

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

In the Matter of the Reduction in Force  
Involving the Respondents Identified in  
Exhibit A.

OAH No. 2013030317

Respondents.

**PROPOSED DECISION**

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 26, 2013, in Vista, California.

Melanie A. Peterson and Kelly Owen, Fagen, Friedman & Fulfroft, LLP, represented Myrna Vallely, the Assistant Superintendent, Human Resources.

Fern Steiner, Esq., Smith, Steiner, Vanderpool & Wax, represented 27 of the respondents identified in Appendix A.

Respondents Chelsea Sorich and Elizabeth O'Shae-West appeared and represented themselves. 39 respondents properly served did not request a hearing.

Before the hearing the accusations served on Patricia Arosemena, Sylvia Arteaga, Susan Stewart and Misty Oleson were withdrawn and their layoff notices rescinded.

Oral and documentary evidence was received and the matter was submitted on April 26, 2013.

**FACTUAL FINDINGS**

1. Myrna Vallely made and filed the accusation in her official capacity as Assistant Superintendent, Human Resources of the Vista Unified School District.

2. Respondents are identified on Appendix A. Each respondent is a certificated employee of the district.

3. On February 21, 2013, the Governing Board adopted Resolution No. 13-49 reducing particular kinds of services and directing the superintendent to give appropriate notices to certificated employees whose positions would be affected by the action. The resolution called for the elimination of the following services and the entire adult education program:

- Reduce/eliminate Elementary Counselor Service	4.5 FTE
- Reduce/eliminate Adult Education/ROP Supervisor	1.0 FTE
-Reduce/eliminate Adult Education/ROP Assistant Principal	1.0 FTE
- Eliminate Entire Adult Education Program/Services:	
Adult Basic Education (ABE)	77.0 Hours/Week
Adult Education/Career Education	40.0 Hours/Week
Adult Education/Older Adults	37.0 Hours/Week
Career Technical Education-Adult Education	304.0 Hours/Week
Driver Education	37.5 Hours/Week
English as a Second Language (ESL)	345.5 Hours/Week
English as a Second Language/Citizenship	12.0 Hours/Week
English as a Second Language/Community	
Based English Tutoring (ESL/CBET)	41.6 Hours/Week
High School Diploma (HSD)	129.0 Hours/Week
High School Diploma/Concurrent	10.0 Hours/Week

4, Consistent with the Board's Resolution, the District identified certificated employees for layoff. The decision to reduce or discontinue a particular kind of service is a matter reserved to the district's discretion and is not subject to second-guessing in this proceeding. (*Rutherford v. Board of Trustees of Bellflower Unified School District* (1976) 64 Cal.App.3d 167.) A school district's decision to reduce a particular kind of service must not be fraudulent, arbitrary or capricious. (*San Jose Teachers Association v. Allen* (1983) 144 Cal. App. 3d 627, 637.)

5. The district established tie-breaking criteria to determine the order of termination for those employees who shared the same seniority dates.

6. The District considered attrition, resignations, retirements and requests for transfers in determining the actual number of necessary layoff notices to be delivered to its employees. No evidence was presented that any known positively assured attrition was not considered. The District must issue final layoff notices before May 15, and when it does so it will take into account any additional attrition that has occurred. After that, further attrition will allow the District to rehire laid off employees. The layoffs will not reduce any of the District's offerings in code mandated courses below the level required by law.

7. On or before March 15, 2013, the District timely served on Respondents a written notice that the Superintendent had recommended that their services would be terminated at the close of the current school year. The reasons for the recommendation were set forth in these preliminary layoff notices.

8. An accusation was served on each respondent. No evidence was introduced demonstrating that all prehearing jurisdictional requirements were not met.

9. Assistant Superintendent Vallely testified about the District's financial crisis which necessitated this layoff.

#### *Elementary School versus Secondary School Counselor Issue*

10. The District's resolution will result in its retention of more junior employees who are secondary school counselors and the release of more senior employees who are elementary school counselors.

11. All the District's counselors possess a Pupil Personnel Services (PPS) credential which authorizes an individual to teach "school counseling." There are six requirements that all individuals with a specialization in school counseling must meet and all holders of a PPS may perform the following duties:

- Develop, plan, implement, and evaluate a school counseling and guidance program that includes academic, career, personal, and social development;
- Advocate for the high academic achievement and social development of all students;
- Provide schoolwide prevention and intervention strategies and counseling services;
- Provide consultation, training, and staff development to teachers and parents regarding students' needs; and
- Supervise a district-approved advisory group program as described in [the Education Code]

12. The Commission on Teacher Credentialing, which awards the PPS, does not distinguish between elementary and secondary school counselors.

