RESOLUTION
OF THE
STATE ADMINISTRATOR
OF THE
OAKLAND UNIFIED SCHOOL DISTRICT

ADOPTING IN PART AND MODIFYING IN PART THE PROPOSED DECISION
IN THE
MATTER OF THE TEACHER LAYOFF HEARINGS AND RELEASE OF ADULT EDUCATION HOURLY TEACHERS
AKA
IN THE MATTER OF
MOLLY AIGNER, ET AL
OAH No. N2005030072

RESOLUTION NO. 0405-0134

WHEREAS, pursuant to Sections 44949 and 44955 of the California Education Code, the State Administrator acting as the Governing Board of the Oakland Unified School District has considered the findings set forth in the proposed decision issued on May 6, 2003 by the Honorable Nancy Rasmussen, Administrative Law Judge, in the matter of the Teacher Layoff Hearing of Oakland Unified School District, OAH No. N2005030072 ("Proposed Decision"); and

WHEREAS, the Proposed Decision contains Judge Rasmussen's determination that sufficient cause exists for the elimination of 462 Full Time Equivalent Positions and recommends that notice be given to the employees holding those positions that their services will not be required for the 2003-2004 school year; and

WHEREAS, the Proposed Decision includes a determination that the District shall not reduce Middle School and Secondary Counseling for the 2005-006 school year; and

WHEREAS, the Governing Board seeks to modify the Proposed Decision and to reduce the Middle School and Secondary Counseling for the 2005-006 school year based upon its own findings that: (a) Counseling is not a mandated service under the Education Code; (b) the District has the discretion to eliminate or reduce Middle School and Secondary Counseling in order to maintain maximum flexibility: (3) the District has the discretion to determine whether counseling will be provided in a different manner or at all in the 2005-2006 school year; and (4) the District has the right to reinstate Middle School and Secondary Counselors based on its programmatic needs; and

WHEREAS, the Governing Board is authorized to give notice to temporary certificated

employees of its decision to release them at any time prior to serving 75 percent of the school year, or after that time so long as the employees are notified before the end of the school year, pursuant to Education Code section 44954; and

WHEREAS, each of the employees classified as temporary was hired and classified as such in order to fill the short range needs of the District; and

WHEREAS, the Governing Board has received a recommendation to release all 234 Hourly Adult Education teachers; and

WHEREAS, the Proposed Decision contains Judge Rasmussen's determination that the District's 234 Hourly Adult Education teachers have been properly classified as temporary employees; and

WHEREAS, Judge Rasmussen has determined that all of the Hourly Adult Education teachers are temporary employees, the District intends to release them; and

WHEREAS, Section 44949 requires the Governing Board to make the final determination as to the sufficiency of the cause and disposition of this matter; and

NOW, THEREFORE, BE IT RESOLVED that the Governing Board of the Oakland Unified School District has considered the findings set forth in the proposed decision of the Hon. Nancy Rasmussen and adopts the Proposed Decision in all respects except for that provision which seeks to preclude the District from reducing or eliminating Middle School and Secondary Counseling services for the 2005-2006 school year; and

BE IT FURTHER RESOLVED that the Governing Board modifies the Proposed Decision by allowing for the reduction or elimination of Middle School and Secondary Counseling services for the 2005-2006 school year; and

BE IT FURTHER RESOLVED that as a result of the adoption and modification of the Proposed Decision, a maximum of the following number of Full Time Equivalent Positions shall be eliminated:

PARTICULAR KINDS OF SERVICES		**NUMBER OF FULL-TIME EQUIVALENT POSITIONS**
1. Elementary and Middle School Self-Contained and Core Program Classroom Teachers		164

2.	Middle and Secondary School Counseling		24
3.	Elementary, Middle and Secondary Art		6
4.	Elementary Preparation Program		2
5.	Adult Education Contracted Teachers		58
Total Full-time Equivalent Reduction			**254**

BE IT FURTHER RESOLVED that the partial adoption and modification of the Proposed Decision shall not constitute an admission or waiver of any legal arguments on the part of the District. Nor shall the adoption of the Proposed Decision be considered procedural in the nature or the promulgation of District Board policy. Moreover, any and all principles set forth in the decision shall be strictly limited to the current layoffs and to the individuals in the named decision and shall not be interpreted to apply globally to all District employees outside of the current layoff context.

BE IT FURTHER RESOLVED that the State Administrator acting in his capacity as the Superintendent or his designee is directed to send appropriate notices in accordance with the provisions of Education Code section 44949 and section 44955 to those employees whose positions will be lost by virtue of this action.

