deadline might then estop a teacher from alleging a different seniority date at the hearing.\textsuperscript{103}

**Seniority of Employees Sharing the First Date of Paid Service**

Although the relative seniority of community college teachers with the same beginning date of paid service is still determined by lottery,\textsuperscript{104} legislation known as the Behr Bill changed the procedure for teachers in grades K-12.\textsuperscript{105} In the case of K-12 teachers with equal seniority, the governing board now determines the order of termination and reappointment based on the needs of the district and its students.\textsuperscript{106} A 1978 amendment requires boards to provide a written statement of the criteria used in making that determination.\textsuperscript{107}

Teachers who have received March 15 notices and whose order of termination was determined pursuant to the Behr Bill have the right to receive statements of criteria no later than five days prior to the hearing.\textsuperscript{108} After termination, a teacher may request a statement of criteria used in determining the order of reemployment.\textsuperscript{109} Because employees are not terminated until the end of the school year, requests submitted prior to that time could be considered premature. Once terminated, an employee has the right to receive a statement of reasons no later than fifteen days after such request.\textsuperscript{110} Permanent employees have reemployment rights for thirty-nine months after layoff (probationary emp-

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\textsuperscript{104} CAL. EDUC. CODE § 87414 (West 1978).

\textsuperscript{105} Cal. Stat. 1977, ch. 433 (codified at CAL. EDUC. CODE §§ 44844-44846, 44955 (West 1978)).

\textsuperscript{106} CAL. EDUC. CODE § 44955 (West 1978).

\textsuperscript{107} 1978 Cal. Adv. Legis. Serv., ch. 898, at 636 (amending CAL. EDUC. CODE §§ 44844, 44955). In one case, an ALJ found the following criteria to be reasonable: (1) credentials, (2) training, (3) experience, (4) quality of performance, and (5) personal characteristics. Janet Hunter, No. N-11372, at 3 (Burlingame Elementary School Dist., May 2, 1978) (Coan, ALJ). Another district had more specific criteria: (1) special credentials, (2) 50% assignment during the past five years in foreign language, music, industrial arts, and other specific fields, (3) at least two credentials, one of which authorizes teaching in grades K-8, and (4) placement on seniority list. Carol Coleman, No. N-11238, at 8 (Cupertino Union School Dist., May 4, 1978) (Judson, ALJ). Placement on the seniority list referred to the former placement by lottery.


\textsuperscript{110} Id.
employees for twenty-four months), during which time the needs of the district and its students could conceivably change. Because the statute does not permit districts to amend their criteria for reemployment once they have been formulated, the criteria will have to be general enough to allow for changing conditions.

According to the legislative counsel, the purpose of abolishing the lottery was “to enable districts to respond efficiently to declining enrollment by laying off the less essential of the certificated staff hired on the same date.” In order to accomplish that purpose, the statute had to be applied to all teachers being laid off after its enactment, regardless of when they were hired. Such application was clearly the legislative intent in that the Behr Bill left intact the provision of section 44846 that states that the section “shall apply regardless of date of employment.”

Despite the recognized legislative intent, the retroactivity of the Behr Bill was an issue in 1978 layoff hearings. Teachers contended that the new law unconstitutionally deprived them of a vested fundamental right in having their seniority determined by lottery. Administrative law judges unanimously and correctly decided that the Behr Bill could be retroactively applied. Seniority is not an inherent or constitutional right. Seniority itself confers no rights on employees but entitles them to preferential treatment only to the extent that a statute or collective bargaining agreement so provides. Seniority rights may be limited by subsequent legislation. In Franks v. Bowman Transportation Co., the United States Supreme Court held that under Title VII of the Civil Rights Act of 1964, victims of past discrimination could be awarded retroactive seniority. In answer to the argument that this denied employees seniority rights, the Court stated:

Certainly there is no argument that the award of retroactive seniority

113. Id.
116. Id.
to victims of hiring discrimination in any way deprives other employees of indefeasibly vested rights in employment. This Court has long held that employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public interest.\(^{120}\)

Whether or not California teachers have a vested right in the determination of seniority by lottery must be decided under state law.\(^{121}\) The dimensions of property rights are defined by the statutes and rules that create them.\(^{122}\) To determine whether a right is vested, California courts have considered the extent to which the right is already possessed.\(^{123}\) In the case of the lottery system, no right to its indefinite continuation was possessed because the legislature expressly reserved to itself the right to amend or repeal the statute establishing the system.\(^{124}\) Thus, teachers had no vested right in the continuation of the lottery system, and, in enacting the Behr Bill, the legislature deprived them of nothing that it had indefeasibly bestowed upon them.