13. The District's job description for an "elementary school counselor" indicates that the primary function of this position is to provide "developmental and supportive counseling services to elementary school students;" to "consult with teachers and administrators to assist in developing interventions and alternatives to facilitate student's

academic performance and emotional adjustment;" to "serve as a liaison between school and home to ensure appropriate transition of students;" and to be "available for crisis counseling." There are 12 assigned responsibilities of elementary school counselors, which primarily pertain to the counselor acting as a liaison between the home and teacher and assisting with the child's development and growth at school.

14. The District's job description for a "school counselor" (which the District asserted is the job description for secondary school counselors) identifies the primary function of this position as advising "the students on their educational program, citizenship, Scholastic and vocational aspirations, and their relationships with teachers and other students." There are 16 assigned responsibilities of a school counselor, many of which pertain to advising the students of their academic progress, post-school choices, testing and studies, and schedule preparation.

15. Both job descriptions list a PPS and a Bachelor's degree as "minimum qualifications." While both indicate that a teaching credential is "desirable" and that teaching experience "is highly desirable," only the District's job description for a "special education counselor" specifies that a minimum qualification of "three years' experience in counseling is preferred." There is no similar minimum qualification required for an elementary school counselor or a school counselor.

16. Assistant Superintendent Vallely testified that the job description for "school counselor" is for those individuals hired to work as secondary school counselors. She explained the difference between an elementary school counselor and a secondary school counselor is that the former's the fifth major focus is to assist individual students with social, emotional issues and their adjustment to school, whereas a secondary school counselor's major focus is more on academic counseling, preparing students for college or a career and making sure they have class schedules so they can graduate with the necessary A-G requirements.

Assistant Superintendent Vallely acknowledged that each counselor position only requires a PPS credential, but testified that each job has different skill sets which the District looks for when hiring employees. For secondary school counselors the District looks for individuals with experience and a knowledge of the academic needs of secondary school students. With elementary school counselors the District looks more for individuals with counseling experience and with running group sessions. Assistant Superintendent Vallely described the prior bad experience the District had placing an elementary school counselor as a secondary school counselor at Rancho Buena Vista high school. That counselor had no knowledge regarding the class requirements necessary for graduation, resulting in students not getting the classes they needed. Assistant Superintendent Vallely testified that secondary school counselors must "hit the ground running," there cannot be on-the-job training because students have to be given the correct course selection advice.

17. Jose Villareal, a principal at Vista Magnet Middle School and a former counselor, testified about his education and employment experience. His only experience as

an elementary school counselor was during an internship while in school. Villareal was a secondary school counselor for five years in another district. While in school, Villareal worked on a pilot program at the University of California (UC). That pilot program became the UC training program which secondary school counselors attend to learn about the UC admission requirements and financial aid programs.

Villareal testified about the differences between an elementary school and secondary school counselor but admitted that both follow the national model of the three domains of counseling: academics, career and personal/social. Villareal asserted that secondary school counselors are more concentrated on the first and second domains, whereas elementary school counselors are more focused on the third domain. Secondary school counselors must know the UC and California State University requirements, information regarding financial aid and “must be very well versed” in high school course requirements and exams. Villareal claimed that the district’s job descriptions are very specific about how the counselors are utilized in the District in order to best serve the students; the District would not be served by allowing elementary school counselors to be employed as secondary school counselors “at this time.”

Villareal acknowledged the “huge shift” in the changing of admission policies which secondary school counselors must know. There are also “quite extensive financial aid packets” that must be completed, financial aid information which must be provided, and vocational counseling/military service options which must be offered to students, all of which is the responsibility of secondary school counselors. Villareal agreed that there have been yearly changes in the school models based upon current, ongoing research.

On cross-examination Villareal admitted that he was unaware of any secondary school counselors being retained who had been hired by the district straight out of school. He did not know of any secondary school counselor who had been hired right from school and also did not know if any elementary school counselors who had secondary school experience. Villareal further acknowledged that the secondary school counselors who work in the District’s middle schools are “in the middle,” as they “straddle the roles” elementary school and high school counselors play. When asked if an elementary school counselor could receive training and attend the UC conference so as to become a secondary school counselor, Villareal testified that he did not believe that would “best serve the students,” but did agree that elementary school counselors could learn from those conferences.