BE IT FURTHER RESOLVED that the State Administrator acting as the Governing Board authorizes his designee to notify the 234 Adult Education Hourly teachers of the decision to release them as temporary employees in accordance with the requirements of the Education Code section 44954 at the conclusion of the 2004-2005 school year.

BE IT FURTHER RESOLVED that the State Administrator acting as the Superintendent or whomever he authorizes as his designee is further authorized to take any other actions necessary to effectuate the intent of this Resolution. This decision is effective immediately.

PASSED AND ADOPTED on May 11, 2005 by the State Administrator of the Oakland Unified School District, County of Alameda, State of California, at regularly scheduled meeting of the State Administrator and/or Governing Board.

I certify that the foregoing resolution was duly introduced, passed and adopted as stated.

_____

Randolph E. Ward, Ed.D.
State Administrator
Oakland Unified School District

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State of California
Department of General Services

LEGISLATIVE FILE
File ID No. 05-0533
Introduction Date 5-11-05
Enactment No.
Enactment Date
By

May 6, 2004

Dr Randolph Ward
State Administrator
Oakland Unified School District
1025 Second Avenue
Oakland, CA 94606

STATE ADM
MAY 6 2005
OUSD

Re: In the Matter of the Teacher Layoff Hearing of
Oakland Unified School District
OAH No. N2005030072

Dear Board Members:

Enclosed with this letter are the administrative law judge's proposed decision, the agency order of adoption, Exhibits 1 through 41 and Exhibits A through O in the above-referenced case. Please return a copy of the order of adoption after the Board adopts its final Decision.

On or before May 7, 2005, the Governing Board must submit a copy of the proposed decision to all teachers who were respondents in the hearing, in accordance with Education Code section 44949.

Very truly yours,

Nancy L. Rasmussen

NANCY L. RASMUSSEN
Administrative Law Judge
Office of Administrative Hearings

NLR:wc

Enclosures

BEFORE THE
BOARD OF EDUCATION
OAKLAND UNIFIED SCHOOL DISTRICT

In the Matter of the Accusation Against: Molly Aigner, et al., Respondents.	OAH No. N2005030072

PROPOSED DECISION

Administrative Law Judge Nancy L. Rasmussen, Office of Administrative Hearings, State of California, heard this matter on April 25, 26 and 27, 2005, in Oakland, California.

Deborah Cooksey, Nicholas T. Calderon and Edward Holtz, of Ruiz & Sperow, LLP, represented the Oakland Unified School District.

Dale L. Brodsky, David N. Weintraub and Sharon Seidenstein, of Beeson, Tayer & Bodine, represented some of the respondents. These respondents consisted of K-12 teachers, counselors and contracted adult education teachers.

Stewart Weinberg and Vincent A. Harrington, Jr., of Weinberg, Roger & Rosenfeld, represented some of the respondents. These respondents consisted of hourly adult education teachers.

The record was held open for the parties to submit additional exhibits. On April 28, 2005, Mr. Weintraub's updated list of respondents represented by his firm was received by facsimile transmission and marked as Exhibit O for identification. On April 29, 2005, the District's list with the final numbers of teachers to be laid off was received by facsimile transmission and marked as Exhibit 40 in evidence. On May 2, 2005, the administrative law judge sent Ms. Cooksey a letter requesting clarification of the numbers on Exhibit 40. Mr. Calderon's letter in response received by facsimile transmission later that day was marked as Exhibit 41 in evidence.[1] On May 2, 2005, the record was closed and the matter was deemed submitted.

[1] When the original of Exhibit 41 was received on May 3, 2005, that document was substituted for the facsimile copy.

FACTUAL FINDINGS

1. Randolph E. Ward made and filed the accusation in his official capacity as State Administrator of the Oakland Unified School District (District).

2. Respondents are certificated employees of the District.

3. On February 23, 2005, State Administrator Ward approved Resolution No. 0405-0078 and Resolution No. 0405-0091 reducing or discontinuing particular kinds of services and directing that appropriate notices in accordance with Education Code[2] sections 44949 and 44955 be sent to all employees whose positions will be lost as a result.

4. On or before March 15, 2005, Deputy Superintendent Arnold W. Carter gave written notice to approximately 562 certificated employees, including respondents, of the recommendation that their services will not be required for the 2005-06 school year.

