

BEFORE THE
GOVERNING BOARD OF THE
COVINA-VALLEY UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation
Against:

KIMBERLY ALIOTO and Other
Certificated Employees of the Covina-Valley
Unified School District,

Respondents.

OAH Case No. 2009030131

PROPOSED DECISION

This matter was heard by Vincent Nafarrete, Administrative Law Judge, on April 13 and 14, 2009, at Covina. Complainant David L. Samuelson, Assistant Superintendent, Personnel Services, of the Covina-Valley Unified School District was represented by Margaret A. Chidester, Attorney at Law.

Respondents named and designated in Exhibit A were represented by Glenn Rothner, Attorney at Law. Respondent Jason Seliskar represented himself.

The following respondents, who were served with accusations and filed notices of defense, did not appear and were not represented at the hearing: Elizabeth Esquivel, Long Hoang, Leslie Kell, Agata Murena, Karen Penado, Lauren Perkins, Marisa Samuel, and Carrie Troyer.

On April 14, 2009, complainant's counsel filed a Supplemental Brief that she thought she forgot to present during the hearing. The Supplemental Brief was, in fact, presented during the hearing and marked as Exhibit 13. In addition, the Administrative Law Judge re-numbered the letter by respondent Stacy Leigh Yuki Okuno to the Assistant Superintendent, dated July 1, 2006, and originally marked and admitted as Exhibit 8, as Exhibit 14.

Oral, documentary, and stipulated evidence and oral and written arguments having been received, the Administrative Law Judge submitted this matter for decision on April 14, 2009, and finds as follows:

FACTUAL FINDINGS

1. The Administrative Law Judge takes official notice that, on March 20, 2009, the Accusation was made and filed by David L. Samuelson in his official capacity as Assistant Superintendent, Personnel Services, Covina-Valley Unified School District, State of California (District).
2. Except for those teachers who are temporary employees, respondents, and each of them, are permanent or probationary certificated employees of the District.
3. The District is a comprehensive school district comprised of elementary, middle, and high schools that serves and educates approximately 14,000 students of the east San Gabriel Valley. Due to the current state budget crisis and the uncertainty of the amount of state funding available for education for the next school, the Superintendent of the District has determined that the District must reduce expenditures of the District to ensure a balanced or solvent budget as well as a three percent reserve.
4. (A) On March 2, 2009, in Layoff Resolution No. 08-09-27, pursuant to Education Code sections 44949 and 44955 and based upon recommendation of the Superintendent, the Governing Board of the District determined and resolved that it is necessary to reduce or discontinue particular kinds of services which are now being rendered by certificated personnel at the close of the current 2008-2009 by a total of 88.0 full-time equivalent (FTE) positions. The Governing Board directed the Superintendent and/or his designee to serve notices of termination upon certificated employees in accordance with and in the manner prescribed by Education Code sections 44955 and 44949 and in a number corresponding to the services reduced or discontinued and positions affected thereby. The Governing Board authorized the Superintendent or his designee to issue, where it was deemed necessary, additional notices of termination so that "certain other employees whose rights may be affected will have an opportunity to be heard."

(B) On March 2, 2009, in Layoff Resolution No. 08-09-27, the Governing Board adopted tie breaking criteria to be used in determining the order of termination or layoff of certificated employees who first rendered paid service to the District on the same date or have the same first date of paid service. The Governing Board also adopted criteria for exempting certain certificated employees from the order of layoff who have special training, experience, and credentials not possessed by other certificated employees with more seniority and who are assigned to teach certain courses of study or to fulfill particular administrative tasks. Under this portion of its resolution, the Governing Board has determined to exempt administrators, who will be assigned to administrative positions for the next school year, as well as speech and language pathologists and psychologists, who are difficult to recruit and hire, from the certificated layoff process.
5. On or about March 13, 2009, pursuant to the resolutions of the Superintendent and the provisions of Education Code sections 1294, 44949, and 44955, the Assistant Superintendent as designee of the Superintendent gave written notices to certain respondents,

who are temporary certificated employees, that the Superintendent had recommended that their services will not be required for the ensuing 2009-2010 school year and that, as temporary certificated employees, they may be released from employment without a hearing. The written notices included the resolutions of the Superintendent to reduce and/or discontinue certain services or programs of the Department, the list of particular certificated services to be reduced or eliminated, tie-breaking criteria, pertinent sections of the California Education Code, and a request for hearing. The Department further notified these temporary certificated employees that, if they claimed that they could not be released from employment without a hearing, they were required to submit a request for hearing, attend the layoff proceeding, and present evidence at the hearing that they are entitled to participate in the hearing. Respondents who are temporary certificated employees of the Department, and each of them, requested a hearing to determine if there is cause for not re-employing them for the ensuing school year.

