

BEFORE THE
BOARD OF EDUCATION
OF THE
BEAR VALLEY UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

OAH No. 2010030276

Respondents listed in Appendix A.

PROPOSED DECISION

Donald P. Cole, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Blue Jay, California on April 14, 2010.

Sherry G. Gordon, Atkinson, Andelson, Loya, Ruud & Romo, APLC, represented the Rim of the World Unified School District.

Ronald G. Skipper, Esq., represented the respondents listed in Appendix A.

The matter was submitted on April 14, 2010.

FACTUAL FINDINGS

1. Tim Larson, Director of Special Programs/Personnel of the Bear Valley Unified School District, made and filed the accusation dated March 12, 2009, in his official capacity as the designee of Dr. Nancy Wright, District Superintendent.
2. Respondents¹ are certificated District employees.
3. On March 3 and 11, 2010, in accordance with Education Code sections 44949 and 44955, the superintendent notified the Board of Trustees of the Bear Valley Unified School District in writing of her recommendation to reduce or discontinue particular kinds of

¹ The District initially identified 36 certificated employees as respondents. That number was gradually reduced, so that by the date of the hearing there remained the 21 respondents identified in Appendix A. The term “respondents” as hereafter used in this Proposed Decision refers collectively to these 21 remaining individuals.

services for the upcoming school year. The superintendent stated the reasons for the recommendation. The recommendation that respondents be terminated from employment was not related to their competency as teachers.

4. On March 3, 2010, the board adopted Resolution No. 09-10-011, determining that it would be necessary to reduce or discontinue particular kinds of services at the end of the current school year. On March 12, 2010, the board adopted amended Resolution No. 09-10-012, again authorizing a reduction in particular kinds of services for the 2010-2011 school year.² The board determined that the particular kinds of services that must be reduced for the 2010-2011 school year were the following full time equivalent (FTE) positions:

<u>Particular Kind of Service</u>	<u>Full-Time Equivalent</u>
ES Self-Contained Classroom TS	15
MS Core Teaching Services	4
MS English/Language Arts TS	1
MS Math TS	1
MS Science TS	1
MS Social Science TS	1
ES Special Education TS	1
HS Chemistry TS	0.4
HS Physics/Physical Science TS	0.4
HS Advanced Placement Physics TS	0.2
HS Math TS	1
HS French TS	0.8

The proposed reductions totaled 26.8 FTE positions.³

5. The board directed the superintendent or her designee to determine which employees' services would not be required for the 2010-2011 school year as a result of the reduction of the foregoing particular kinds of services. The board further directed the superintendent or her designee to send appropriate notices to all certificated employees of the district who would be laid off as a result of the reduction of these particular kinds of services.

6. The board further determined in Resolution No. 09-10-012 that "competency," as described in Education Code section 44955, subdivision (b), for the purposes of bumping, "shall necessarily include possession of a valid credential in the relevant subject matter area, 'highly qualified' status under the No Child Left Behind Act in the position into which the employee is bumping, an appropriate EI Authorization (if required by the position), **and for**

² The circumstances attending the adoption of the amended resolution are set forth below.

³ In this Finding, ES refers to elementary school (K-6), MS refers to middle school, HS refers to high school, and TS refers to teaching services.

counseling positions, at least one (1) year of experience in the past three (3) years in a counseling position.” (Emphasis in original.⁴)

7. On or before March 15, 2010, the district timely served on respondents a written notice that the superintendent had recommended that their services would not be required for the upcoming school year. The notice set forth the reasons for the recommendation. The notice advised respondents of their right to a hearing, that each respondent had to deliver a request for a hearing in writing to the person sending the notice by the date specified in the notice, a date which in each case was more than seven days after the notice was served, and that the failure to request a hearing would constitute a waiver of the right to a hearing. Along with the written notice, the district timely served on respondents the accusation and required accompanying documents.

The recommendation that respondents be terminated from employment was not related to their competency as teachers.

8. Certain respondents timely filed written requests for hearing and notices of defense to determine if there was cause for not reemploying them for the upcoming school year. All pre-hearing jurisdictional requirements were met.⁵

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

10. The services the board addressed in Amended Resolution No. 09-10-012 were “particular kinds of services” that could be reduced or discontinued within the meaning of Education Code section 44955. The board’s decision to reduce or discontinue these particular kinds of services was not arbitrary or capricious and constituted a proper exercise of discretion.

11. The reduction or discontinuation of particular kinds of services related to the welfare of the district and its pupils. The reduction or discontinuation of particular kinds of services was necessary to decrease the number of certificated employees of the district as determined by the board.

12. The board considered all positively assured attrition, including resignations, retirements and requests for transfer, in determining the actual number of necessary layoff notices to be delivered to its employees.

13. Respondent Robert Kinder is in an elementary school teaching position. In addition to his multiple subject credential, Kinder also holds a PPS (pupil personnel services) credential, which authorizes him to serve as a school counselor. Kinder previously served as

⁴ The language in bold-face type was not present in and represents the amendment to original Resolution No. 09-10-011.