5. The District served an accusation on all respondents who filed timely requests for hearing to determine if there is cause for terminating their services for the 2005-06 school year. Most or all of the respondents filed notices of defense. The parties stipulated that every employee who received a layoff notice who submitted a written request for hearing and/or a notice of defense by the commencement of the hearing would be deemed a respondent in this proceeding. All prehearing jurisdictional requirements have been met.

6. In Resolution No. 0405-0078, State Administrator Ward took action to reduce or discontinue the following services for the 2005-06 school year:

SERVICES	FTE[3]
Elementary and Middle School Self-Contained and Core Program Classroom Teachers	200
Middle and Secondary School Counseling	47
Elementary, Middle and Secondary School Art	15
Regional Occupational Program/Vocational Education Program in Electronics	1
Elementary Preparation Program	50
Elementary, Middle and Secondary School Music	15

[2] All statutory references are to the Education Code.

[3] Full-time equivalent positions.

TOTAL	328

7. In Resolution No. 0405-0091, State Administrator Ward took action to reduce or discontinue the following services for the 2005-06 school year:

SERVICES	FTE
All Certificated Employees Teaching in the Adult Education Program	360

8. Before the layoff notices were sent out, the District determined that funding was available to avert the reduction of services in Elementary, Middle and Secondary School Music. No Music teachers received layoff notices.

9. As of the time of the hearing, the District had rescinded the layoff notices to approximately 61 employees. The rescissions announced at the hearing (which were not listed on the District's Exhibit 29) were for Anna Ponce, Ken Epstein, Eldicia Miler, Diana MacDonald, Heywood Dousseaux, Rosa Maria Corsico Perez and Justin Kimball.

10. At the conclusion of the hearing, the District had reduced the number of teachers it intended to lay off to those set forth below. It is not known how many FTE's these teachers represent.

Elementary and Middle School Self-Contained and Core Program Classroom Teachers		164
Middle and Secondary School Counseling		24
Elementary, Middle and Secondary School Art		6
Regional Occupational Program/Vocational Education Program in Electronics		0
Elementary Preparation Program		2
	Sub-total	**196**
Adult Education Contracted Teachers		58
Adult Education Hourly Teachers		234
	Sub-total	**292**
	Grand Total	**486**

Attrition

11. The District took into account all positively assured attrition as of March 15 in determining how many teachers should receive preliminary layoff notices. Respondents contend that the District should be required to take into account positively assured attrition occurring between March 15 and May 15, when final layoff notices must be issued, but this contention is without merit. Under *San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 635, a school district is not required to consider positively assured attrition occurring after March 15.

Skipping

12. Pursuant to Resolution No. 0405-0078, the District intends to retain regardless of seniority (i.e., "skip" in the layoff process) certificated employees who possess credentials and qualifications needed for Special Education, Secondary Mathematics, Secondary Science; Bilingual Education certificated employees who possess BCLAD[4] and who are currently serving in the District's bilingual programs; District Nurses; and District Psychologists. The employees being skipped are all in areas where the District has a shortage of certificated employees.

13. Section 44955 allows a school district to deviate from terminating a certificated employee in order of seniority if the district demonstrates a specific need for personnel to teach a specific course or course of study and the employee has special training and experience necessary to teach that course or course of study. Respondents do not dispute the District's need to skip employees in the areas identified in the resolution. They contend, however, that the category of "Bilingual Education certificated employees who possess BCLAD and who are currently serving in the District's bilingual programs" is too restrictive. Respondents assert that teachers who are in BCLAD training are allowed to teach Bilingual Education, so they should be skipped along with teachers possessing BCLAD certification. This assertion lacks merit. Whether to skip BCLAD trainees is a matter within the District's discretion. The District did not abuse its discretion when it limited the Bilingual Education teachers subject to skipping to those teachers who have completed BCLAD training and received their certificates.

Seniority

14. In February 2005, the District delivered to each certificated employee an Annual Statement of Intent form prepared by the District's Human Resources Department. These forms listed each employee's credentials, seniority date and "permanency" information. Besides asking employees to indicate whether they intended to return, resign or request a leave of absence for the 2005-06 school year, these forms asked employees to notify the District if they believed the listed information regarding their credentials, seniority

[4] Bilingual, Cross-Cultural, Language and Academic Development.

date or permanency was inaccurate. The Human Resources Department researched and responded to all submissions of corrections and made modifications to the District's records if warranted. The District prepared a revised seniority list which it utilized to determine which employees would receive preliminary layoff notices.

