

BEFORE THE  
GOVERNING BOARD OF THE  
BENICIA UNIFIED SCHOOL DISTRICT  
STATE OF CALIFORNIA

In the Matter of the Accusations against:

Brandon M. Andrews  
Claudia K. Bru  
Debbie A. Ewing  
Carol L. Garcia  
Nancy I. Garcia  
Mary Kraybill  
Julie A. Nerland  
Deborah L. Thomas<sup>1</sup>

OAH No. N2004020574

Respondents

**PROPOSED DECISION**

Administrative Law Judge Karl S. Engeman, State of California, Office of Administrative Hearings, heard this matter in Benicia, California, on April 29, 2004.

Laurie S. Juengert, Attorney at Law, represented the Benicia Unified School District.

A. Eugene Huguenin, Jr., Esq. represented all of the respondents.

The matter was submitted on April 29, 2004.

**FACTUAL FINDINGS**

1. Shalee Cunningham, Ph.D. made the accusations in her official capacity as the Superintendent of the Benicia Unified School District (District).

---

<sup>1</sup> Barbara Emminizer and Robin Beckers were respondents but the accusations and notices were dismissed by District at the beginning of the administrative hearing. The parties stipulated that the correct date of first paid probationary service for Debbie Ewing is August 28, 2000.

2. On March 11, 2004, the Superintendent gave written notice to the Governing Board (Board) of the District of her recommendation that notice be given respondents that their services would not be required for the ensuing school year and stating the reasons therefor.

3. On March 11, 2004, , the Board adopted Resolution No. 03-04-28 directing Superintendent or her designated representative to give notices to certificated employees that their services would not be required for the 2004-05 school year.

4. On March 12, 2004, respondents were served with written notice of the recommendation that notice be given them that their services would not be required for the ensuing school year and stating the reasons therefor.

5. Each respondent timely requested a hearing to determine if there is cause for not reemploying him/her for the ensuing school year.

6. The Board has resolved to reduce or discontinue the following services of the District no later than the beginning of the ensuing school year:

Reduction K-5	5.00 FTE <sup>2</sup>
Reduction Reading Specialists	3.00 FTE
Reduction History Teacher	1.00 FTE
Total Reductions	9.00 FTE

7. On February 6, 2004, the District distributed to all probationary and permanent certificated employees a memorandum requesting that they return confirmation of their credentials, dates of hire and status. Based upon information received, credentialing and dates of hire were updated. Criteria were established to break ties among employees with the same hire dates. Points were assigned for each criterion applied. The District met with employee representatives to resolve ties. The District's seniority list was then established.

8. Respondent Deborah Thomas has a listed first date of paid probationary service (seniority date) of August 26, 1999. She was first employed by the District as a long term substitute teacher in school year 1997/1998 and worked approximately 88% of the school year in that position. In school year 1998/1999, she continued substitute teaching on an as needed basis. She was also employed by the District as a Home/Hospital teacher. She visited a female freshman student in the student's Grandmother's home virtually every school day for approximately one hour. She prepared lesson plans, made assignments, graded the student's work and performed all the customary teaching tasks relating to the student's core curriculum. Her pay records for the period June 1, 1998, through June 30, 1999, show a total of 138 hours so if she only worked with one student, she would have

---

<sup>2</sup> Full Time Equivalent.

worked more than 75% of the school days which the parties stipulated as 135 for the 1998/1999 school year. On cross examination, Thomas conceded that while she could not recall any other student with whom she worked in a home/hospital assignment that year, it was "possible" that she did so on a short term basis. It was also possible that her assignment extended beyond June 10, 1999, her deadline for submission of hours for the fiscal year ending June 30, 1999.<sup>3</sup> Considering the totality of the evidence, it is found that Thomas did teach on at least 75% of the school days in school year 1998/1999. The parties agreed that if Thomas is given a new seniority date sometime in September of 1998, she would clearly be senior to employees who are junior and rendering services which she is credentialed and competent to provide.

9. Following the Superintendent's recommendation to the Board to reduce 5 FTE K-5 positions and the Board's adoption of that recommendation in the form of Resolution 03-04-28 on the same date, six elementary teachers submitted their resignations effective at the end of this school year. Prior to the formulation of the Superintendent's recommendation, she had been in regular communication with representatives of the Benicia Teachers' Association and she was aware of at least five of the upcoming resignations. One additional resignation was a surprise but she asserted that even had she known of a sixth resignation, that would not have changed her recommendation to reduce elementary teaching by 5 FTE based primarily on concerns about overstaffing at that level.