⁵ Certain respondents failed to file timely requests for hearing and/or notices of defense. At the hearing, the district waived any jurisdictional defects resulting from such failures.

a counseling intern in Anchorage, Alaska (in 1997) and provided unspecified counseling services in Poway, California in 2002.⁶ Based on his counseling credential and experience, Kinder asserted that, though he is slated for lay off as a low seniority elementary school teacher, he should be permitted to bump Rob Benson, a district high school counselor with less seniority than Kinder.

Pursuant to the competency criteria set forth in Amended Resolution 09-10-012, Kinder is not competent to bump Benson because Kinder has not had at least one year of counseling experience in the past three years. Kinder asserted that the language of the Amended Resolution requiring a bumping individual to have at least a year of counseling experience within the past three years was added by the board for the specific purpose of excluding him from bumping into Benson's counseling position. He based this assertion on the following chronology of events: (i) The board adopted Resolution 09-10-011, which did not require an individual seeking to bump into a counseling position to have served as a counselor for at least a year during the preceding three years (March 3, 2010); (ii) Kinder sent an email to the district, advising the district that he believed he should be able to bump Benson (March 9, 2010); and (iii) the board approved Amended Resolution 09-10-012, which included language requiring an individual seeking to bump into a counseling position to have the year of experience in the preceding three years (March 11, 2010).

The foregoing chronology, viewed in isolation, raises a potential concern about the motivation and actual purpose of the district and the board in amending the lay-off resolution. However, Tim Larson, the district's Director of Special Programs/Personnel, credibly testified that the decision to amend the resolution originated from Larson's realization, while at a conference that took place between March 4 and 6, 2010, that the qualifying language requiring a year of recent counseling experience was necessary in order to protect the high school counseling positions, which for budgetary reasons had over the past two years dwindled from four to two. In other words, though formal board action took place after the district received Kinder's email, the intention to amend the bumping criteria originated before the district received Kinder's email. Further, Larson credibly denied that the amendment to the bumping criteria was motivated by an intention to exclude Kinder from being able to bump a school counselor. Finally, no evidence was presented that would support an inference of any improper animus against Kinder on the part of the district or the board.

The concerns expressed by Kinder are understandable. However, based on all of the evidence presented, the district's decision to amend the bumping criteria as expressed in Amended Resolution No. 09-10-012 were neither arbitrary nor capricious and constituted a proper exercise of its discretion.

⁶ Though Kinder presented no documentation in support of his claim that he served as a counselor in Poway in 2002, and though he did not provide this information when he applied for a teaching position with the district (he did, in contrast, state on his application that he had served as a counseling intern in 1997), his testimony that he served as a counselor with Poway Unified School District in 2002 is credited. However, he did not describe the specifics of his service in that capacity, and since he stated on his application only that he had served as a teacher with Poway Unified, it is inferred that his involvement in counseling duties in that district in 2002 was on a limited, less than full time basis.

14. No certificated employee junior to any respondent was retained to perform any services which any respondent was certificated and competent to render.

LEGAL CONCLUSIONS

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

2. School districts retain discretion to determine standards of competency for purposes of teacher layoffs, and those standards will be upheld as long as they are reasonable. (*Duax v. Kern Community College District* (1987) 196 Cal.App.3d 555, 565.)⁷

3. A preponderance of the evidence sustained the charges set forth in the accusation. Cause exists under Education Code sections 44949 and 44955 for the district to reduce or discontinue particular kinds of services. The cause for the reduction or discontinuation of particular kinds of services related solely to the welfare of the schools and the pupils thereof. Cause exists to reduce the number of certificated employees of the district due to the reduction and discontinuation of particular kinds of services. The district identified the certificated employees providing the particular kinds of services that the board directed be reduced or discontinued. It is recommended that the Board give respondents notice before May 15, 2010, that their services are no longer required by the district.

ADVISORY DETERMINATION

The following advisory determination is made:

The accusations served on respondents are sustained.⁸ Notice shall be given to respondents before May 15, 2010, that their services will not be required because of the reduction or discontinuation of particular services as indicated.

DATED: _____

DONALD P. COLE
Administrative Law Judge
Office of Administrative Hearings

⁷ *Duax* involved the layoff of community college teachers pursuant to Education Code section 97743, but is applicable here by analogy.

⁸ Where the lay off of a respondent is less than a full-time-equivalent position, the applicable fraction of a full-time-equivalent position is indicated in parentheses opposite the individual's name.

Appendix A

1. Molly Anderson
2. Kathryn Carpenter (0.8)
3. Rosie DesRochers
4. Mark DesRochers
5. Rachel Edwards
6. Amy Ellis
7. Amy Fuller
8. Julie Herrera
9. Susan Isles (0.4)
10. Robert Kinder
11. Ann Licon (0.2)
12. Manuel Marquez
13. Susan Maya (0.2)
14. Jennifer Maybin
15. Andrea McLinn
16. Sharon Meagher
17. Jana Roberts
18. Julia Seaman (0.2)
19. Shauna Ward
20. Katherine Williams
21. Joy Wright