15. Many of the District's certificated employees taught under an emergency permit, an intern credential or a pre-intern certificate before they obtained their preliminary or clear teaching credential. The District does not classify such employees as probationary until they submit verification of their teaching credential or verification that they have completed the requirements and application for the credential. Once they are classified as probationary, the District gives these employees one year of credit for purposes of seniority and tenure if they served at least 75 percent of the previous school year. According to Dorothy Epps, the District's Human Resources Coordinator, this practice is pursuant to the collective bargaining agreement and has been going on for the five years she has worked in the District. Employees who taught under an emergency permit or provisional credential for more than one year before obtaining their preliminary or clear teaching credential do not get credit for their additional service.

16. Many respondents fall into the category of certificated employees who taught under an emergency permit or provisional credential for more than one year before obtaining their preliminary or clear teaching credential. These respondents now contend that their seniority dates should be changed to reflect their first dates of paid service under an emergency permit or provisional credential. These claims to earlier seniority dates are without merit and are rejected.

In support of their position, respondents cite *California Teachers' Association v. Governing Board of the Golden Valley Unified School District* (2002) 98 Cal.App.4th 369, but this case cannot be construed to allow credentialed teachers to retroactively add service under an emergency permit or provisional credential to acquire greater seniority during a layoff. In *Golden Valley*, the court allowed a teacher serving under an emergency permit to be classified as a probationary employee and held that such a teacher is entitled to the statutory protections governing the mid-year dismissal of a probationary employee. However, the court agreed with the ruling in *Summerfield v. Windsor Unified School District* (2002) 95 Cal.App.4th 1026, that time spent teaching under an emergency permit cannot be counted toward accruing tenure as a permanent employee. It is logical to conclude that such service also should not count for seniority purposes. This conclusion finds support in *Summerfield* – although the teacher there had been employed under an emergency permit for the 1997-1998 school year and had been classified by her district as a probationary employee, the court referred to "her first probationary year" as the 1998-1999 school year, when she was first employed as a probationary employee under a preliminary credential.

Interns and pre-interns also do not acquire tenure under their provisional credentials, although section 44466 and section 44885.5, subdivision (b), in effect, give former interns

(university interns and district interns, respectively) credit of one year toward tenure if they keep teaching in the same district where they completed the internship program.

Allowing employees teaching under an emergency permit or provisional credential to accrue seniority could lead to the absurd result of such employees being retained in a layoff situation over fully-credentialed teachers with less school district service. While respondents are not necessarily asserting that this should happen, there is no legal justification for now changing their seniority dates to retroactively give them seniority for their service before they became fully-credentialed (beyond the one year of credit the District gives them under the collective bargaining agreement).

17. Respondents also ask that the District be required to go back and re-order the seniority list, making sure that all employees who are entitled under the collective bargaining agreement to one year of seniority credit for service under an emergency permit or provisional credential actually received such credit. Respondents assert that the District has not been consistent in giving such credit. This assertion is based upon the hearsay declaration of respondent Diana MacDonald (whose layoff notice was rescinded). According to MacDonald, she was hired to teach in the District under an emergency permit on April 5, 1999, and she has been teaching in various assignments since then. Although she received her professional clear credential on August 21, 2001, her seniority date on the District's seniority list is August 28, 2001 (presumably her first date of paid service after receiving her credential), rather than August 28, 2000. In view of the testimony of Dorothy Epps that the one-year credit has been given to employees who were entitled to it, MacDonald's hearsay information is not sufficient to support a finding to the contrary. Furthermore, even if the District did make some mistakes on the seniority list, each employee was given ample opportunity to notify the District and obtain a correction. There is no basis for requiring the District to now go back and re-order the seniority list.

Authority of State Administrator

18. To address the District's fiscal insolvency during the 2002-03 school year, the Legislature in May 2003 passed Senate Bill No. 39 (SB 39). The Governor approved this bill, and it was chaptered on June 2, 2003, taking effect immediately as an urgency statute. SB 39 required the Superintendent of Public Instruction to "immediately assume all of the rights, duties, and powers of the governing board of the Oakland Unified School District." (Section 4, subdivision (a).) Section 4, subdivision (b), provided that: "The Superintendent of Public Instruction, in consultation with the Alameda County Superintendent of Schools, shall appoint an administrator to act on behalf of the Superintendent of Public Instruction in exercising the authority described in this act." The District's governing board was stripped of its rights, duties and powers, and required to serve as an advisory body reporting to the administrator. (Section 5, subdivision (b).) SB 39 appropriated $100 million as an emergency loan to the District, in the form of a line of credit from which funds could be disbursed "only if the administrator and the County Office Fiscal Crisis and Management

Assistance Team jointly determine that the disbursement is necessary." (Section 9, subdivisions (a) and (b).)