18. Respondent Chelsea Sorich graduated from Sonoma State with a Bachelor’s degree in psychology. She received a Master’s degree in counseling from the University of San Diego and obtained her PPS credential. In 2009 Sorich began working as a secondary school counselor for the San Diego Unified School District (SDUSD) where she worked at both a middle school and a high school, offering the many services and attending the UC conference which Villareal testified about. In 2011 Sorich was laid off in that district during a reduction in force and began working at one of this District’s elementary schools, where she is presently employed.

Sorich testified that she was hired by SDUSD right out of school, she had no secondary school counselor experience, but she worked hard, worked closely with peers, and taught herself all she needed so that she could successfully counsel secondary school students. Sorich testified that it is the person, and not the training, that determines whether or not an individual will be a good or poor employee as a secondary school counselor. She described herself as very hands-on, as someone very concerned about the academic success of her students and that she worked very hard to ensure they achieved it. As a secondary school counselor, Sorich had a caseload of 500 students, she was responsible for all their transcripts, recommendation letters, scholarship applications, financial aid applications, hosting parent nights to inform parents of the application process, ensuring compliance with A-G requirements, providing vocational and technical education to students and providing all of the secondary school counseling services about which Villareal testified. No evidence refuted Sorich's assertion that she could provide secondary school counseling services to the District.

19. Education Code section 44955, subdivision (d)(1), authorizes the District to deviate from terminating a certificated employee in order of seniority if it demonstrates a specific need for personnel to teach a specific course or course of study and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess.

20. Because subdivision (b) of section 44955 mandates 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," junior employees may be given retention priority pursuant to section 44955, subdivision (d)(1), only if they possess special training and experience that their more senior counterparts lack. (*Alexander v. Board of Trustees* (1983) 139 Cal.App.3d 567, 571; *Moreland Teachers Assn. v. Kurze* (1980) 109 Cal.App.3d 648, 655.)

21. The "*special training and experience necessary*" language in section 44955, subdivision (d)(1), must be read in context with 44955, subdivision (b). When one does that, it appears that the word "necessary" substantially limits 44955, subdivision (d)(1). A district may require special training and special experience, but a district cannot require more of either than is "necessary" to teach the course. If "necessary" were not read in that limiting way, 44955, subdivision (d)(1), could be used to circumvent the seniority rights secured by 44955, subdivision (b). On the other hand, reading "necessary" in that limiting way harmonizes the language of the two subdivisions.

22. Thus, a district may not use skipping criteria that are not "necessary" to teach a course. Requiring a certain type of experience or a certain length of experience may be appropriate but only if it is shown to be "necessary." There are a few decisions in which courts have approved of a requirement of prior experience. *Martin v. Kingfield School District* (1983) 35 Cal.3d 294, is an example. That case concerned the section 44956 preferred right of reappointment. An elementary school teacher who had been terminated

asserted her right to be rehired to fill a new position as a middle school science teacher, a position for which she was credentialed. The district established a requirement of prior experience as a middle school teacher and did not rehire Martin for the position. The case stands for the proposition that a district, in requiring prior middle school experience for a middle school science position, did not abuse its discretion. However, as the job descriptions introduced at this hearing demonstrated, the District did not *require* prior secondary school experience before hiring counselors, it merely *desired* it.

23. The seminal case for the retention of less senior employees, *Bledsoe v. Biggs Unified School District* (2008) 170 Cal.App.4th 127, requires a district to not only establish a specific need for personnel to teach a specific course of study, but to also establish that the certificated employee it proposes to retain has special training and experience necessary to teach that course or course of study or to provide those services. (*Id.* at p.138.) Prior administrative law decisions may be relied upon when making those determinations. (*Id.* at 137-142.)

24. In 2002, in a pre-*Bledsoe* decision, the District determined that secondary school counseling was a distinct, particular kind of service, which permitted it to retain those employees over more senior employees who were elementary school counselors.

