

BEFORE THE
STATE ADMINISTRATOR OF THE
VALLEJO CITY UNIFIED SCHOOL DISTRICT

In the Matter of the Non-Reemployment of
Certificated Employees Corresponding to
78.06 Full Time Equivalent Positions

OAH No. N2005030437

PROPOSED DECISION

This matter was heard before Administrative Law Judge Jonathan Lew, State of California, Office of Administrative Hearings on April 18, 2005, in Vallejo, California.

The Vallejo City Unified School District was represented by Lawrence M. Schoenke, Esq., Miller Brown & Dannis, 71 Stevenson Street, 19th Floor, San Francisco, California 94105.

Except as otherwise noted, respondents were represented by David Weintraub, Esq., Beeson, Tayer and Bodine, 1404 Franklin Street, Oakland, California 94612.

Respondents Lois Banks, Linda Combs, James Gordon, Pamela McCluskey, Kristine Mietzner, David Parker, Allison Simpson, Carol Stalcup and Rosalind Vance were unrepresented and they did not appear at hearing.

The case was submitted for decision on April 18, 2005.

FACTUAL FINDINGS

1. Richard J. Damelio, Ed.D., is the State Administrator of the Vallejo City Unified School District of Solano County (District). He made and filed the Accusation in his capacity as such public officer.

2. Each of the respondents listed on Attachment A, attached hereto and incorporated herein by reference, was at all times mentioned herein and now is a certificated employee of the District.

3. On March 2, 2005, the State Administrator of the District adopted criteria for establishing the order of termination among respondents who have the same date of first rendering paid service and the order of termination among respondents.

4. On March 2, 2005, the State Administrator of the District adopted Resolution No. 2291 directing that the State Administrator or his designated representative give notices to certificated employees that their services would not be needed for the 2005-06 school year.

5. On March 15, 2005, respondents were served in the manner prescribed by law with written notice that it had been recommended that notice be given to them that their services would not be required for the ensuing 2005-06 school year. Such notice stated the reasons for such recommendation.

6. Respondents, within the time limit specified in Education Code section 44949, subdivision (b), requested a hearing to determine if there is cause for not reemploying them for the ensuing school year.¹

All pre-hearing jurisdictional requirements were satisfied.

7. The State Administrator of the District took action to reduce or discontinue 78.06 Full Time Equivalent (FTE) positions in Resolution No. 2291. Specifically, the State Administrator has decided to reduce or discontinue the following particular kinds of services:

9 – 12 Library Program	3.0
9 – 12 Counselor Program	14.0
Nurses	8.0
Elementary Prep Time Program Teachers	4.0
9 – 12 Independent Study Program Teachers	4.0
Home Outreach Program of Education (HOPE) K- 12 Teachers	8.0
Categorically Funded Instructional Associates	11.8
Categorically Funded Elementary Support Teachers	15.66
Beginning Teacher Support and Assessment Program (BTSA)	3.0
Professional Development Center Program (PDC)	1.6
Categorically Funded Instructional Associate/IIUSP	1.0
Community Day School Program Teachers (CDS)	4.0
TOTAL	78.06 FTE

The particular kinds of services described in Resolution No. 2291 are to be reduced or discontinued not later than the beginning of the school year, 2005-06. They are particular kinds of services which may be reduced or discontinued within the meaning of Education

¹ The District received timely requests for hearing from all but three respondents. Elizabeth Gaines, Pamela McCluskey and Patricia Smith filed requests for hearing with the District on March 25, 2005, two days beyond the five-day deadline. A motion was made at the time of hearing to allow respondents Elizabeth Gaines and Patricia Smith to participate in these proceedings based upon principles of due process, basic fairness and equity, as well as lack of prejudice to the District. The motion to allow respondents Elizabeth Gaines and Patricia Smith to participate is granted.

Code section 44955. The decision to reduce or discontinue the services is neither arbitrary nor capricious but rather a proper exercise of the District's discretion.