19. On June 16, 2003, pursuant to SB 39, Superintendent of Public Instruction Jack O'Connell appointed Randolph Ward to be the administrator of the District. Ward has served in that capacity since then.

20. The agenda for the February 23, 2005, public meeting at which the layoff resolutions, No. 0405-0078 and No. 0405-0091, were approved by Ward indicated that the meeting was of the State Administrator and/or the Board of Education (the District's governing board). Ward does not recall if any Board members attended the hearing. The decision to reduce or discontinue particular kinds of services and to lay off teachers was made by Ward alone. The Board did not vote on the layoff resolutions or authorize Ward to act on its behalf.

21. Respondents contend that this entire proceeding is defective because State Administrator Ward lacks the authority to lay off teachers. Section 44955 provides that "when in the opinion of *the governing board* it shall have become necessary by reason of [the planned reduction or discontinuation of particular kinds of services] . . . to decrease the number of permanent employees in the district, *the governing board* may terminate the services of . . . certificated employees of the district . . . ." (Italics added.) Respondents assert that SB 39 did not specifically take away the Board's authority under this statute, and if it did so by implication, then SB 39 infringes on Oakland's constitutional right to local control of its public schools. Respondent's arguments are without merit. SB 39's transfer of all of the Board's rights, duties, and powers to the Superintendent of Public Instruction included the Board's authority under section 44955. When the Superintendent of Public Instruction appointed Ward to act on his behalf as administrator, Ward assumed the Board's authority under Section 44955. The provisions of the California Constitution cited by respondents, Article IX, Section 16, and Article XI, Section 3, do not support a determination that SB 39 is unconstitutional.

22. State Administrator Ward has the authority to act in place of the Board in pursuing a layoff of certificated employees under section 44955.

Reasons for Layoff

23. One of State Administrator Ward's primary responsibilities is to shore up the fiscal integrity of the District. Of the $100 million line of credit from the state, the District has borrowed $65 million, which it is repaying over a 20-year period. As of the second interim report for the 2004-05 school year, the District had a budget deficit of $6.7 million. For the last four years, student enrollment has declined in the District, causing a corresponding decline in ADA (Average Daily Attendance) revenue from the state. The District projects that enrollment for the 2005-06 school year will decline by approximately

2,000 students. The District does not yet have the final figures on its budget for the 2005-06 school year, but there is no question that the District's fiscal crisis is ongoing.

24. In looking for areas where service cuts could be made, Ward focused on areas with less direct impact on students. He felt that eliminating the elementary "teacher prep period" program would have the least direct impact on students. Ward apparently determined to eliminate all counseling positions, but he reasoned that counseling services could still be provided next year. School principals are allowed to create their own budgets under "Results-Based Budgeting," and they can choose to hire counselors. Ward expects many of the resources for counseling next year to come from categorical funds that historically have gone unspent.

25. Thirteen elementary schools in the District are in Program Improvement Year 4 (PI-4) under the No Child Left Behind Act (NCLB). NCLB requires that such schools be restructured to effect major changes in their operation. Restructuring options include closing the schools and reconstituting them with new staff or reopening the schools as charter schools. Charter schools can be either within the District or outside the District. In order for a school to be "charterized," over 50 percent of the tenured teachers at the school must sign a petition requesting District approval of the charter. In the two charter petitions that respondents submitted in evidence, the teachers who signed the petition were also certifying that they "are meaningfully interested in teaching at the school." The problem created by a school becoming charterized is that the present teachers who do not want to teach in the charter school must be reassigned within the District, creating a potential surplus of certificated employees.

26. In February 2005, when State Administrator Ward was considering whether to reduce particular kinds of services and lay off teachers, the District did not know what would happen with the PI-4 schools and their teachers. Ward had his staff analyze various plausible scenarios to determine the possible surplus of certificated employees for the 2005-06 school year. By the time the layoff resolutions were drafted, the District had determined that five of the 13 schools would definitely stay with the District, but what would happen with the other eight schools was still up in the air. No petitions to charterize any of the schools had been received, but Ward proceeded on the assumption that all eight schools could be charterized.