**Bumping and Skipping**

After determining that a decline in ADA or reduction in services will necessitate terminating certificated employees, a district must identify the particular teachers to be affected. This determination is controlled by the statutory directive that governing boards terminate employees in the inverse order of employment, determining whether any employee to be terminated is credentialed and competent to perform services being rendered by a more junior employee.\(^{125}\) Both pro-

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120. *Id.* at 778.
124. **CAL. EDUC. CODE** § 44851 (West 1978) (originally enacted as § 13269; Cal. Stat. 1959, ch. 2, at 921). Section 44851 provides that all employment under various sections of the Education Code (including § 44844, which established the lottery system) "shall be subordinate to the right of the legislature to amend or repeal [said sections] or any provision of provisions thereof at any time, and nothing herein contained shall be construed to confer upon any person employed pursuant to the provisions hereof a contract which will be impaired by the amendment or repeal of [said sections] or of any provision or provisions thereof." Section 44851, like other statutes, is a part of a teacher's contract of employment. *See Fry v. Board of Educ.,* 17 Cal. 2d 753, 760, 112 P.2d 229, 234 (1941).
125. **CAL. EDUC. CODE** §§ 44955, 87743 (West 1978); Thompson v. Modesto City High School Dist., 19 Cal. 3d 620, 627-28, 566 P.2d 237, 242, 139 Cal. Rptr. 603, 608 (1977); Lacy
bational and permanent employees have such bumping rights.footnote{126}

When identifying the employees to be terminated, the focus of attention differs slightly depending on whether the layoffs are a result of declining ADA or reduction in services. When reducing services, the district looks first at the persons actually performing those services. They will be laid off unless their seniority, credentials, and competency enable them to bump an employee having less seniority.footnote{127} When the layoffs result from a decline in ADA, the district must lay off the least senior employees, regardless of the service they are rendering, unless they possess credentials and competencies not also possessed by a more senior person among those being dismissed.footnote{128} In such case, the district may retain or “skip” such a qualified junior employee. Teachers have bumping rights; districts have skipping rights. In some cases, employees with special skills have contended that they should have been retained, but administrative law judges have ruled that skipping is a district right and not a duty.footnote{129}

Skipping rights are more readily available to secondary schools and community colleges, where subject-matter credentials are now required.footnote{130} Elementary schools lack this flexibility because classroom

footnote{126} See cases cited note 125 supra.

127. See Lacy v. Richmond Unified School Dist., 13 Cal. 3d 469, 472-74, 530 P.2d 1377, 1378-80, 119 Cal. Rptr. 1, 2-4 (1975); Krausen v. Solano County Junior College Dist., 42 Cal. App. 3d 394, 403-04, 116 Cal. Rptr. 833, 839-40 (1974); Teacher Dismissals, supra note 5, at 1421-22. Certificated employees in the regular school program may bump teachers employed in a categorically funded project or under contract with an outside agency pursuant to Education Code § 44909 or 87470. Teachers hired for those special programs, however, may not bump teachers in the regular program when such contract has expired or the categorically funded project has been completed. 55 Ops. Cal. Att'y Gen. 428, 432 (1972). Teachers in the regular program may not bump children's center permit teachers with less seniority because the statutory grounds authorizing layoff of the two types of employees are different. Rutherford v. Board of Trustees, 64 Cal. App. 3d 167, 180, 134 Cal. Rptr. 290, 298 (1976); see note 17 supra.