6. On or about March 3, 2009, pursuant to the resolutions of the Superintendent and the provisions of Education Code sections 44949 and 44955, the Assistant Superintendent as designee of the Superintendent gave written notices by certified and regular mail to those respondents, who are permanent or probationary certificated employees of the District, and each of them, that the Superintendent had recommended that their services will not be required for the ensuing 2009-2010 school year and the reasons for this action.¹ The written notices included the resolution of the Superintendent to reduce and/or discontinue particular kinds of services or programs performed by certificated employees in the District, the list of particular certificated services to be reduced or eliminated, tie-breaking and exemption criteria, pertinent sections of the California Education Code, and a request for hearing. Respondents who are permanent or probationary certificated employees of the District, and each of them, timely requested a hearing to determine if there is cause for not re-employing them for the ensuing school year.

7. The District's Preliminary Notice Not to Reemploy dated March 3, 2009, was sufficient in providing notice to respondents under Education Code sections 44949 and 44955. Respondents were not prejudiced by errors in the notice, if any, with respect to the description of their employment status, home addresses, or any other matters. No claims were raised in the hearing that the notice was, in fact, deficient in any respect.

8. On or about March 18, 2009, the District properly served by regular and certified mail respondents, who are permanent or probationary certificated employees or temporary certificated employees of the District, and each of them, with an Accusation, Statement to Respondent, Request for Discovery, copies of Education Code sections 44949 and 44955 and Government Code sections 11500, 11505, 11506, 11507.5-11507.7, 11509,

¹ The District served preliminary notices of layoff upon 158 certificated employees (Exh. 3). After being served with preliminary notices, 126 of the 158 certificated employees filed requests for a hearing and the remaining 32 certificated employees did not file hearing requests (Exh. 4).

and 11520, Notice of Defense form, and Notice of Hearing.² All of the respondents filed timely notices of defenses, requesting a hearing to determine if there is cause not to re-employ them for the ensuing school year and objecting to the Accusation. All prehearing jurisdictional requirements have been met by the parties.

9. On April 1, 2009, the District withdrew the Preliminary Notice of Layoff and Accusation that it issued and served upon the 61 certificated employees named in the Withdrawal of Preliminary Notices of Layoff (Exh. 6). During the course of the hearing, the District withdrew the Preliminary Notice of Layoff and Accusation that it issued and served upon respondents Lori Huntsman, Susan Gandara-Rowley, and Melissa Ullom.

10. On March 2, 2009, pursuant to Resolution No. 08-09-27 and its findings, the Governing Board resolved and took action to reduce or discontinue certain services or programs offered by the Department for the 2009-2010 school year in the following FTE positions:

<u>Services</u>	<u>Full-Time Equivalent Positions</u>
1.1 Assistant Principal, Grades 6 – 8	1.0
1.2 Dean, 9 – 12	1.0
1.3 Principal, K – 5	2.0
1.4 Counselors, 6 – 12	3.0
1.5 Classroom Teacher, 7 – 12 Art	2.0
1.6 Classroom Teacher, 7 – 12 English	6.0
1.7 Classroom Teacher, K – 6	44.0
1.8 Classroom Teacher, 7 – 12 Math	3.0
1.9 Classroom Teacher, Mild Moderate	5.0
1.10 Classroom Teacher, 7 – 12 Physical Education	3.0
1.11 Classroom Teacher, 7 – 12 Social Science	6.0
1.12 Classroom Teacher, 7 – 12 Science (Life)	2.0
1.13 Classroom Teacher, 7 – 12 Science (Physical)	2.0
1.14 Classroom Teacher, 7 – 12 Spanish	2.0
1.15 Learning Specialists, Elementary Schools	6.0

The reduction or discontinuance of the services set forth hereinabove constitute a total of 88.0 full-time equivalent positions.

11. The services set forth in Finding 10 above are particular kinds of services performed by certificated employees of the District which may be reduced or discontinued within the meaning of Education Code section 44955. The determination of the Governing

² The District served Accusation packets upon the 126 certificated employees who had been served with preliminary notices of layoff and had requested a hearing, as set forth in Exhibit 6.

Board to reduce or discontinue these services is within its sound discretion and is not arbitrary or capricious. The District demonstrated that the reduction or discontinuance of these particular kinds of services is related to the welfare of the District and its pupils and is necessary for the District to maintain a balanced budget and sufficient reserve.