27. The decision to reduce Elementary and Middle School Self-Contained and Core Program Classroom Teachers by 200 FTE was the result of an analysis of the projected number of surplus teachers holding multiple subject credentials offset by the projected number of such teachers leaving the District for various reasons. The largest component of the surplus was the 198 teachers projected to be released from the eight PI-4 schools in the event they became charterized. (There are 409 teachers in those eight schools, and assuming that 51 percent of the teachers signed the charter petitions, it was projected that approximately 49 percent would come back to the District for reassignment.)

28. Charter petitions for two of the PI-4 schools, Cox and Hawthorne, were submitted to the District at the April 13, 2005 meeting of the State Administrator and/or the Board of Education. As of the hearing, Ward had not yet reviewed these petitions. There is no legal deadline for submitting charter petitions, but, as a practical matter, it would be impossible after a certain point to create a charter school program in time for the 2005-06 school year. Ward hopes to know by mid-May how many teachers will be affected by charter school creation.

29. Hearsay evidence suggests that none of the PI-4 schools besides Cox and Hawthorne will submit petitions to become charter schools for next year. In light of this, respondents argue that it was an abuse of discretion for the State Administrator to recommend the layoff of 200 teachers. This argument does not have merit. In determining how to allocate its resources, a school district is given broad discretion to reduce or discontinue particular kinds of services and lay off teachers. As of February 23, 2005, when the layoff resolutions were approved, and up to the March 15 deadline for preliminary layoff notices, it was not unreasonable for State Administrator Ward to assume that eight schools could be charterized and to base projections of a teacher surplus on that assumption. If it turns out that a large number of teachers are laid off only to be later rehired, it will have been an unfortunate exercise, but this is the reality of a statutory scheme that requires a school district to make layoff decisions at a point when it does not know how much money it will have the following year, or, as in this case, when it does not know how big a teacher surplus it will have by reason of charter school creation. Ward acted within its discretion in reducing Elementary and Middle School Self-Contained and Core Program Classroom Teachers by 200 FTE.

Adult Education

30. State Administrator Ward made the decision to discontinue the District's Adult Education Program after receiving budget figures from the director of the program, Alan Kern, showing that expenditures exceed revenues for the 2004-05 school year (by some $2.6 million dollars in the first interim budget) and are projected to do so for the 2005-06 school year. A budget shortfall in the adult school requires the District to take funds away from the K-12 program. Ward felt that the Adult Education Program threatened the financial stability of the District, so he decided to discontinue the program and lay off all the adult school teachers.

31. Respondents claim that the budget figures provided to Ward are not accurate. Respondent Patricia Jensen is a 28-year adult school employee who in 2002 got involved in oversight of the Adult Education Program as a stakeholder. She has been on a committee to make sure the program does not have a deficit, as it had several years ago. During collective bargaining negotiations in early March, Jensen saw the budget document that was provided to Ward. She was shocked to see that it showed a deficit, since a preliminary budget she saw in October 2004 showed a surplus. According to Jensen, Kern admitted that a $500,000 capital outlay item included on the preliminary second interim budget for 2004-05 was a

mistake. Jensen also takes issue with the amounts shown for other expenditure items. Although she did not have access to the District's budget information, Jensen put together her own budget figures, utilizing salary information available to her as well as historical spending data. By her calculations, the Adult Education Program will have a budget surplus this year and next. Also, Jensen asserts that the adult school's ADA generates money from the Lottery that goes to the District's general fund, and this has amounted to millions of dollars over the years.

32. Respondents contend that the Adult Education Program is financially self-sufficient and actually gives back money to the District, through the Lottery. They assert that the elimination of the program would constitute an abuse of discretion, since the stated reason for the action – that the program has a budget deficit – is not true. Respondents believe that Ward's real agenda is to pressure the teachers to ratify his proposed collective bargaining agreement, which apparently contains pay and/or benefit concessions by the teachers. Jensen cited reports in the press that Ward had said he would restore the Adult Education Program if the contract was ratified.

33. State Administrator Ward did not abuse his discretion when he decided to eliminate the Adult Education Program. He was entitled to rely on the budget document he received from the program director without having to question the accuracy of the numbers. Based on the financial picture painted by that document, Ward's decision to cut the program was reasonable. If Patricia Jensen is correct, and the Adult Education Program actually makes money for the District, Ward has the opportunity to rescind the layoff notices and restore the program. It was not established that he acted in bad faith in eliminating the Adult Education Program.

