

BEFORE THE
BOARD OF EDUCATION
OF THE
BARSTOW UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Layoff/Accusation
Against:

23 CERTIFICATED EMPLOYEES,

Respondents.

OAH No. 2009031105

PROPOSED DECISION

This matter came on regularly for hearing before Roy W. Hewitt, Administrative Law Judge, at Barstow, California on April 29, 2009.

Todd M. Robbins, Esq. of Atkinson, Andelson, Loya, Ruud & Romo, represented the Barstow Unified School District (the district).

Rosalind D. Wolf, Esq. represented all of the respondents who appeared at the hearing.

Oral and documentary evidence was received and the matter was submitted on April 29, 2009.

FACTUAL FINDINGS

1. On March 10, 2009, the Superintendent of the district recommended, with regard to the ensuing school year, that the Board of Education of the district (the board) reduce or eliminate particular kinds of services (PKS) provided by the district for the 2009-2010 school year.

2. On March 10, 2009, the board adopted Resolution number 35, determining that it would be necessary to reduce or discontinue PKS at the end of the current school year.

The board determined that the PKS that must be reduced for the 2009-2010 school year were the following full time equivalent (FTE) positions:

<u>PKS</u>	<u>FTE</u>
Elementary Classroom Teachers	20
Counselor	2
Library Media Facilitator	1
Total FTE positions to be reduced or eliminated	<hr/> 23

The parties do not dispute the fact that the services listed above are PKS, which may be reduced or discontinued within the meaning of Education Code section 44955.

3. The district's recommendation and the board's decision to reduce or discontinue the services listed in Finding 2, above, were neither arbitrary nor capricious; rather, the recommendation and decision were based on the projected, \$4.5 million dollar, budget deficit. Thus the board's decision represents a proper exercise of its discretion.

4. The reduction and discontinuation of services is related to the welfare of the district and its pupils, and it has become necessary to decrease the number of certificated employees as determined by the board.

5. The Superintendent designated the respondents, permanent or probationary teachers employed by the district, by creating a seniority list, first selecting teachers to be laid off in the inverse of the order in which they were employed, then assigning and reassigning employment in such a manner that all employees to be retained will be retained so as to render any service which their seniority and qualifications entitle them to render.

6. Prior to March 15, 2009, the following 23 certificated employees (respondents) affected by the layoffs received written notice notifying them that pursuant to Education Code sections 44949 and 44955, their services "will not be required for the ensuing 2009-10 school year:"

1. Aherns, Julie
2. Alvarez, Nichole
3. Arch, Alicia
4. Baker, Amber Elaine
5. Bengel, Nadine
6. Bravo, Erica
7. Crews, Golden
8. Crowley, Shellie Marie
9. Diza, Julie
10. Hailey, Patricia
11. Harris, LaKisha Seals
12. Jones, Jessica Michelle

13. Klieber, Christine Ann
14. Latner, Sandra
15. Maxey, Christine
16. Mendoza, Tera Christine
17. Monge, Linda Josephine
18. Plazola, Janice G.
19. Stepp, Angela
20. Strait, Stephanie
21. Tompkins, Christina
22. Turner, Lirea
23. Villarreal, Nohelia

7. On March 11, 2009, the Superintendent of the district made and filed an accusation in her official capacity.

8. Prior to March 15, 2009, all respondents were served with board resolution number 35, a Notice of Recommendation that Services Will Not be Required, the Accusation, a Notice of Defense, a Notice of Hearing, and copies of Education Code sections 44949 and 44955 and Government Code sections 11506, 11507.5, 11507.6, 11507.7, and 11520. Additionally, the Notice of Recommendation that Services Will Not be Required advised respondents as follows: "Your request for a hearing must be in writing and delivered on or before March 20, 2009 to: Board of Trustees . . . If you fail to request a hearing on or before this date, your failure to do so shall constitute a waiver of your right to a hearing. For your convenience, a hearing request entitled 'Notice of Defense' is enclosed." (Exh. 6)

9. 20 respondents timely submitted their notices of defense requesting a hearing to determine if cause exists for not re-employing them for the ensuing year. One of the three respondents who failed to request a hearing, Tera Christine Mendoza, subsequently resigned her position with the district.