128. By limiting the bumping rights of senior employees to positions that they are certificated and competent to fill, the statutes authorize districts to retain or skip junior employees possessing credentials or competencies not possessed by more senior employees being laid off. See 59 Ops. Cal. Att'y Gen. 73, 76 (1976). The procedure is called “skipping” because the district skips over the names of junior employees as it progresses through the seniority list to employees having greater seniority.


130. See CAL. EDUC. CODE §§ 44256(a), 87277 (West 1978).
teachers are often credentialed and competent to teach any grade. Those most often skipped in elementary schools are special education teachers, teachers with bilingual certificates or credentials, counselors, speech therapists, art and music teachers, and administrators.

In some extreme cases, skipping because of special skills may not be permitted, such as when a skill is very narrowly defined and is not the actual academic subject in question. In one case, an ALJ refused to permit a district to retain a physical education teacher because of her skill in Afro-Asian dancing when more senior physical education teachers were being laid off. Similarly, a bilingual machine-shop instructor was not entitled to preference over more senior instructors lacking bilingual competency because bilingualism was not a requirement for the position. When employees have the same beginning date of paid service, however, a district may establish bilingualism as one of the criteria for determining which employees best meet the needs of the district and its students. Presumably, meeting affirmative action goals could also be one of the criteria for selecting among persons with equal seniority.

Competency and Credentials

When a district reduces a service, it must determine whether the employee performing that service is credentialed and competent to perform the duties of any less senior employee being retained. A district need not take into account credentials applied for but not yet received, nor is it responsible for knowing about credentials that have been obtained but not filed with the district or the county office of

131. Id. § 44256(b).
134. Jose Sandoval, No. N-11332, at 3 (San Jose Community College Dist., May 1, 1978) (Judson, ALJ).
136. See authorities cited note 125 supra.
education. In *Campbell Elementary Teachers Association* and *Degener v. Governing Board*, courts held that a district is not accountable for credentials filed after the governing board's decision has become final.

Although the courts did not determine whether the absence of a credential is to be considered as of the date of the preliminary notice, the date of the hearing, or the date the decision becomes final, they strongly suggested that districts not be held accountable for credentials filed after the March 15 notice deadline. The reason is that a district must analyze the credentials of employees who may be subject to layoff before it sends the March 15 notices and cannot notify additional employees after March 15. Thus, if a teacher arrives at a hearing announcing for the first time possession of a counseling credential, it is too late for the district to add another classroom teacher to the layoff list. As a matter of practice, districts could notify teachers in the fall of credentials the district has on record and the need for them to file credentials newly obtained.

Possession of the appropriate credential does not guarantee a teacher the right to replace a more junior employee. The teacher also must be competent to perform the service. Incompetency may be

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138. *Id.;* Campbell Elementary Teachers Ass'n v. Abbott, 76 Cal. App. 3d 796, 814-15, 143 Cal. Rptr. 281, 292-93 (1978). Teachers are required by law to register their credentials with the county board of education. *See* CAL. EDUC. CODE §§ 44330, 44857, 87210, 87426 (West 1978). If a teacher relies on the representation of a school clerk that the credential will be filed without further effort needed by the teacher, the district may be estopped from asserting noncompliance with the registration requirements. Mary Sonderegger, No. L-16440, at 8 (Glendale Unified School Dist., July 7, 1978) (Geftakys, ALJ).


143. CAL. EDUC. CODE §§ 44955, 87743 (West 1978); *Teacher Dismissals, supra note 5,* at 1422. Competency becomes an issue only when the least senior employee performing a service that is being reduced or discontinued is credentialed to perform a service being rendered by a more junior employee whose position is being retained. Relative competency among employees performing the service being reduced is not relevant in a layoff hearing. *See* Kathleen T. McGreevy, No. L-16579, at 2 (Rio Hondo Community College Dist., Apr. 18, 1978) (Gallagher, ALJ); Mary Sonderegger, No. L-16440, at 9-10, 12 (Glendale Unified School Dist., July 7, 1978) (Geftakys, ALJ). When a service is reduced, the most junior person performing the service is generally either laid off or reassigned. If a more senior employee performing the service is incompetent, the only means of dismissing that employee is termination for cause. *See also* King v. Berkeley Unified School Dist., 89 Cal. App. 3d 1016, 1023, 152 Cal. Rptr. 782, 786 (1979). The court in *King* held that whether an employee who has been laid off is competent to hold a position to which he claims reemployment
shown by a lack of teaching experience or recent academic training in the field.  