34. Respondents also contend that the District cannot discontinue providing adult education services when there is no plan for a community college district to take over providing these state-mandated services. This contention is lacking in merit. The issue of how adult education services will be provided if the District eliminates its Adult Education Program is beyond the scope of this proceeding. State law does not require a school district to provide adult education services.

Particular Kinds of Services

35. The services identified for reduction or elimination in Resolution No. 0405-0078 and Resolution No. 0405-0091 are particular kinds of services within the meaning of section 44955.

Counseling

36. Respondents contend that the reduction or elimination of Middle School and Secondary School Counseling should be disallowed because the District has not established that counseling services will actually be reduced or provided in a different manner next year.

On this point, respondents must prevail. The evidence is somewhat sketchy, but there is no doubt that counseling services will be provided next year. School principals are allowed to hire counselors, and at least one high school and one middle school have notified Human Resources that they need counselors for next year. It is unknown whether counseling services will be provided next year with fewer counselors than this year. The fact that counseling services *may* be provided in a different manner next year is insufficient to justify the proposed reduction or elimination of counseling positions.

Reductions in Art

37. Respondents raised the issue of whether the District's reduction in Art at the secondary school level will leave enough course offerings to allow students to meet the Visual and Performing Arts (VPA) entry requirement for the University of California. The District established that there will be enough high school courses next year in dance, drama, music and visual art to allow students to meet the VPA requirement.

Bumping by Part-Time Teachers

38. Section 44955 requires a school district to "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." To meet this requirement, the District has worked out a "bumping" chart whereby teachers whose current positions are being eliminated will be retained if they are qualified to teach in an area not impacted by the reduction of services or if they have more seniority than another employee teaching in an area impacted by the reduction of services. (In the latter case, the less senior employee would be subject to layoff, unless he or she had bumping rights.)

39. Respondents Kathleen Buty, Eric Gahm and Donna Lee Luiz are part-time employees (.60, .80 and .80 FTE, respectively) who have received layoff notices when numerous employees with less seniority are not being laid off. The District does not allow a part-time employee to bump a full-time employee. The District also does not allow a part-time employee to bump a part-time employee who is on leave for part of his or her position and who has the right to return next year to a full-time position, or to bump a part-time employee who is sharing a position with someone on leave for part of his or her position. During cross-examination, it was pointed out to Dorothy Epps that various part-time employees with less seniority than Buty, Gahm and Luiz are not being laid off. Epps did not know the particulars of these employees' assignments and she did not have the opportunity to research District records to determine whether Buty, Gahm or Luiz should have been allowed to bump any of them.

40. It cannot be determined from the available evidence that respondents Buty, Gahm or Luiz should have been allowed to bump a part-time teacher with less seniority. Sufficient questions have been raised, however, that it would be reasonable to require the District to re-examine this issue before sending out final layoff notices. It is noted that the

three part-time respondents would not be allowed to bump a part-time teacher with a greater percentage FTE. For example, respondent Buty (with a .60 position) would not be allowed to bump a teacher in a .80 position.

Temporary Employees

41. None of the District's hourly adult education teachers is employed to teach for more than 60 percent of the hours per week considered a full-time assignment for permanent employees. Accordingly, section 44929.25 requires that these teachers be classified as temporary employees, and the District has so classified them. Despite the fact that temporary certificated employees may be dismissed at the pleasure of the governing board, the District sent its hourly adult education teachers "precautionary" layoff notices.

42. At the hearing, counsel for the hourly adult education teachers asserted that one such teacher, respondent Margaret Clement, might be entitled to classification as a probationary employee under *Kavanaugh v. West Sonoma County Union High School District* (2003) 29 Cal.4th 911. (In that case, the California Supreme Court held that under section 44916[5] a teacher who was not given written notice of her status as a temporary employee on or before her first day of paid service must be considered a probationary employee.) No evidence was taken on this issue, however, because Clement does not have standing to challenge her classification in this proceeding. The provisions of sections 44949 and 44955 are to protect permanent and probationary employees from being laid off without cause. The precautionary layoff notices sent to Clement and other employees classified as temporary cannot serve to enlarge the governing board's jurisdiction to permit such employees to contest their classification in this forum.