10. Each respondent who requested a hearing and filed a Notice of Defense was properly noticed of the date, time and place of the instant hearing.

11. All prehearing jurisdictional requirements were met.

12. Respondents are certificated permanent or probationary employees of the district.

13. The following concerns were raised during the hearing:

a. Certain respondents did not receive seniority credit for attending the New Teachers training which was conducted the summer before they commenced teaching pursuant to their employment contracts;

b. One respondent, Shellie Marie Crowley, believes that her seniority date should be changed from 1/14/2008 to 8/29/2007 because she began teaching as a long-term substitute for the district on 8/29/2007;

c. One respondent, Amber Elaine Baker, believes that her seniority date should be changed from 8/21/2006 to 8/19/2005 because she began teaching as a long-term substitute for the district on 8/19/2005;

d. One respondent, Angela Stepp, believes her seniority date should be changed from 10/12/2006 to 10/02/2006 because her contract with the district is dated 10/02/06;

e. Two respondents, Nadine Bengel and Nohela Villarreal, were concerned about the fact that the district seniority list failed to list their clear multiple subject teaching credentials and the impact, if any, the omissions had on their lay off status;

f. Certain respondents were concerned that Rose Ellen Proctor who is teaching Kindergarten through fourth grade Special Education Day Classes was improperly “skipped;”and,

g. One respondent expressed concern about the district’s ability to continue operating the library once the only Library Media Facilitator position is eliminated.

14. In connection with these concerns, the uncontroverted testimony and documentary evidence established the following:

a. The district held a three day New Teacher (NT) training session for newly hired teachers during the summer, prior to the start of the 2007-2008 school year. Some of the respondents were led to believe that the training was mandatory; however, the district Assistant Superintendent testified that the training is “not required.” Furthermore, teachers who attended the summer training were paid an extra stipend from a “categorically funded fund,” above and beyond what was agreed to in their respective contracts, for their attendance. The foregoing facts, considered as a whole, lead to the conclusion that the district acted properly in not counting the date the teachers attended the NT training for purposes of establishing seniority (i.e. the date of attendance was not the teachers’ first date of paid services under their employment contracts);

b. Shellie Marie Crowley (respondent Crowley) began teaching as a long-term substitute for the district on 8/29/2007. She worked full-time as a long-term substitute until she signed a “probationary contract” with the district on January 14, 2008. After signing the contract respondent Crowley continued teaching the same class she taught as a long-term substitute. There were no breaks in her service. The district set January 14, 2008 as

respondent Crowley's seniority date because, since she did not work 75% of the school year as a long-term substitute, the district believed that it could not "tack" respondent Crowley's long-term substitute time on to her seniority. The district's conclusion emanates from construing the "tacking" criteria too restrictively. If respondent Crowley is not credited with her service as a long-term substitute then she will, in essence, be improperly penalized for agreeing to become a probationary employee. Had respondent Crowley continued working the entire school year as a long-term substitute and then taken a probationary position the very next school year there is no question that she would be credited with a seniority date that reflected her first date of service as a long-term substitute since she is entitled to "tack" one year of long-term substitute service on to her seniority as long as she worked as a long-term substitute for 75% or more of the school year. In the present instance, the fact that respondent Crowley's status changed from that of a long-term substitute to a probationary employee does not negate the fact that she taught in the same capacity for over 75% of the school year. Consequently, there is no prohibition to crediting respondent Crowley with her long-term substitute services for purposes of establishing her seniority date. Any other conclusion would fly in the face of logic and would result in an injustice. Consequently, respondent Crowley should be credited for her substitute service and her seniority date should be changed to August 29, 2007. Although this modification does not allow respondent Crowley to escape the impact of these lay off proceedings, the modification may affect her position on a subsequent rehire/reinstatement list;

c. Amber Elaine Baker (respondent Baker) began teaching as a regular, not a long-term, substitute for the district on 8/19/2005. As a regular substitute respondent Baker did not work every day. In April of 2006, respondent Baker's status changed to that of a long-term substitute. When asked if she worked 75% or more of the school year respondent Baker candidly admitted that she did not know for sure. Respondent Baker testified that it was "very possible" that she worked 75% of the school year. This evidence was insufficient to order a change in respondent Baker's seniority date from that established by the district;