25. Skipping a junior teacher and terminating a senior teacher instead of terminating the junior teacher is such a fundamental departure from the tenure system that the legislature's limitation of "necessary" should be strictly respected. A district should be allowed to terminate a senior teacher for not having "necessary" experience only if the experience actually is "necessary." And it is useful to consider that there was no evidence that prior to employment, any of the District's secondary school counselors had any such experience; whereas the evidence did establish that Sorich has prior secondary school experience.

26. All counselors in the District hold a PPS credential. All provide counseling services to the students. While it is true that a secondary school counselor offers a different type of counseling service than an elementary school counselor, as secondary school counseling is more focused on post-high school pathways, the District failed to establish that the respondents who are elementary school counselors are not certified and competent to render secondary school counseling services. The initial certification for counselors is the same, a PPS; there is no distinction between certification for an elementary school counselor and certification for a secondary school counselor. The District failed to establish that the counselors that it proposes to retain have special training and experience that any of the elementary school counselors it is proposing to release do not. In fact, at least as to Sorich, the evidence established that she possesses the special training and experience that would allow her to hold that position if she were senior to a secondary school counselor being retained.<sup>1</sup> Although it is understandable why the District's prior experience with an

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<sup>1</sup> During the hearing, the District's counsel advised that there is no one junior to Sorich who is being retained.

elementary school counselor who did not pan out as a secondary school counselor would make it reluctant to venture down that road again, the law requires that it demonstrate that retained junior employees have special training and experience that more senior employees do not; not that one employee who made such a career move in the past did not work out.

27. The evidence regarding special training and experience, primarily offered by Villareal, was non-persuasive. Villareal's testimony was little more than a self-promoting recitation of his "preferences." His assertion that elementary school counselors could not obtain the requisite knowledge at the UC conference made no sense and he failed to provide any foundation for his belief that elementary school counselors could not apply information learned at the UC conference and be able to work as secondary school counselors, but that secondary school counselors could. That testimony was especially all the more unclear given that elementary school counselors must satisfy 12 assigned responsibilities identified in their job description, many of which presumably require the same skill set they would employ if permitted to attend a UC conference and thereafter apply that information at work. In sum, neither Villareal's testimony, nor that offered by Assistant Superintendent Vallely met the District's burden of proof. Moreover, the 2002 decision, although instructive, is not controlling. Different witnesses testified in that matter and in that case "persuasive testimony was elicited," as opposed to the non-persuasive testimony put forth here. Moreover, that matter was decided prior to *Bledsoe* which set forth the burden a district must meet, which did not occur here. Accordingly, the evidence established that the District's skip involved making a distinction without a difference, making the skip arbitrary and capricious.

28. The evidence regarding Sorich demonstrated that the District failed to prove that it is justified in skipping her merely based upon her current position. That, however, does not necessarily mean that she is spared from termination. She may or may not be. The District must retain the most senior counselors who are certificated and competent to render the service that any junior counselors will be rendering. That may be Sorich or it may be someone more senior than she is; in fact, during the hearing, the District's counsel advised that there is no one junior to Sorich who is being retained. In any event, the District must rescind the layoff notices issued to any elementary school counselor who is senior to a secondary school counselor who was retained.

#### *Adult Education Issue*

29. The District proposes eliminating the adult education program based upon the governor's recommendation that responsibility for adult education be transferred to the community colleges, despite the fact that the governor's recommendation has yet to be adopted or implemented. Assistant Superintendent Vallely acknowledged that the District's adult education program has been very successful and that other districts are not eliminating their adult education programs as they await word from Sacramento. Assistant Superintendent Vallely admitted that the District would still receive federal money for adult education although it might not be a line item on the district budget.

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30. Respondent Elizabeth O'Shae-West testified that the District will continue to receive federal funding for the adult education program, even if that program is eliminated. The adult education program services 17,000 students, uses only 1% of the District's budget, and generates revenue for the District as adults are charged for the courses they take. O'Shae-West could not understand why the District would eliminate such a highly successful, revenue-generating, miniscule budget-using program. She also feared for the future of the adults taking courses as an added benefit of the program was the support it lent the District because the students' parents received further education, vocational training and English language learning, all of which promote the overall well-being of the District, its students and the Vista community.

31. While O'Shae-West's testimony was heartfelt and sincere, and she raised very valid concerns, the decision to reduce or discontinue a particular kind of service is matter reserved to the district's discretion and is not subject to second-guessing in this proceeding. (*Rutherford v. Board of Trustees of Bellflower Unified School District* (1976) 64 Cal.App.3d 167.) The evidence did not demonstrate that the District's decision to eliminate the adult education program was fraudulent, arbitrary or capricious. (*San Jose Teachers Association v. Allen* (1983) 144 Cal. App. 3d 627, 637.)