Other Matters

43. All contentions made by respondents not specifically addressed above are found to be without merit and are rejected.

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[5] Section 44916 states, in pertinent part:

> ...At the time of initial employment during each academic year, each new certificated employee of the school district shall receive a written statement indicating his employment status and the salary that he is to be paid. If a school district hires a certificated person as a temporary employee, the written statement shall clearly indicate the temporary nature of the employment and the length of time for which the person is being employed. If a written statement does not indicate the temporary nature of the employment, the certificated employee shall be deemed to be a probationary employee of the school district, unless employed with permanent status.

44. With the possible exception of respondents Kathleen Buty, Eric Gahm and Donna Lee Luiz, no certificated employee junior in seniority to any respondent is being retained by the District to perform services that any respondent is certificated and competent to render.

LEGAL CONCLUSIONS

Motion to Dismiss

1. Respondents made a motion to dismiss this proceeding on the basis that State Administrator Ward lacks the authority to lay off teachers under section 44955. For the reasons set forth in Factual Findings 21 and 22, this motion is denied.

Motion to Compel District to Assign Proper Seniority Dates

2. Respondents made a motion to compel the District to give teachers seniority credit for all their service under an emergency permit or provisional credential. For the reasons set forth in Factual Finding 16, this motion is denied.

* * * * *

3. 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.

4. In accordance with Factual Findings 39 and 40, cause exists to require the District to review its records to determine whether respondents Kathleen Buty, Eric Gahm or Donna Lee Luiz have the right to bump a part-time teacher with less seniority. These respondents do not have the right to bump a full-time employee (or a part-time employee with a greater percentage FTE). Neither do they have the right to bump a part-time employee who is on leave for part of his or her position and who has the right to return next year to a full-time position, or to bump a part-time employee who is sharing a position with someone on leave for part of his or her position. If respondents Kathleen Buty, Eric Gahm or Donna Lee Luiz have the right to bump a part-time teacher with less seniority, the respondent(s) with bumping rights shall be retained by the District for the 2005-06 school year.

5. In accordance with Factual Finding 36, cause does not exist for the District to reduce or discontinue Middle School and Secondary School Counseling for the 2005-06 school year.

6. Subject to the limitation set forth in Legal Conclusion 5, cause exists because of the reduction or discontinuation of particular kinds of services pursuant to section 44955 to give notice to certificated employees corresponding to the numbers of persons set forth in Factual Finding 10 that their services will not be required for the 2005-06 school year. The

cause relates solely to the welfare of the schools and the pupils thereof within the meaning of section 44949.

ORDER

1. In accordance with Legal Conclusion 4, the District shall review its records to determine whether respondents Kathleen Buty, Eric Gahm or Donna Lee Luiz have the right to bump a part-time teacher with less seniority. If any of these respondents have the right to bump a part-time teacher with less seniority, he or she shall be retained by the District for the 2005-06 school year.

2. In accordance with Legal Conclusion 5, the District shall not reduce Middle School and Secondary School Counseling for the 2005-06 school year.

3. Subject to the limitation set forth in 2, notice may be given to certificated employees corresponding to the numbers of persons set forth in Factual Finding 10 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: May 6, 2005

Nancy L. Rasmussen
NANCY L. RASMUSSEN
Administrative Law Judge
Office of Administrative Hearings

BEFORE THE
STATE AMINISTRATOR
AND/OR THE
BOARD OF EDUCATION
OAKLAND UNIFIED SCHOOL DISTRICT

In the Matter of the Accusation Against	)	
	)	
Molly Aigner, et al.,	)	OAH No. N2005030072
	)	PROPOSED DECISION
Respondents.	)	

NOTICE IS HEREBY GIVEN TO YOU that at the 4:00 P.M., State Administrator and/or Board of Education Meeting to be held May 11, 2005, the Legislative File No. 05-0533 - Adoption of Resolution No. 0405-0134 - Adopting in whole or in part the decision of the Administrative Law Judge, In OAH Case No. N2005030072, dated the 6th of May 2005, regarding the dismissal of certificated employees; authorizing the issuance of final layoff notices pursuant to the ALJ Decision and decision of the State Administrator as a result of the reduction in and/or elimination of services and further the release of certificated temporary employees, will be considered and possibly acted upon or adopted by the State Administrator of the Oakland Unified School District.

You have a right to attend and participate, if desired, in this meeting as the PROPOSED DECISION is considered or acted upon.

The meeting will be held in the Board Room, Paul Robeson Building, 1025 2nd Avenue, Oakland, CA 94606.

Executed this 6th day of May, 2005 at Oakland, California.

Edgar Rakestraw, Jr.
Secretary
Board of Education &
State Administrator

ER:st