Although a district has the initial duty to examine a teacher’s academic and professional experience and make a determination of competency or incompetency, once the district finds the teacher incompetent, the burden shifts to the teacher to establish competency. In one case, a high school teacher established competency to serve in an elementary school by virtue of having had ten years’ experience as an elementary school teacher. In another case, a teacher who several years earlier had taught physical education established her competency to teach that subject; she, however, failed to establish competency in other fields in which she was credentialed but had no experience. Administrative law judges readily find a failure to establish competency when employees have had no experience in a particular field. Prior experience is not determinative, however, when it is outdated or at a different educational level. For example, a teacher who had twelve years earlier taught math, science, and other subjects in an integrated seventh and eighth-grade class was not found competent to rights is a discretionary decision to be made by a school district’s responsible officials because of their special competence.

145. See note 125 supra.
146. Although an early decision speaks in terms of a district’s burden of proving incompetency, actually at issue there was the burden of determining incompetency and the duty to provide a hearing at which the teacher could present evidence to rebut the charge. Davis v. Gray, 29 Cal. App. 2d 403, 84 P.2d 534 (1938). See also Krausen v. Solano Junior College Dist., 42 Cal. App. 3d 394, 403-04, 116 Cal. Rptr. 833, 838-39 (burden satisfied by examining teacher’s experience and qualifications and providing him an opportunity to present evidence of competency). Decisions of ALJs are generally phrased in terms of the teacher’s failure to establish competency, not the district’s failure to establish incompetency. See, e.g., Gary W. Gaudet, No. L-16580, at 5 (Bellflower Unified School Dist., July 21, 1978) (Willd, ALJ); Martha Hernandez, No. L-16236, at 4 (Goleta Union School Dist., May 5, 1978) (Chapman, ALJ); Sheila Krausse, No. L-16585, at 3 (Orcutt Union School Dist., May 5, 1978) (Nelson, ALJ); Charlotte W. Hunter, No. L-16548, at 3 (Charter Oak Unified School Dist., May 5, 1978) (Gallagher, ALJ).

This result is in accord with an opinion of the attorney general that states, “Where competency is not demonstrated by a senior employee, a junior employee having the ability to serve the needs of the program may be retained . . . and the senior employee may be terminated.” 59 Ops. Cal. Atty Gen. 73, 76 (1976).

teach those subjects at the community college level.150

Skipping Administrators

Districts sometimes retain administrators who would otherwise be laid off because of their lack of seniority.151 In such cases, more senior teachers who have administrative credentials are often found to lack the competency or experience required for the administrative position.152 Even if credentialed and competent, however, teachers are not allowed to bump administrators. In 1978, administrative law judges who addressed the issue held that the assignment of management employees is the prerogative of the district and that the seniority principles of the layoff statutes are inapplicable to administrative assignments.153

Frequently cited in support of this conclusion is Hentschke v. Sink,154 in which the court upheld the right of a school board to select its own administrative staff and to reassign administrators without the showing of cause required for a dismissal. The court recognized that the confidential relationship between a governing board and its administrators requires complete trust and that lack of trust is not susceptible to the type of proof required for a termination.155 Hentschke supports the conclusion that a teacher with an administrative credential who might be competent to hold an administrative position cannot compel a promotion to an administrative position.