12. Further, the District has obviated the need to reduce or discontinue all of the particular kinds of services described in Finding 10 above and to terminate the employment of all respondents by taking into account the personnel changes due to resignations, temporary leaves of absence, and/or reassignments of individual employees within the District. The District has determined what will be positively assured attrition for the 2009-2010 school year, as set forth in its Exhibit 1-c.

13. At the conclusion of the hearing in this matter, the District presented a list of 78 certificated employees (Exh. 11) whose employment it plans or proposes to terminate pursuant to the reduction or discontinuance of particular kinds of services for the 2009-2010 school year. This layoff list includes respondents as well certificated employees who did not request a hearing after being given the Preliminary Notice of Layoff.³

Individual Respondents

14. Respondent Jason Seliskar is a certificated employee of the District who teaches elementary school and was served with a Preliminary Notice of Layoff and Accusation as part of the reduction of elementary classroom teachers. Seliskar has a seniority date of August 25, 2006. However, the District has determined that Seliskar is qualified and entitled to bump a less senior certificated employee who teaches at the secondary level. The District does not plan to terminate Seliskar's employment in this layoff process but has elected not to withdraw his preliminary layoff notice or to dismiss his accusation at this time.

15. Respondent Jennifer Fenati is a certificated and second-year probationary employee of the District. Her first date of paid service with the District is August 22, 2007. She is a resource specialist teacher in English and World History for the special education mild and moderate program at a middle school. Fenati was served with a layoff notice and Accusation but the District does not plan to terminate her employment. Nevertheless, Fenati complains about the application of tie breaker criteria to intern teachers whom she claims are not credentialed teachers and are able to obtain seniority over teachers who are District employees and credentialed. Fenati's claims are not persuasive, for teachers who are interns

³ There are a number of respondents whose employment the District does not intend or propose to terminate for the ensuing school year. However, the District has elected not to withdraw the preliminary layoff notices or accusations that were issued to these respondents at the time of the hearing as a matter of "being cautious" prior to issuance of the instant Proposed Decision.

are, in fact, probationary employees, get paid for their services, and are eligible to receive preliminary credentials upon completion of their internships.

16. (A) Respondent Vickie Herman is an elementary school teacher who received a layoff notice and Accusation as part of the District's reduction of elementary classroom teachers. Herman disputes the determination of the District that her date of first paid service is August 31, 2005. She contends that her seniority date should be September 22, 1997, when she was first hired by the District, under the doctrine of equitable estoppel.

(B) Specifically, respondent Herman explains that, in 2002, she became ill due to what she believes was mold in her classroom. She took family medical leave and worked half-time but did not recover. On June 13, 2003, she resigned from her tenured position after speaking with the then-assistant superintendent of personnel who erroneously advised that, if she re-joined the District within 39 months, she would retain tenure and her original seniority date.

(C) Here, Herman's contention that the District should be estopped from changing her original seniority date is not persuasive. The evidence did not clearly demonstrate that Herman resigned because the administrator told her she could keep her seniority date; rather, she took what became a break in service because she was ill. Nor was it shown that Herman resigned in reliance upon the administrator's mistaken advice or that the administrator was apprised of the fact that Herman was going to resign and/or intended Herman to act upon his advice and resign. Equitable estoppel cannot be applied in these circumstances. (See *Driscoll v. City of Los Angeles* (1967) 67 Cal. 2d 297, 305; *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489.) Moreover, estoppel should not be applied as a matter of public policy inasmuch as Education Code section 44848 clearly provides that, when a certificated employee resigns and is re-employed by a school district, the certificated employee's seniority date is deemed to be the date when he or she rendered first paid service after re-employment. (See *Smith v. Governing Bd. of Elk Grove Unified School District* (2004) 120 Cal.App.4th 563, 569.) Respondent Herman's date of first paid service is as determined by the District and she may be laid off as part of the reduction of elementary classroom teachers.

17. (A) Respondent Emily Melnicki is a District high school social science and AVID teacher and holds a preliminary social science credential. She teaches four periods of World History. She is a first-year probationary employee with a seniority date of August 22, 2008. She was duly notified that the District proposes to terminate her employment as part of the reduction of classroom social science teachers for grades 7 through 12. The District also intends to have Melnicki bumped by respondent Diana Rudolph, an elementary grade level teacher who has a seniority date of August 25, 2006 and a supplemental authorization in social science that allows her to teach social science for grades 9 and below.