#### *Final Layoff Notice*

32. Except for the counselors referenced above, the District is not retaining any employee with less seniority to perform a service that any respondent is certificated and competent to render.

### LEGAL CONCLUSIONS

1. Jurisdiction for this proceeding exists pursuant to sections 44949 and 44955, and all notices and other requirements of those sections have been provided as required.

2. A district may reduce services within the meaning of section 44955, subdivision (b), "either by determining that a certain type of service to students shall not, thereafter, be performed at all by anyone, or it may 'reduce services' by determining that proffered services shall be reduced in extent because fewer employees are made available to deal with the pupils involved." (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)

3. A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated and competent to fill. In doing so, the senior employee may displace or "bump" a junior employee who is filling that position. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469, 473-474.) Junior teachers may be given retention priority over senior teachers only if the junior teachers possess superior skills or capabilities which their more senior counterparts lack. (*Santa Clara*

*Federation of Teachers, Local 2393, v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831, 842-843.)

4. Because of the reduction of particular kinds of services, cause exists pursuant to Education Code section 44955 to give notice to respondents that their services will not be required for the 2013-2014 school year. The cause relates solely to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949. The district has identified the certificated employees who are providing the particular kinds of services that the Governing Board directed be reduced or discontinued. It is recommended that the Governing Board, consistent with the findings herein, give respondents notice before May 15, 2013, that their services will not be required by the District for the school year 2013-14.

5. A preponderance of the evidence sustained the charges set forth in the accusation subject to the recommendations listed in the factual findings. This determination is based on all factual findings and on all legal conclusions.

#### RECOMMENDATIONS

It is recommended that the governing board give notice to the respondents whose names are set forth below except for those respondents who are elementary school counselors as referenced above in the Findings of Fact Nos. 10-28, inclusive, that their employment will be terminated at the close of the current school year and that their services will not be needed for the 2013-2014 school year.

It is recommended that the governing board reevaluate the respondents who are elementary school counselors and rescind the layoff notices to any of those whose dates of hire are senior to secondary school counselors the District skipped.

DATED: May 7, 2013

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MARY AGNES MATYSZEWSKI  
Administrative Law Judge  
Office of Administrative Hearings

## VISTA UNIFIED SCHOOL DISTRICT

### EXHIBIT "A"

Adams	Hillary
Adolphs-Harris	Vickie
Albert	Jenna
Alon	Margo
Apodaca	Irma

Axson	Susan
Baltazar-Moreno	Zonia
Barwicke	Reeva
Bechtold	Nicole
Bermudez	Morella
Bispo	Jacqueline
Borgstede	Valentyna
Brown	Karen
Campbell	Patricia
Confrome	Sonia
De La Cruz	Rosa
DeMaria	Joseph
Diaz	Claudia
Douglass	Denise
Dufresne	Jennifer
Enriquez	Rosa
Escandon	Kathleen
Fierros	Guadalupe
Figueroa	Kathy
Fox	Patricia
Gillanders	Tracy
Gorgueiro	Andrew
Gutierrez	Veronica
Hasan	Renee
Hernandez	Cristina
Honeycutt	JoAnn
Juarez	Luis
Juarez	Pedro
Kamdar	Nilufa
Kildiszew-Smith	Diana
Lamb	Kathleen
Lee	Mary Patricia
McGrath	Rosanne

Mejia	Heidi
Melkonian	Mark
Napier	Martie
Newcomer	Mary Jean
Niavez	Edward
O'Shea-West	Elizabeth
Parker	Deborah
Park	Florence
Parr-Garcia	Carol
Pierce	Elizabeth
Quinlan	David
Quisenberry-Boyd	Kathryn
Scott	Nicole
Simica	Melinda
Sloat	Frank
Sorich	Chelsea
Steier	Kim
Stevenson	Lisa
Stiemke	Kimberley
Tempos	Rosa
Thompson	Maria
Travers	Stephany
Ulbert	Sean
Vasquez	Aida
Villagrana	Lupe
Villegas	Gloria
Vinson	Cheryl
Vitiello II	Terrance
Wallner	Mary
Wehrli	Nicole
Zurita	Lizette