One might argue, nevertheless, that an employee who is competent and credentialed to perform an administrative service could require the district to retain him as a teacher if the district wishes to retain a more junior administrator. If such an employee is retained as a classroom teacher, however, an ALJ might rule that no teachers more senior to

150. Lewis Lindsay Sign, No. N-11353, at 3 (Siskiyou Joint Community College Dist., Apr. 28, 1978) (Michaels, ALJ).
152. See proposed decisions cited note 151 supra.
155. 34 Cal. App. 3d at 23, 109 Cal. Rptr. at 551.
the one retained be laid off if they also are credentialed and competent to perform the retained teacher’s service.\(^\text{156}\)

If a district must risk invalidating dozens of otherwise proper layoffs in order to choose its administrators, the discretion to select administrative personnel becomes very limited. For this reason, the term “competency” as applied to administrative employees should be defined by courts to include the concept of acceptability to the governing board. Alternatively, the statutes could be interpreted to exclude administrative positions from the requirement that districts “make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render.”\(^\text{157}\)

Inverse Bumping

In one 1978 layoff hearing, employees asserted what the administrative law judge called “inverse bumping rights,” a concept that involved three groups of employees.\(^\text{158}\) The group with the least seniority consisted of employees who had been skipped because of special credentials or qualifications. A second group with slightly more seniority was composed of classroom teachers being laid off because they were not credentialed and competent to perform the specialized services of the more junior employees being retained. Finally, an even more senior group was not subject to layoff and, in addition, had the same special credentials possessed by the junior employees being skipped.

The teachers being laid off—the second group—contended that the district was obligated to reassign the senior classroom teachers to the positions requiring special credentials. Such a decision would allow the teachers being laid off to exercise bumping rights over the less senior teachers being skipped. The ALJ ruled correctly that section 44955 did not contemplate “inverse bumping rights.”\(^\text{159}\) A contrary decision would have allowed the employees in question to affect the employment of employees senior to them, in effect bumping them out of their classroom positions and compelling their transfer to positions requiring special credentials. The district’s obligation to make assignments and reassignments is limited to attempting to place an employee

\(^{156}\) See text accompanying notes 160-66 infra.


who would otherwise be terminated in a position being held by an employee with less seniority.

The Domino Effect

A district may sometimes fail to send a teacher a March 15 notice because of a miscalculation of seniority or failure to recognize that the employee is subject to bumping by a more senior teacher. After March 15, the district loses its power to correct the error, and the teacher cannot be dismissed. A single mistake of this type may set off a domino effect, invalidating the dismissals of some or all of the employees senior to the one mistakenly retained. This harsh result is said to be required by the statutory directive that districts terminate employees in the inverse order of employment, making assignments and reassignments "in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render." In addition, the domino theory is based on the provision that "the services of no permanent employee may be terminated . . . 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."

According to the domino theory, these provisions prohibit districts from dismissing any teacher who is credentialed and competent to perform the service of any less senior teacher being retained, even if that means reinstating ninety teachers because one more junior was mistakenly retained. Application of the domino theory can have devastat-

165. CAL. EDUC. CODE § 44955 (West 1978). The provision pertaining to community college employees is the same except that the terms "regular" and "contract" replace "permanent" and "probationary." Id. § 87743. See id. § 87602 for definitions of "regular employee" and "contract employee."
166. See cases cited notes 160-61 & 163 supra. In Teachers Local 1163 v. Board of Trustees, Civ. No. 193982 (Cal. Super. Ct., San Mateo County, Aug. 22, 1975), the domino theory was applied when the district sent a junior group of teachers notices for decline in ADA and sent more senior teachers notices based upon reduction in services. The ADA was
ing results. Dozens of otherwise valid dismissals may be disallowed because of a single error by a district. Because the statute obligates districts to terminate employees in the inverse order of employment, the real issue is whether the domino effect is the appropriate remedy when a district fails to do so.

Given the large number of teachers that may be involved, the complexity of the procedure, and the legal uncertainties involved in determining seniority, the opportunity for error is enormous. Unless miscalculated, and some of those sent ADA notices could not be terminated. Termination cannot be based on any reason not stated in the March 15 notice. Karbach v. Board of Educ., 39 Cal. App. 3d 355, 363, 114 Cal. Rptr. 84, 89 (1974). In addition, the court in Teachers Local 1163 held that all who had been sent notices for reduction in services had to be reinstated because the district had not shown that they were not credentialed and competent to perform the services of the less-senior teachers who had been ordered reinstated. This particular problem no longer need arise because an appellate court has authorized the sending of notices that state both decline in ADA and reduction in services as the cause for dismissal. Campbell Elementary Teachers Ass'n v. Abbott, 76 Cal. App. 3d 796, 803-04, 143 Cal. Rptr. 281, 286 (1978).