(B) In this proceeding, Melnicki complains that Rudolph cannot teach World History or social science at the grade levels higher than grade nine and asserts that she should be retained to teach those higher level social science classes. It was not established,

however, that the District's bumping of Melnicki by Rudolph and her layoff will result in the District not being able to fulfill its obligations to offer sufficient social science classes to students at the high school level. Respondent Melnicki's employment with the District may be terminated pursuant to the reduction of classroom teaching in social science.

18. (A) Respondent Staci Leigh Yuki Okuno teaches sixth graders in the subjects of English, Art, and Mathematics in a self-contained classroom. She holds a multiple subject credential and a CLAD authorization and has a seniority date of August 30, 2006. The District proposes to terminate Okuno's employment pursuant to the reduction of elementary classroom teaching.

(B) Here, respondent Okuno contends that she should be retained because she is qualified and/or competent to teach mathematics at the middle school level and can bump mathematics teachers with less seniority. Okuno became a District teacher and employee in September 1998. In June 2005, she left the employ of the District to teach in Nevada. One school year later, in August 2006, Okuno became re-employed by the District after this break in service and after being recruited by the District to teach sixth grade mathematics and science in the Gifted and Talented Education (GATE) program. She taught mathematics and science to GATE students for two school years before being reassigned to her present assignment. Okuno contends that she has experience teaching mathematics for the District and was authorized by the Governing Board to teach mathematics in October 2004 under Education Code section 44256, subdivision (b).

(C) Respondent Okuno's arguments are not persuasive. Unlike the mathematics teachers who are being retained, she is not credentialed or authorized to teach mathematics at the middle school level. The Governing Board authorization that she received in October 2004 was valid only for the 2004-2005 school year and was not renewed thereafter. In fact, Okuno then resigned from the District. Upon her re-employ, and in November 2006, Okuno was certified to teach mathematics and science at the sixth grade level but only for a self-contained elementary classroom (Exh. 10). As such, the evidence did not demonstrate that respondent is credentialed or qualified to teach mathematics at the secondary level. Respondent Okuno may be terminated pursuant to the District's reduction of elementary classroom teaching.

19. (A) Respondent William Selak is an elementary school teacher who holds a multiple subject credential. His first date of paid service with the District is August 25, 2006, and the District has proposed to terminate his employment pursuant to the reduction of elementary classroom teaching. Selak also holds a supplementary authorization in introductory music.

(B) In this layoff proceeding, respondent Selak contends that he should be retained to teach music inasmuch as he has a supplementary music authorization, a music teacher has resigned his position, and he can be reassigned to that position. The District has not resolved to reduce or discontinue any particular kinds of service in music. Selak's argument has merit. In February 2009, Andrew Henken, a music teacher for the District

since August 22, 2007, resigned his position. Henken is junior to Selak, held a preliminary single subject credential in music, and taught band, choir, and music at the elementary grade level. Thereupon, the District restructured its music services for the elementary grades for the current and/or ensuing school year by deciding not to fill the music position vacated by Henken and by having three, instead of four, music teachers. As established by the testimony of the Assistant Superintendent, the District restructured its elementary music service due to both budgetary and enrollment constraints after projecting that there will be 210 less elementary students enrolled in the school district next year. Under the circumstances and timing of this layoff matter, the District's action in restructuring its elementary music offerings was a reduction of the particular kind of service in music which was not authorized by the Governing Board and was not accomplished pursuant to the proceedings under Education Code sections 44949 and 44955. The District did not provide any authority for its restructuring of the music service in the face of a pending reduction in force proceedings. As such, the position and services performed by Henken still exists in the District and, based on his supplementary music authorization, respondent Selak must be reassigned to that position or service to teach music at the elementary grade levels pursuant to Education Code section 44955, subdivision (c). Respondent Selak's employment cannot be terminated pursuant to the present reduction or discontinuance of particular kinds of services.

20. (A) Respondent Christopher Wade Grinnell is a first-year probationary employee who teaches digital photography at the District's Northview High School. His seniority date is August 22, 2008. In this proceeding, the District views Grinnell as an art teacher and seeks to terminate his employment on the basis of the 2.0 FTE reduction of classroom teaching in art at grades 7 through 12.

(B) Since April 17, 2006, Grinnell has held a preliminary single subject teaching credential in art. In addition, since November 1, 2007, he has held a preliminary full-time designated subjects career technical education teaching credential in arts, media, and entertainment. His career technical education credential authorizes him to teach arts, media, and/or entertainment in grades 12 and below and to teach career technical instruction courses in classes organized primarily for adults.

