BEFORE THE GOVERNING BOARD OF THE
VALLEJO CITY UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Employment Status of: EIGHT RESPONDENTS IDENTIFIED BELOW	OAH No. N 2004040135

PROPOSED DECISION

Robert Walker, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Vallejo, California, on April 23, 2004.

Sandra Woliver, Attorney at Law, and Neha M. Sampat, Attorney at Law, represented the complainant, Clifford Solari, Deputy Superintendent of the Vallejo City Unified School District.

David Weintraub, Attorney at Law, represented the respondents, Rocquel Colbert, Michael Duarte-Gomes, Michele Hawley-Pelton, Dwayne Jones, Gena Keck, Elisabeth Mallia, Marilu Saldana, and Almatha Suggs.

FACTUAL FINDINGS

1. Clifford Solari, the complainant, wishes to make a record of the fact that the school district has rescinded the accusation as to two employees who are not respondents in this proceeding. Those employees are Retina Bowen and Louise Brown.

2. Not later than March 15, 2004, in accordance with sections 44949 and 44955 of the Education Code,[1] the superintendent caused the governing board of the district and respondents to be notified in writing that it was recommended that respondents be notified that the district would not require their services for the ensuing school year. The notice stated the reasons for the recommendation. The stated reason was a proposed reduction or discontinuation in particular kinds of services. The recommendation was not related to respondents' competency.

[1] All references to the Code are to the Education Code unless otherwise specified.

3. The superintendent proposed reducing or discontinuing particular kinds of services by a total of 183.42 full time equivalent positions (FTE). The superintendent proposed reducing or discontinuing social work services by 4 FTE and counselor services by 14 FTE.

4. A notice was delivered to each respondent either by personal delivery or by depositing the notice in the United States mail, registered, postage prepaid, and addressed to respondent's last known address.

5. The notice advised each respondent of the following: He or she had a right to a hearing. In order to obtain a hearing, he or she had to deliver a request for a hearing in writing to the person sending the notice. The request had to be delivered by March 22, 2004, which was not less than seven days after the notice of termination was served. And the failure to request a hearing would constitute a waiver of the right to a hearing.

6. Each respondent timely filed a written request for a hearing to determine whether there was cause for not reemploying him or her for the ensuing year. An accusation was timely served on each respondent. Each respondent filed a timely notice of defense. All prehearing jurisdictional requirements were met.

7. Within the meaning of section 44955 of the Code, the services are "particular kinds of services" that can be reduced or discontinued. The recommendation to reduce or discontinue these services was not arbitrary or capricious but constituted a proper exercise of discretion.

8. The reduction or discontinuation of particular kinds of services relates to the welfare of the district and its students. The reduction or discontinuation is necessary in order to decrease the number of certificated employees of the district.

9. Seven of the respondents are counselors, and the district plans to lay off all seven of them. The district is eliminating its counseling program for the middle schools and severely reducing it in the high schools. Colleen O'Neal Anderson also is a counselor, and she has less seniority than the seven counselors the district plans to lay off. The district mistakenly failed to notify Ms. Anderson that it was recommended that she be notified that the district would not require her services for the ensuing school year. Ms. Anderson holds a teaching credential, and the district intends to offer her a teaching position. Respondents contend that there is no teaching position available in Ms. Anderson's field and that, therefore, the district will, ultimately, have to retain her as a counselor. Respondents further contend that the district may not lay them off while retaining Ms. Anderson as a counselor.

10. Except for one break in service, Almatha Suggs has worked for the district for 19 years. Because of her break in service, however, for seniority purposes, the date on which she first rendered paid service is August 30, 2002.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under sections 44949 and 44955 of the Code. All notice and jurisdictional requirements contained in those sections were satisfied.

2. Within the terms of sections 44949 and 44955 of the Code, the district has cause to reduce or discontinue particular kinds of services and to give notices to respondents that their services will not be required for the ensuing school year. The cause relates solely to the welfare of the schools and the pupils.

3. If the district retains Ms. Anderson as a counselor, it must lower – by one – the number of FTE positions in counseling that it eliminates. And it must retain the most senior counselor who, were it not for the district's failure to serve a notice on Ms. Anderson, could be laid off. That counselor may be – but will not necessarily be – one of the respondents.

4. The language of subdivision (b) of section 44955 of the Code might be read as requiring that – if the district were to retain Ms. Anderson as a counselor – it would be required to retain all counselors who are permanent employees with more seniority than Ms. Anderson has. That subdivision says, in part:

> [T]he services of no permanent employee may be terminated ... while any ... other employee with less seniority is retained to render a service which said permanent employee is certificated and competent to render.

5. But if the district had sent a notice to Ms. Anderson, that would not have saved the jobs of seven or more employees – only the job of the counselor who is most senior. And in *Alexander v. Board of Trustees of the Delano Joint Union High School District*,[2] the court spoke of a similar circumstance in terms of which teachers had and which had not suffered prejudicial error. Counselors who would have been laid off even if the district had notified Ms. Anderson will suffer no prejudice by the district's retaining her.

6. In Alexander the court said:

> Because at least some of the persons skipped should have received the notices, a corresponding number of the most senior of the employees who were not reemployed must have been improperly given notices. The trial court must determine which of the Teachers suffered prejudicial error in this case.[3]

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[2] (1983) 139 Cal.App.3d 567.

[3] *Id.* at p. 576.

7. Thus, even if the district retains Ms. Anderson as a counselor, it is not required to retain all of the respondents.

ORDER

1. The accusations served on the respondents are sustained.

2. Before May 15, 2004, the district may give notice to the respondents that the district will not require their services for the ensuing school year.

3. If the district retains Ms. Anderson as a counselor, it must lower – by one – the number of FTE positions in counseling that it eliminates. And it must retain the most senior counselor who, were it not for the district's failure to serve a notice on Ms. Anderson, could be laid off.

DATED: April 30, 2004

Robert Walker
Administrative Law Judge
Office of Administrative Hearings