The domino theory is generally applied to reinstate both permanent and probationary teachers. See, e.g., Sheila Krausse, No. L-16585, at 2, 4 (Orcutt Union School Dist., May 5, 1978) (Nelson, ALJ); Christine Shimuzu, No. L-16507, at 1, 3 (Huntington Beach City School Dist., Apr. 12, 1978) (Marion, ALJ). But see Lucian G. Bonnafoux, No. L-16535, at 9-10 (San Dieguito Union High School Dist., May 10, 1978) (Britt, ALJ); text accompanying notes 180-85 infra. If the record does not show the credentials and qualifications of the less-senior teacher, the administrative law judge may presume that those more senior could render the service, Sheila Krausse, No. L-16585, at 4 (Orcutt Union School Dist., May 5, 1978) (Nelson, ALJ), although some ALJs merely order the district to make that determination, Lucian G. Bonnafoux, No. L-16535, at 11 (San Dieguito Union High School Dist., May 10, 1978) (Britt, ALJ). If the district has correctly determined the order of termination by seniority, however, the ALJ makes a specific determination that no employee is being retained to render a service that any more-senior employee being laid off is certificated and competent to render. See, e.g., Helen Peterson, No. N-I 1207, at 5 (Sunnyvale School Dist., May 1, 1978) (Judson, ALJ); Charlotte W. Hunter, No. L-16548, at 3 (Charter Oak Unified School Dist., May 5, 1978) (Gallagher, ALJ).


168. An example of an uncertain issue concerning seniority is whether a year spent as an intern counts toward determining seniority when the intern is rehired the next year as a probationary teacher. Compare James Baughman, No. N-11246, at 6 (Campbell Union High School Dist., May 16, 1978) (Kendall, ALJ) with Lewis Allbee, No. L-16334, at 5 (Barstow Unified School Dist., July 3, 1978) (Hogan, ALJ). Interns may not achieve probationary or permanent status while serving under an intership credential even though the credential authorizes the same services as a regular credential. CAL. EDUC. CODE §§ 44454, 44466 (West 1978). Although a year of intership may count toward the achievement of tenure, id. § 44466, the statute is silent with respect to granting retroactive seniority. See notes 91-92 & accompanying text supra. A policy argument for not according interns retroactive seniority, which would give them preference in a layoff situation, is that at the time they were serving their internship, they had not completed the requirements for becoming a certificated employee. This is not true with respect to temporary teachers who later are rehired in a probationary position.
another remedy is mandated by statute, the consequences of a district's good-faith error in determining seniority should be limited to reinstatement of employees who were actually prejudiced by the mistake.

Suppose, for example, that because of a decline in ADA a district decided to reduce the number of certificated employees, and forty-five probationary and permanent teachers were sent March 15 notices. Because of a miscalculation of his seniority, Mr. Baker was not notified. He has less seniority than all but two of the forty-five teachers who were noticed. Because the March 15 deadline passed before the mistake was discovered, Mr. Baker cannot be dismissed. The most senior of the noticed employees competent and credentialed to perform the service being rendered by Mr. Baker is Mr. Costello. If not for the district's error in failing to notice Mr. Baker, Mr. Costello could have been retained. Mr. Costello has thus been prejudiced by the district's mistake, but the other forty-four noticed employees would have been dismissed regardless of the error.

Absent any statutory provision compelling a contrary result, the natural, reasonable, and logical consequence of the district's failure to notice Mr. Baker would be limited to the reinstatement of Mr. Costello, the only person prejudiced by the mistake. This result would apply if an employer in the private sector violated a collective bargaining agreement by retaining employees with less seniority while laying off more senior employees. Such cases are usually decided by arbitration. In one case involving the layoff of more than one thousand employees, the arbitrator specified that "[t]o avoid misunderstanding, it is intended that if at a base, two stewardesses with minimum seniority were retained beyond the 15th, only the two stewardesses with the most seniority are to be reimbursed though other more senior stewardesses may have been released." Similarly, recovery of damages at common law for negligence or breach of contract is limited to persons who prove they have been injured by the allegedly wrongful act.