(C) Before joining the District this school year, Grinnell taught career technical education courses, including commercial art and digital photography, for the East San Gabriel Valley Regional Occupational Program (ROP). He obtained the career technical education credential in arts, media, and entertainment to be able to teach courses for ROP. After one year, Grinnell became an employee of the District to earn more money. However, he continues to be affiliated with ROP. At Northview High School, he teaches five classes of digital photography; the classes are sanctioned by ROP and the high school students must be concurrently enrolled in the ROP to be able to take one of his classes. In his digital photography classes, Grinnell teaches students about photographic and camera techniques, use of computer programs to form and manipulate images, printing, and internet output. His digital photography classes are career technical educational classes and designed for students who want to become professional photographers. Grinnell also assists his students

to enter photography competitions which are judged by juries of professional photographers. In addition, Grinnell's digital photography classes are not overseen by any art or performing art department of the high school. As such, the preponderance of evidence demonstrated that Grinnell is a career technical education teacher and not an art teacher. He does not teach art. Grinnell may not be laid off from employment with the District as part of the reduction or discontinuance of the particular kind of service in art.

21. (A) The District may take action against any certificated employee, who was duly served with preliminary notices of layoff but then did not request a hearing, pursuant to Education Code sections 44949 and 44955.

(B) The District may likewise take action against any respondent, who was duly served with a preliminary notice of layoff and an accusation but then did not file a notice of defense or make an appearance at the hearing after filing a notice of defense, pursuant to Government Code section 11520, subdivision (a), and Education Code sections 44949 and 44955.

22. It was not established that there is any certificated employee with less seniority than those respondents or certificated employees, who is being retained by the District to provide services, that respondents or other certificated employees are certificated and competent to render.

* * * * *

Pursuant to the foregoing findings of fact, the Administrative Law Judge makes the following determination of issues:

LEGAL CONCLUSIONS

1. Jurisdiction exists for the subject proceedings pursuant to Education Code sections 44949 and 44955, based on Findings 1 – 13 above. All notices, the Accusation, and other related papers and reports required by these Education Code sections have been provided in timely manner and, as such, the parties have complied with the statutory requirements.

2. Cause exists pursuant to Education Code sections 44949 and 44955 to reduce by 88.0 full-time equivalent positions the concomitant number of certificated employees of the Department due to the reduction or discontinuance of particular kinds of services, as set forth in Findings 1 – 13 and 21 – 22 above. With respect to those respondents whose employment have been found to be terminable by the District and any other certificated

employees who received notices but did not request a hearing, the causes set forth in the Accusation relate solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949.

3. Cause does not exist pursuant to Education Code sections 44949 and 44955 to terminate the employment of respondents William Selak and Christopher Wade Grinnell due to the reduction or discontinuance of particular kinds of services, based on Findings 19 – 20 above.

4. Based on Findings 1 – 22 above, there is no certificated probationary or permanent employee with less seniority than any one of respondents or the certificated employees who is being retained by the District for the 2009-2010 school year to render services which any one of respondents or certificated employees is certificated and competent to render.

* * * * *

WHEREFORE, the Administrative Law Judge makes the following Order:

ORDER

1. The Accusations issued against respondents William Selak and Christopher Wade Grinnell must be dismissed, based on Conclusion of Law 3 above. These two respondents may not be given notice that their services will not be required for the 2009-2010 school year.

2. The Accusations issued against the remaining respondents are sustained, based on Conclusions of Law nos. 1 – 2 and 4 above. The Covina-Valley Unified School District may give notice to these respondents, and each of them, in the inverse order of seniority that their services will not be required for the ensuing 2009-2010 school year because of the reduction or discontinuance of particular kinds of services pursuant to Education Code section 44955.

3 The Covina-Valley Unified School District may give notice to those certificated employees, who were served with notices and/or accusations that their services will not be needed next year but did not file requests for hearing or did not appear at the hearing, that their services will not be required for the ensuing 2009-2010 school year because of the reduction or discontinuance of particular kinds of services pursuant to Education Code sections 44949 and 44955.

4. Before giving notice to respondents and the other certificated employees who did not request a hearing, the Covina-Valley Unified School District shall determine and take into account any additional positively assured attrition among certificated employees in deciding how many and when certificated employees should be terminated before the ensuing 2009-2010 school year.

Dated:

Vincent Nafarrete
Administrative Law Judge
Office of Administrative Hearings