8. Nona Cohen-Bowman is the Director of Certificated Personnel for the District. She notes that the decision to reduce particular kinds of services was prompted by financial difficulties experienced by the District. She believes that none of the particular kinds of services described above are mandated and that while there is a possibility that some of the services will be restored, this has not happened as of this date. After accounting for employee attrition and transfers, notices were sent to 59 certificated employees.

Under a different process, temporary and provisional employees, holding one year contracts with the District, were given separate notices on February 28, 2005, that their services for the upcoming school year were not needed.² These employees included District pre-interns, interns, and teachers holding emergency certificates or waivers. The District released 69 employees based upon their credential status, a number that respondents contend is far in excess of those temporary employees legitimately substituting for the approximately 24 District teachers on long term leave. Respondents believe such temporary employees should be classified as probationary employees, placed on the layoff list and entitled to rehire rights. Respondents concede, however, that such argument is made solely on behalf of teachers not named in this case and that the status of such teachers has no direct impact on the seniority or other layoff rights of named respondents. The appropriate classification of temporary teachers not named as respondents, having been determined to have no impact on the rights of named respondents or on the resolution of relevant issues, will not be considered here. The issue of their appropriate classification should be contested in a different forum.

9. Nurse Services. Lisa Tosch is a credentialed school nurse and she testified to the important services provided by the District's school nurses. There are a number student services that are provided by nurses such as vision, hearing and scoliosis screening. Students with individualized health care plans may require assistance from nurses for catheterization, tube feeding and suctioning. Other students with diabetes may require daily monitoring and insulin injections. Certain of these services cannot be delegated to unlicensed personnel. However, other services, though mandated, may still be performed by individuals who are not certificated nursing staff. (See Ed. Code, §§ 49426, 49452, 49452.5 and 49455.) The District's school nurses note that Vallejo's population has a high percentage of at-risk children, frequently challenged by health issues, who do not achieve without the right support services. With the cutbacks proposed in nursing services, there would be a reduction of the nurse to student ratio from 1:2,650 to 1:19,000. Ms. Tosch believes students in the District will be left without a critical safety net if school nurses are not present and she is

² Under Education Code section 44954, the governing boards of school districts may release temporary employees requiring certification qualifications at the pleasure of the board prior to serving at least 75 percent of the school year, or upon notice of non-reelection for the succeeding school year where the employee has served at least 75 percent of the school year.

concerned for students with any unforeseen illness, injury or health problems for which school nurses will not be able to detect or provide the necessary care.³

While the District will be required to have a plan in place for the provision of nursing services for the 2005-06 school year, it does not have to have a finalized plan in place at the time the decision is first made to reduce/eliminate particular nursing services. And in the absence of any evidence as to how the District intends to deliver the required services, it is premature to consider whether the District will or will not meet the statutory requirements. Evidence Code section 664 creates a presumption that the action or official duties of a public entity, such as the District, have been regularly performed. (*Degener v. Governing Board* (1977) 67 Cal.App.3d 689, 696.) The State Administrator for the District has discretion to determine how and in what manner mandated services are to be provided. (*Campbell Elementary Teachers Association v. Abbott* (1978) 76 Cal.App.3d 796, 811; *Gallup v. Board of Trustees* (1996) 41 Cal.App.4th 1571, 1582-90.) Changing the way in which a service is to be performed constitutes a reduction in a particular kind of service, as does having fewer employees available to perform the service. (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 179; *Campbell Elementary Teachers Association, Inc. v. Abbott, supra*, 76 Cal.App.3d at p. 811.) For these reasons, the District may reduce nursing services by 8.0 FTE as proposed in the resolution.

10. Categorically Funded Instructional Associate Positions. Eight respondents are currently slated for layoff from instructional associate positions. They contend that their services are not being reduced at all, but instead they are being re-categorized into "teacher leaders" positions. Carleen Gundersgaard is the assistant superintendent for academic achievement and accountability. She confirms that the District intends to create new teacher leader positions and that instructional associates will get "first crack" at these positions if they are interested. But the teacher leader is a new position and the expectation is that they will be doing a different job than instructional associates. Currently, the duties of instructional associations are site based driven. Specific responsibilities vary and are flexible, defined largely by the needs of the assigned school. In contrast, the proposed teacher leader position will provide grade level teams with skills to implement a curriculum. The teacher leaders, acting as professional developers/coaches, will be responsible for working much more with teacher teams, harnessing the energy and teaching skills that these teachers hold.