The use of the domino theory as a remedy for failure to comply to the letter with seniority requirements would be appropriate if imposed

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169. American Airlines, Inc., 27 LABOR ARB. REP. 448, 453 (1956); see Penn Corp., 61 LABOR ARB. REP. 1045 (1973) (denial of seniority rights to be recalled after layoff under a collective bargaining contract did not result in reinstatement of senior employees when they would not have been recalled even if a new employee had not been hired).

by statute. When a right is purely statutory, as is seniority in the case of teacher layoffs, remedies are in fact confined to those provided by the statute. If none is provided, any appropriate common-law remedy may be used. The statutory requirement that districts terminate in the inverse order of employment does not compel a remedy that would result in reinstatement of employees not adversely affected by a good-faith procedural error. The only provision that could be construed to support the domino theory is that which states that no permanent employee shall be terminated while any employee with less seniority is retained to render a service that the permanent employee is certificated and competent to render. There is no legislative history establishing whether this provision was intended to introduce a domino effect into the layoff process. Because the statute already requires termination by inverse order of employment, the statement concerning permanent employees might appear to give those employees a special remedy. That conclusion is unnecessary.

At the time the provision was introduced, the layoff statute applied only to permanent employees. Therefore, the directive that employees be terminated in the inverse order of employment was not sufficient to indicate that districts had to dismiss probationary employees before implementing the layoff section. For that reason, the additional provision appears to have been necessary to clarify the layoff procedure and does not necessarily represent an intent to establish a remedy requiring application of the domino theory. When the statute was amended to include the layoff of probationary employees, the provision in question was retained and changed slightly.

Because there had been no reported cases involving application of the domino theory, however, the legislature cannot be presumed to have recognized or intended that interpretation. The legislature is not presumed to be aware of statutory constructions of administrative agencies in the absence of a showing that such interpretations were brought to the attention of the legislature. Unlike opinions of the attorney general, proposed decisions of

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171. See text accompanying notes 116-18 supra.
administrative law judges are not published or widely circulated.

When viewed in the light of its statutory history, the layoff provision in question cannot be said to unambiguously establish the domino theory as a remedy. Moreover, a literal construction leading to absurd results should be avoided in favor of one that is practical and reasonable.\textsuperscript{178} This principle of statutory construction has been employed in the past to avoid the absurd results of literally applying a provision seemingly requiring districts to lay off at least one permanent employee in order to dismiss any probationary employees.\textsuperscript{179} An interpretation that limits reinstatement to employees who would not have been laid off but for the district's good-faith error would not undermine the legislative intent that seniority rather than some other criterion determine layoff order. In such cases, there is substantial compliance with the seniority requirements, and no teacher is injured.

Even if the statutory provision is construed to authorize the domino theory, there is no authority for extending the remedy to probationary employees. One administrative law judge has expressly limited the domino effect in this manner, holding that the requirement that employees be terminated in inverse order of employment is directory and not jurisdictional.\textsuperscript{180} Probationary employees thus were held not entitled to the benefits of the domino effect when a mistake in seniority was not arbitrary, capricious, or in bad faith.\textsuperscript{181} Characterization of statutory obligations as directory as opposed to mandatory or jurisdictional involves a determination of whether the legislature intended failure to comply with a procedural requirement to invalidate the governmental action to which the requirement relates.\textsuperscript{182} If not expressed, "the intent

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\item \textsuperscript{180} Lucian G. Bonnafoux, No. L-16535, at 9-10 (San Dieguito Union High School Dist., May 10, 1978) (Britt, ALJ).
\item \textsuperscript{181} \textit{Id.} at 10.
\item \textsuperscript{182} Morris v. County of Marin, 18 Cal. 3d 901, 908-10, 559 P.2d 606, 610-12, 136 Cal. Rptr. 251, 255-57 (1977). In this context the term "mandatory" is not used to distinguish provisions that are permissive from those that are obligatory but applies solely to the remedy
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must be gathered from the terms of the statute construed as a whole, from the nature and character of the act to be done, and from the consequence which would follow the doing or failure to do the particular act at the required time.\textsuperscript{183}

