

BEFORE THE
GOVERNING BOARD OF THE
BERRYESSA UNION SCHOOL DISTRICT

In the Matter of the Accusation Against:

DOREEN CARTER, et al.,

Respondents.

OAH No. 2008030453

PROPOSED DECISION

Administrative Law Judge Cheryl R. Tompkin, State of California, Office of Administrative Hearings heard this matter on April 17, 2008, in San Jose, California.

Janet Cory Sommer, Attorney at Law, represented the Berryessa Union School District.

Christopher Schumb, Attorney at Law, represented respondents.

The matter was submitted on April 17, 2008.

FACTUAL FINDINGS

1. Marc Liebman made and filed the Accusation against respondents in his official capacity as the Superintendent (Superintendent) of the Berryessa Union School District (District).
2. Respondents Doreen Carter, Michelle Flores, Celeste Galvan, Kaaren Hack, Harninder Mehat, Lisa Moulthrop and Cecilia Torres-Ruvalcaba are all certificated employees of the District.
3. On February 25 and March 4, 2008, the Superintendent recommended to the Governing Board (Board) of District that the following particular kinds of services be reduced or discontinued for the 2008-2009 school year:

Adaptive Physical Education Teacher	1.0 F.T.E.
School Counselor	8.5 F.T.E.
Elementary Music Teacher	4.0 F.T.E.
Elementary Physical Education Teacher	3.0 F.T.E.

School Nurse	1.0 F.T.E.
School Psychologist	2.0 F.T.E.
Special Education Program Specialist	1.5 F.T.E.
New Teacher Advisor	3.0 F.T.E.
Truancy Abatement Counselor	0.2 F.T.E.
Elementary School Assistant Principal	0.5 F.T.E.
Middle School Assistant Principal	1.0 F.T.E.
Administrative Services – Coordinator Student Services	0.5 F.T.E.
English Language Development Support Teacher	2.2 F.T.E.
Administrative Services – Coordinator English Language Development	1.0 F.T.E.
Elementary Reading Instruction Teacher	1.5 F.T.E.
Special Day Class Teacher	<u>2.0 F.T.E.</u>

Total Certificated F.T.E. to be Reduced or Eliminated: 32.9 F.T.E.

4. On February 25, 2008, the Board adopted Resolution No. 07-25, reducing or discontinuing particular kinds of services for the 2008-2009 school year and directing the Superintendent to send appropriate notices to all employees affected by the reduction.

5. On March 28, 2008, the Superintendent gave written notice to respondents, pursuant to Education Code sections 44949 and 44955, of his recommendation that notice be given them that their services would not be required for the ensuing school year. The written notice set forth the reasons for the recommendation.

6. Respondents each made a timely request in writing for a hearing to determine if cause existed for not reemploying them for the 2008-2009 school year. However, respondents Michelle Flores, Celeste Galvan and Cecilia Torres-Ruvalcaba failed to return a timely Notice of Defense. Prior to hearing, the layoff notice was rescinded as to respondents Michelle Flores and Celeste Galvan. At hearing District agreed to allow testimony by Torres-Ruvalcaba (who ultimately did not testify), but reserved the right to argue in any subsequent writ proceeding that she was not a proper party to the subject proceeding.

7. All prehearing jurisdictional requirements have been met.

8. District currently employs 8.5 F.T.E. school counselors. The February 25, 2008, Board resolution authorized release of all 8.5 F.T.E. counselors. However, at hearing District indicated that only 4.5 F.T.E. school counselor positions will actually be reduced. District will retain 4.0 F.T.E. school counselors for the 2008-2009 school year. In deciding how many F.T.E. to reduce, District considered an anticipated \$3.7 million budget decrease. It also met with counselors to assess counseling duties in District and to determine how to meet all requirements while maintaining consistency in services across District.

Currently, one counselor is assigned to three District elementary schools and the remaining 7.5 counselors are assigned to ten District middle schools. The proposed

reduction in the counseling program will result in the elimination of 4.5 middle school counselors. Counseling services will necessarily be reduced because there will be fewer counselors available to provide services to students.

Some of the duties now performed by the middle school counselors will be handled by administrators, teachers and parents and/or will only be performed by counselors to the extent they have time after performing required counseling duties. Other services currently provided by counselors will be eliminated completely (e.g., conflict mediation: student training, program management and meetings). While some of the tasks undertaken by counselors are mandated, counselors themselves are generally not a mandated service. However, counselors are a mandated service under AB 1802. AB 1802 is a grant funding program that requires that certain mandated services be performed by counselors. Participation in the AB 1802 program is voluntary. District participates in the AB 1802 program and plans to continue its participation in the 2008-2009 school year. But for the AB 1802 grant funding, District would have reduced its counseling services to 2.5 F.T.E. Currently, 1.5 F.T.E. counselors perform most of the AB 1802 counseling services, along with additional counseling services. District expects the three middle school counselors that remain after the reduction in services to perform all of the AB 1802 services, but may assign the elementary school counselor to perform AB 1802 services or other middle school duties if necessary.