11. Laurie Reemsnyder. Ms. Reemsnyder is a photography teacher assigned to Bethel High School, where she has been art department chair over the past four years. She received Teacher of the Year honors in 2004. She was asked to teach photography in 2000, at a time that the high school had no dark room or photography equipment/materials whatsoever. She wrote a course description that was eventually approved by both the University of California and California State University systems to fulfill an "f" requirement.

³ Much of this information was communicated to Dr. Damilio and the District is apparently looking ahead to upcoming contract negotiations where issues relating to nursing services will be discussed. Dr. Damilio has yet to commit to a plan for how nursing services will be provided for the upcoming school year.

She believes her layoff would deprive students of the ability to meet this college requirement. She also designed a curriculum to align with the California visual /performing arts standards. Ms. Reemsnyder is the only photography teacher in the District who holds an art credential. Projected signups for her photography course next year approximate eight sections.

It is not clear whether photography courses are being reduced, or whether another teacher is bumping into the position held by Ms. Reemsnyder. In either event, she has not established that the District acted improperly or unreasonably in reducing a particular kind of service or retaining a more senior teacher to teach art/photography classes at Bethel High School or elsewhere.

12. Credit for Time Served as Interns. Two respondents contend they should be credited with more seniority based upon additional time they served as interns with the District. Respondent David Samson was first hired by the District on February 1, 2000. He was hired under a contract for temporary certificated employment as a middle school teacher. He held a multiple subject credential (intern). He did not work for the District for the 2000-01 school year. The District treated this period as a break in employment and a notation in his file indicates that it was prompted by his resignation. However, when he returned to work for the District he apparently completed a form (Intent to Return to Duty) intended for teachers returning from leave. There was no evidence in the file suggesting that Mr. Samson had ever sought or was ever approved for leave. Mr. Samson returned to the District and entered into contracts for certificated employment for school years 2001-02; 2002-03; 2003-04 and 2004-05. He received his preliminary credential on March 1, 2004. The District originally listed Mr. Samson's seniority date as March 1, 2004. The District has since changed his seniority to an earlier date, August 29, 2003, essentially crediting him with a portion of the time (up to one school year) he had worked as an intern for the District. Mr. Samson believes his seniority should be even earlier, and based upon the date he first rendered paid service in a probationary position. Under Education Code section 44885.5, district interns are to be classified as probationary employees and Mr. Samson contends that his seniority date should therefore be his first date of paid service as an intern. This would either be from the beginning of school year 2001-02, or even earlier if he was on leave during school year 2000-01.

Similarly, the District gave respondent Marnee McKenzie a seniority date of July 30, 2004. She has been employed with the District continuously since August 30, 2002. Over the first two years of her employment (school years 2002-03 and 2003-04) she held intern credentials. Her preliminary credential was issued July 30, 2004. The District concedes that she should now be credited for up to one school year for certificated service as an intern and intends to adjust her seniority date to August 29, 2003. Ms. McKenzie believes her seniority date should be August 30, 2002, her first date of paid service as an intern.

13. Education Code section 44845 provides that: "Every probationary or permanent employee employed after June 30, 1947, shall be deemed to have been employed on the date upon which he first rendered paid service in a probationary position." As noted earlier,

school districts shall classify as probationary employees "any person who is employed as district intern pursuant to Section 44830.3 and any person who has completed service in the district as a district intern pursuant to subdivision (b) of Section 44325 and Section 44830.3 and is reelected for the next succeeding school year to a position requiring certification qualifications." (Ed. Code, § 44885.5.)

