

BEFORE THE
BOARD OF TRUSTEES OF THE
BARSTOW COMMUNITY COLLEGE DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

Lee Ordway,

Respondent

OAH No. L2004020363

PROPOSED DECISION

On April 30, 2004 Administrative Law Judge Ralph B. Dash, Office of Administrative Hearings, heard this matter in Riverside, California.

Aaron V. O'Donnell, Attorney at Law, represented the Barstow Community College District ("District").

Kate Phillips, Attorney at Law, represented Respondent Lee Ordway.

Oral and documentary evidence was received at the hearing. The record was left open until May 17, 2004 for the filing of post-trial briefs. The parties stipulated that the Administrative Law Judge must issue his Proposed Decision by no later than May 25, 2004, and the District had until June 1, 2004 to make its Final Decision. Post-trial briefs and reply-briefs were timely received and the matter was deemed submitted on May 17, 2004.

FACTUAL FINDINGS

1. The parties stipulated that all notice and jurisdictional requirements of Education Code¹ Sections 87740 and 87743 have been met.

2. Dr. James Meznek is the President of the District and made the Accusation in his official capacity. On March 11, 2004, the Board of Trustees of the District

¹ All code references are to the Education Code unless otherwise specified.

adopted a resolution to reduce and discontinue the following particular kinds of services no later than the beginning of the 2004-2005 school year:²

Reduce Computer Science Teaching Services--1.0 FTE³

Reduce Program Coordinator/Instructor Services--2.0 FTE

Total services reduced--3.0 FTE

2. The services set forth in Finding 1 are particular kinds of service that may be reduced within the meaning of Section 87743. None of the programs or classes to be eliminated is mandated by the State to be taught at a community college. The decision to reduce the services set forth above was neither arbitrary nor capricious, but constituted a proper exercise of discretion. The reduction or discontinuation of services was necessary to reduce the number of certificated employees of the District as determined by the Board of Trustees.

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

4. During the current school year, Respondent has been working 60% of the time teaching computer science, and 40% of the time as the Chair of "Off-Campus/Online Programs. However, his teaching **position** was 100% computer science.

5. The District presented its seniority list at the hearing. Evidence showed that four teachers, including Respondent, were hired on the same date, September 13, 2001. One of these teachers, Wendy Chisholm, is certificated and competent to render the same teaching service (computer science) as Respondent, yet is listed as being senior to Respondent for purposes of these proceedings. The seniority rankings came about as follows:

On January 28 and 29, 2002, the District conducted a "lottery" to determine, with respect to the four teachers hired on the same date, their order of seniority. The lottery is mandated by Sections 87413 and 87414. The lottery was conducted by having each of the teachers draw a "lot" from a container, the lots being marked "1", "2", "3" and "4". The lottery was conducted over the course of two days. Each of the teachers was not present as the lots were drawn; rather the container of lots was hand carried to the teacher's classroom where each teacher drew a lot separately. Ms. Chisolm drew lot "2" and Respondent drew lot "4". Thus, Ms. Chisolm was ranked senior to Respondent.

² The Board of Trustees also elected not to renew contracts for five temporary employees who also taught computer science courses.

³ Full time equivalent.

LEGAL CONCLUSIONS

1. All notice and jurisdictional requirements set forth in Education Code sections 87740 and 87743 were met.

2. Respondent contends the time and manner in which the seniority lottery was conducted violated the relevant sections of the Education Code; that the District failed to correct the mistake it allegedly made in the manner of conducting the lottery, and therefore the seniority list used at the hearing of this matter is void.

Section 87413 provides, in pertinent part, "In case two or more employees accepted employment on the same date, the governing board of the district shall determine the order of employment by lots drawn by the employees concerned..." Section 87414 provides, "Every academic employee who first rendered paid service on the same date shall participate in a **single drawing** to determine the order of employment...within 30 days of the date service was first rendered by the employee." (emphasis added)

It is undisputed the lottery was not conducted within the 30 day requirement of Section 87414 (employment date in mid-August of 2001 and lottery held at the end of January 2002). Case law is clear that the District's failure to hold the lottery within the time specified in Section 87414 does not make it invalid. In Compton College Federation of Teachers v. Compton Community College District, (1980) 108 Cal.App. 3d 437 held, at page 443, "...the 30-day time period in Section 87414 was necessarily intended to be directory rather than mandatory...Noncompliance with a directory provision does not result in invalidity of the proceeding or action taken..." Thus, the District's failure to timely hold the lottery, in the absence of any evidence of prejudice (and there was none presented at the hearing of this matter) does not invalidate the lottery.

Respondent next contends that the manner in which the lottery was conducted was not a "single drawing", and thus invalid. The manner in which the lottery was conducted presents the potential for great mischief to occur. Unless the lots are drawn with everyone present, the lot container could easily be "rigged" so as to pre-determine the outcome. However, there was no evidence presented that such mischief did occur, nor can it be determined whether the manner in which it was held was, or was not, a "single drawing". Each teacher drew one time; there was not a second or third lottery held where each teacher had the chance to draw again. Thus, an argument can be made that although "drawings" were done at four separate times, the entirety of the draws constituted a "single drawing" within the meaning of the statute.

While no published authority could be found defining the term "single drawing", the facts in Compton, supra, are instructive. In that case, seven teachers were hired on the same date. The seniority lottery there was conducted on two

separate dates, March 27 and March 29, 1978. Presumably, some lots were drawn on one date, and some on the other. Whether the teachers were all present at the time of each drawing cannot be determined. However, the possibility of tampering with the lots was just as great there as here. No contention was made that holding the lottery on two separate days violated Section 87414.

Under Evidence Code Section 664, it is presumed that official duty has been regularly performed. This presumption is applicable to school boards. See for example, City and County of San Francisco v. Cooper, (1975) 13 Cal.3d 898. This presumption, which includes that the law has been obeyed, is rebuttable by evidence to the contrary. Carruth v. City of Madera, (1965) 233 Cal.App. 2d 192. There was no evidence presented that the lottery, as conducted here, violated the law, other than the argument that the term "single drawing" means that all teachers must be present and draw lots at one time. No evidence or convincing legal argument was made that would support this position to the extent the presumption of Evidence Code Section 664 was rebutted.

It is certainly true that a school's administrative decisions must be made in a manner that do not arbitrarily infringe on employees' rights of seniority and reemployment. See, Balen v. Peralta Junior College Dist., (1974) 11 Cal. 3d 821). No evidence was presented that such misconduct occurred here.

ORDER

The District may give notice to teacher/Respondent Lee Ordway that his services will not be required for the 2004-2005 school year because of the reduction and discontinuance of particular kinds of service.

DATED: May 21, 2004

RALPH B. DASH
Administrative Law Judge
Office of Administrative Hearings