## LEGAL CONCLUSIONS

1. All notice and other jurisdictional requirements set forth in Education Code sections 44944 and 44955 were met.<sup>4</sup>

### *RESPONDENT THOMAS' CORRECT SENIORITY DATE*

2. Section 44918 reads, in pertinent part:

(a) Any employee classified as a substitute or temporary employee, who serves during one school year for at least 75 percent of the number of days the regular schools of the district were maintained in that school year and has performed the duties normally required of a certificated employee of the school district, shall be deemed to have served a complete school year as a probationary employee if employed as a probationary employee for the following school year.

---

<sup>3</sup> The evidence did not establish whether there were billing records for the next fiscal year which reflecting additional hours that Thomas billed for school year 1998/1999 relating to this program.

<sup>4</sup> All statutory references are to the Education Code unless otherwise indicated.

(d) Those employees classified as substitutes, and who are employed to serve in an on-call status to replace absent regular employees on a day-to-day basis shall not be entitled to the benefits of this section.

3. During more than 75% of the number of regular school days respondent Thomas was performing the duties normally required of a certificated school employee and she was employed as a probationary employee for the following school year. Therefore, she is deemed to have served a complete year as a probationary employee during school year 1997/1998. It follows that she is senior to employees who have not been given a notice and who are rendering services which she is certificated and competent to render. Her notice therefore violates section 44955(a).

#### *POSITIVELY ASSURED ATTRITION*

4. Section 44955 reads, in pertinent part:

(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 inter district 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. (Emphasis added)

5. District was not required to take into account positively assured attrition at the time that the Governing Board resolved to eliminate and/or reduce PKS. Such consideration is limited to lay off cases based on a reduction in ADA in which case the "corresponding percentage of employees in the district" who may be given notice should be reduced by attrition known to the District before March 15<sup>th</sup>. *Lewin v. Board of Trustees* (1976) 62 Cal. App.3d 977, at 980-983.

6. In *San Jose v. Allen* (1983) 144 Cal. App.3d 627, the court was called upon to decide whether positively assured attrition had to be considered in a PKS layoff. Holding that attrition need not be considered, the court reasoned:

A board's decision as to reduction or discontinuation of a particular kind of service is not tied in with any statistical computation, such as reduction in the number of students. The number of terminations made necessary by PKS reductions depends totally upon the district's decision as to how many services to reduce. Put another way, the language of section 44955 that the governing board of a school district "may terminate the services of not more than a corresponding percentage of the certificated employees of said district" is only applicable to ADA terminations based upon an actual reduction in attendance. Where the governing board determines to discontinue or reduce a particular kind of service, there is no way to calculate a "corresponding percentage," hence it is within the discretion of the board to determine the amount by which it will reduce a particular service. *San Jose Teachers Association v. Allen*, supra, at pp. 635, 636.

7. *Lewin* and *San Jose* dealt with the impact, or lack of impact, of positively assured attrition on the elimination or reduction of particular kinds of services. The cases leave unanswered the question whether resignations which occur between the date of the resolution and the final notice on or before May 15<sup>th</sup> should affect the issuance of notices which are a consequence of such reductions or eliminations. 44955 requires that the District establish that the cause for a PKS notice is the elimination or reduction of services. Arguably, if elementary teachers resign after the resolution, the rationale for noticing one or more elementary teachers who remain may no longer exist. In this case however, the Superintendent knew, before the Governing Board resolved to reduce or eliminate PKS, that at least five elementary teachers would not return in the ensuing school year and that more teachers might avail themselves of early retirement incentives. These probable departures were considered when the level of services to be reduced was considered and resolved. In summary, the process followed by the District did not violate section 44955.

8. No permanent or probationary certificated employee with less seniority is being retained to render a service that respondents, other than respondent Deborah Thomas, are certificated and competent to render.

9. Mandated services for the ensuing school year are not being reduced beyond the level required by law.

10. The reduction or discontinuance of services is related to the welfare of the schools and the pupils thereof.

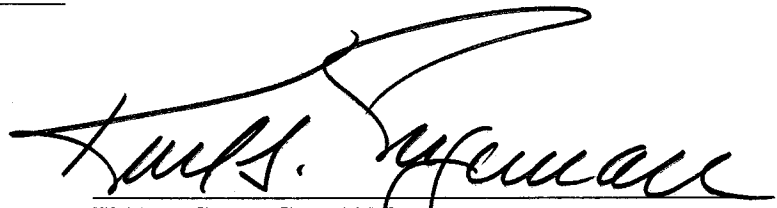
11. Cause exists under sections 44949 and 44955 for providing notices to respondents, except respondent Deborah Thomas, that their services will not be required for the ensuing school year.

ORDER

1. Notice may be given to respondents, save respondent Thomas, that their services will not be required for the ensuing school year to the extent of 8.0 FTE positions.

2. Notice shall not be given to respondent Thomas that her services will not be required for the ensuing school year.

DATED: May 4, 2004

  
KARL S. ENGEMAN  
Administrative Law Judge  
Office of Administrative Hearings