Education Code section 44466 provides:

An intern shall not acquire tenure while serving on an internship credential. A person who, after completing a teaching internship program authorized pursuant to this article, is employed for at least one complete school year in a position requiring certification qualifications by the school district that employed the person as an intern during the immediately preceding school year and is reelected for the next succeeding school year to a position requiring certification qualifications shall, at the commencement of the succeeding school year, acquire tenure.

This section details the requirements for the attainment of permanent status by interns who are participating in intern programs. While interns cannot acquire tenure while serving on an internship credential, they are afforded, after completing a teacher internship program, credit for up to one year certificated service as an intern towards attainment of permanent status or tenure. The District correctly added an additional year for time that David Samson and Marnee McKenzie served under internship credentials. Thus, the correct seniority dates for both Mr. Samson and Ms. McKenzie is August 29, 2003. For both tenure and seniority calculations, the District is not required to credit them with any time they served as interns beyond this one year. To find otherwise would allow teachers remaining on an internship credentials, four years in the case of David Samson, to infringe upon the rights of fully credentialed probationary teachers.⁴

14. Except as provided by statute, no permanent or probationary certificated employee with less seniority is being retained to render a service which respondents, or any of them, are certificated and competent to render. As between employees who first rendered paid service to the District on the same date, the order of termination has been based solely on the needs of the District and the students thereof.

15. The reduction or discontinuation of the particular kinds of services set forth in Resolution No. 2291 are related to the welfare of the schools and the students thereof within the meaning of Education Code sections 44949 and 44955. The decision to reduce or discontinue these services is neither arbitrary nor capricious, but rather a proper exercise of discretion of the District.

⁴ A district intern credential is valid for a period of two years, but may be extended one year upon the recommendation of the school district. (Ed. Code, § 44325, subd. (b).) The Legislature could not have intended extended service as a district intern to be a factor in calculating district seniority, but not in acquiring tenure.

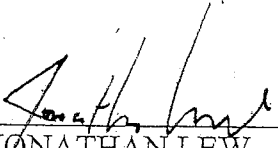
LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists pursuant to Education Code sections 44949 and 44955, and all notices and other requirements of those sections have been provided as required.
2. Cause exists to reduce the number of certificated employees of the Vallejo City Unified School District due to the reduction and discontinuation of particular kinds of services. The cause relates solely to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949.
3. The District may reduce nursing services and categorically funded instructional associate positions as proposed by reason of the matters set forth in Findings 9 and 10. They are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 44955.
4. The district seniority dates of respondents David Samson and Marnee McKenzie shall be changed to August 29, 2003, by reason of the matters set forth in Findings 12 and 13. The District correctly added an additional school year for time that David Samson and Marnee McKenzie served under internship credentials. The District was not required to calculate their seniority from their first date of paid service as an intern.

ORDER

Notice shall be given to respondents that their services will not be required for the 2005-06 school year because of the reduction or discontinuation of particular kinds of services.

DATED: April 29, 2005



JONATHAN LEW
Administrative Law Judge
Office of Administrative Hearings

ATTACHMENT A
LIST OF RESPONDENTS

1. Jennifer Acker
2. Lois Banks
3. Retina Bowen
4. Verónica Bowen
5. Cheryl Casabun
6. David Casdan
7. Linda Combs
8. Margaret Elliott
9. Elizabeth Gaines
10. James Gordon
11. Barbara Haeuser
12. Kathleen Hahn
13. Anca Hariton
14. David Henderson
15. Tamsie Irvan
16. Dwayne Jones
17. Michelle Jordan-Faucett
18. Leigh Lash-Nash
19. Pamela McCluskey
20. Marnee McKenzie
21. Roxanne Meier
22. Kristine Mietzner
23. Kimberly Mitchell
24. David Parker
25. Laurie Potts
26. Laurie Reemsnyder
27. Richard Responde
28. Michael Rettinghouse
29. David Samson
30. Pamela Schecter
31. Jenny Schwartz-Groody
32. Allison Simpson
33. Brenda Smith
34. Patricia Smith
35. Ainsley Soderberg
36. Carol Staulcup
37. Lisa Tosch
38. Rosalind Vance
39. Kathryn Vevoda
40. Esther Yialelis