d. Angela Stepp's (respondent Stepp) employment contract with the district indicates that her dates of service as a temporary certificated employee were from 10/02/2006 through 06/07/2007.(Exh. A) There was some testimony that there was "some other contract" dated 10/12/2006 and that it was not clear if respondent Stepp worked from 10/02 through 10/12/2006; however, no such contract was presented during the hearing. Consequently, in conformity with the evidence, respondent Stepp's seniority date should be changed to 10/02/2006. Although this modification does not allow respondent Stepp to escape the impact of these lay off proceedings, the modification may affect her position on a subsequent rehire/reinstatement list;

e. Nadine Bengel (respondent Bengel) and Nohela Villarreal (respondent Villarreal) do have clear multiple subject teaching credentials which are not included on the seniority list. (Exhs. E & H) Consequently their credentials should be added to the seniority list. Although these modifications do not allow respondents Bengel and Villarreal to escape

the impact of these lay off proceedings, the modification may affect their positions on a subsequent rehire/reinstatement list;

f. Rose Ellen Proctor who is teaching Kindergarten through fourth grade Special Education Day Classes was “skipped” by the district because of her special education status. Respondents contend that there was no provision in the board’s resolution allowing the district to skip Ms. Proctor. The PKS being reduced or eliminated were as follows: Elementary Classroom Teachers; Counseling Services; and, Library Media Facilitator. Respondents assert that Ms. Proctor is an elementary school teacher and there is no ability for the district to skip her based on the fact that she teaches special education classes. The district contends that Special Day Classes are a PKS in and of themselves and are not included in the Elementary Classroom Teachers PKS. District administrators were informed and believed that the Elementary Classroom Teacher reduction was due to the change in class size reduction restrictions and that Special Day Classes were not to be included in the Elementary Classroom Teacher reduction. The district’s argument is persuasive. Special Day Classes may properly be considered a separate PKS from that of Elementary Classroom Teachers in general. There is nothing that would preclude the district from distinguishing between the two PKS’s; therefore, Ms. Proctor was not “skipped;” rather, she was not in a PKS being reduced or eliminated;

g. The district’s ability to continue operating the library once the only Library Media Facilitator position is eliminated is not an issue that is properly before this tribunal. District personnel testified that the reduction and/or elimination of the PKS’s involved in these proceedings will not result in the district’s inability to provide any mandated services and no contradictory evidence was presented.

15. The services of no permanent employee are being terminated while any probationary employee, or any permanent employee with less seniority, is being retained to render services which such permanent employee is certificated and competent to render.

LEGAL CONCLUSIONS

1. Jurisdiction for the instant proceedings exists pursuant to Education Code sections 44949 and 44955, and all notices and other requirements of those sections have been provided, as required.

2. The services listed in Factual Finding 2 are PKS that can be reduced or discontinued under Education Code section 44955. The board’s decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion.

3. Based on the Factual Findings, considered in their entirety, cause exists to reduce the number of certificated employees of the District by 23 FTE positions, due to the budget crisis described in Factual Finding 3.

4. Cause to reduce or discontinue services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949.

5. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render.

6. The district's seniority list should be corrected to reflect the modifications set forth in Finding 14, subdivisions b, d, and e.

7. Cause exists to notify respondents that their services will not be needed during the 2009-2010 school year due to reduction or discontinuance of PKS.

ADVISORY DETERMINATION

WHEREFORE, THE FOLLOWING ADVISORY DETERMINATION is hereby made:

1. The Accusation is sustained. The district shall notify the 23 respondents listed in Finding 6 that their services will not be needed during the 2009-2010 school year due to lack of funds and the resulting need to reduce or discontinue PKS.
2. The district's seniority list shall be corrected to reflect the modifications set forth in Finding 14, subdivisions b, d, and e.

DATED: May 4, 2009

ROY W. HEWITT
Administrative Law Judge
Office of Administrative Hearings