The application of these criteria does not warrant use of the domino theory. The purpose of statutes authorizing layoffs is to enable districts facing economic difficulties to reduce the number of certificated employees\textsuperscript{184} and to ensure that employees will be given notice of possible nonretention sufficiently early so they may seek other positions.\textsuperscript{185} In the hypothetical domino theory case outlined above, all employees except one received timely notice and were being laid off for an appropriate reason. The district made a good-faith effort and substantially complied with the requirement that seniority and not other factors be used to determine layoff order. Imposition of the domino theory undermines the legislative intent to authorize layoffs more than it impairs the principles of seniority. Reinstatement should be limited to those employees actually prejudiced by a district’s error.

**Conclusion**

The number of teacher layoffs invalidated because of procedural or substantive errors by school districts has declined noticeably in the past two or three years. Appellate courts have clarified some of the issues, and administrative law judges seem to be addressing some of the still-unanswered questions with more uniformity than in the past. In addition, districts and their attorneys have become more familiar with the procedures and aware of the pitfalls to avoid.

There are, however, still several areas in which the courts or the legislature should provide clear, workable standards. The legislature should act to streamline the unnecessarily intricate layoff procedures. A single preliminary notice could, for example, replace the present requirement of a March 15 notice followed by an accusation. Such a solution would not adversely affect teachers’ rights. Teachers would then need to ask only once for a hearing instead of filing a request for


hearing in response to the March 15 letter and a notice of defense in answer to the accusation.

A more radical streamlining would do away with the March 15 and May 15 deadlines entirely and require layoff notices to be sent not later than thirty days after the state budget is chaptered. This approach is a logical response to post-Proposition 13 school-financing realities. Districts now must rely much more heavily on state financing than in the past, but they do not know by March 15 or even by May 15 the amount of state funding they will receive. Consequently, the number of layoffs that may be necessary also must await the state financing decisions.

Substantive law issues also need legislative or judicial attention. Although specific mandated courses may be reduced as a particular kind of service, the issue of reducing general classroom teaching has not been resolved. In secondary schools and community colleges, where subjects are taught by designated teachers at particular hours, there is no problem identifying course offerings as particular kinds of services. On the other hand, elementary school districts cannot easily identify the amount by which particular subjects are to be reduced because many subjects are taught by the same teacher in a self-contained classroom at unspecified times during the day. Elementary districts are often limited to identifying the service simply as "classroom teaching." Classroom teaching, like teaching of specific subjects, should be recognized as a particular kind of service that may be reduced to justify layoffs. If not, some elementary districts may be unable to reduce the only service they provide.

Districts also need a clear standard for determining the extent to which attrition must be considered in calculating the number of permissible layoffs. Because districts cannot increase the number of layoffs after March 15, they should not be required to reduce the number of layoffs by attrition occurring after that date. If the district fills positions made vacant by post-March 15 attrition, teachers laid off will have preferential rights to reemployment. In reduction-in-service cases, neither attrition occurring before nor after March 15 should have to be considered because the number of layoffs made necessary by a reduction in services is that determined by the governing board, not one tied to a mathematical formula as in ADA-related layoffs.

186. In 1979, the California School Boards Association announced that it would sponsor legislation incorporating this approach. Proposition 13 Information Service, Jan. 12, 1979, at 10-12; Senate Bill 1133 (1979) would extend the deadline for layoff notices to be sent during the 1979-80 school year.
Of all the legal questions and problems related to layoffs, the one most crucially in need of resolution is the application of the domino theory. Judicial interpretation or perhaps even legislation is needed to relieve districts of the harsh and absurd consequences of the domino effect. The remedy of reinstatement must be limited to teachers actually prejudiced by a district’s error.

The number of teacher layoff hearings will rise in the near future as districts increasingly experience the effects of declining enrollment, inflation, financial uncertainty, and losses in revenue. Now more than ever the remaining unanswered questions must be addressed and a clear, workable, and uniform standard adopted to enable districts to plan needed staff reductions with assurance that their decisions will be upheld.