9. Respondents contend that under *Daniels v. Shasta-Tehama-Trinity J. Community College District* (1989) 212 Cal.App.3d 909, District is required to have a plan that is sufficiently concrete to permit a determination of whether services are actually being reduced or simply shifted to other employees. Respondents argue that District's plan is not sufficiently concrete to permit such a determination and/or that services are not actually be reduced because only a few of the services currently provided by counselors are being eliminated.

Respondents' contentions are not persuasive. In *Shasta*, the court simply noted that the "hearing procedure presupposes some sort of plan on the part of the District as to which employees are to be retained." Here District has a plan to reduce 4.5 F.T.E. counselor positions. The remaining counselors will have fewer duties and will provide a reduced level of services. Certain services previously provided by counselors will be shifted to others or eliminated. The reduction will not cause any District program to fall below mandated levels. Case law has made clear that as long as mandated levels are met, a board may reduce particular kinds of services by maintaining the same or a lesser level of services using fewer employees. (*California Teachers Assn. v. Bd. of Trustees of the Goleta Union School Dist.* (1982) 132 Cal.App.3d 32; and see *Campbell Elementary Teachers Assn. v. Abbot* (1978) 76 Cal.App.3d 796, 811 [changing the manner in which a service is to be performed constitutes a reduction in services]; *Rutherford v. Board of Trustees of the Bellflower Unified School District* (1976) 64 Cal.App.3d 167, 178-179 [board may reduce services by determining that proffered services shall be reduce in extent because fewer employees are made available to deal with the pupils involved]; *Zulac v. Governing Bd. of the Ferndale Unified School Dist.*

(2002) 98 Cal.App.4th 838.) The reduction of 4.5 F.T.E. positions by District constitutes a reduction in particular kinds of services under existing law.

Respondents also suggest that District will not be able to comply with its obligation under the Negotiated Agreement with the California Teachers' Association of Berryessa to not require counselors to work more than 1.0 F.T.E. Even if the District's action in assigning counseling duties were to violate the collective bargaining agreement, such a violation would not prevent the District from exercising its authority under the Education Code to reduce services. Respondents' remedy for a contract violation lies in another forum.

10. The evidence established that District's determination that it can comply with all statutory mandates with a reduced counseling staff was not arbitrary, but rather was based upon reasonable considerations. While it is clear that the counselors who remain in District will have an increased case load and may have to work harder due to the reduction of counseling positions, it was not established that the reduction will prevent the District from providing mandated services. Moreover, it must be presumed that District will perform its official duties and comply with legislative mandates. If District finds it difficult to provide mandatory services next year, it has the option of changing the manner or method of offering the service. (*Campbell Elementary Teachers Assn. v. Abbott*, *supra*, 76 Cal.App.3d 796; *Gallup v. Bd. of Trustees* (1996) 41 Cal.App.4th 1571.)

11. Respondent Doreen Carter holds a Pupil Personnel Services credential in counseling and an Administrative Services certificate. The certificate allows Carter to obtain an administrative credential if she performs administrative services for a district. Administrators are chosen through a competitive screening and selection process. Carter has not applied to become or gone through the process to become an administrator at District. She is currently employed by District as a 1.0 F.T.E. middle school counselor in one of the counseling positions that is being reduced. Carter argues, without any citation to legal authority, that she is entitled to bump into an administrative position. It is undisputed that bumping into an administrative position would be a promotion for Carter.

Carter's contention is unpersuasive. There is no evidence of any legislative intent to remove a District's discretion in hiring administrators and/or permit a district employee who is facing layoff to use the layoff statutes to promote into an administrative position. And Carter cites no legal authority that would support such a result. Carter has failed to establish she is entitled to bump into an administrative position.

12. The evidence established that District will be reducing services for the ensuing school year.

13. No certificated employee junior to respondents is being retained to perform services which respondents are certificated and competent to render.

14. The reduction or discontinuance of services is related to the welfare of District and its pupils.

LEGAL CONCLUSIONS


1. Each of the services set forth in Finding 3 is a kind which may be reduced or discontinued in accordance with applicable statutes and case law. (See Ed. Code § 44955; *Campbell Elementary Teachers Assn. v. Abbot, supra*, 76 Cal.App.3d 796; *Degener v. Governing Bd.* (1977) 67 Cal.App.3d 689.) The decision to reduce or discontinue the services is neither arbitrary nor capricious but rather a proper exercise of the District's discretion.

2. Cause exists to reduce the number of certificated employees at Berryessa Union School District due to the reduction or discontinuance of particular kinds of services pursuant to Education Code section 44955. The cause relates solely to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949.

ORDER

Notice may be given to respondents that their services will not be required for the 2008-2009 school year because of the reduction or discontinuation of particular kinds of services.

DATED: 5/5/08


CHERYL R. TOMPKIN
Administrative Law Judge
Office of Administrative Hearings