

BEFORE THE
GOVERNING BOARD OF THE
FORESTHILL UNION ELEMENTARY SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Reduction in Force of:

KAREN EVERETT
EREN LINSTADT

Respondents.

OAH No. 2010030499

PROPOSED DECISION

Catherine B. Frink, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter in Redding, California, on April 29, 2010.

Emily E. LaMoe, Attorney at Law, of Kronick Moskowitz Tiedemann & Girard, represented the Foresthill Union Elementary School District.

Brendan White, Attorney at Law, and Lesley Beth Curtis, Attorney at Law, of Langenkamp, Curtis & Price, LLP, represented respondents Karen Everett and Eren Linstadt.

Evidence was received, the hearing was closed, and the matter was submitted for decision on April 29, 2010.

FACTUAL FINDINGS

Jurisdiction

1. Jim Roberts, Superintendent of the Foresthill Union Elementary School District (District), State of California, filed the Accusations and Amended Accusations in his official capacity as a public officer.

2. On February 9, 2010, the District's Board of Trustees (Board) adopted Resolution No. 10-08, which reduced and/or discontinued the following particular kinds of certificated services for the 2010-2011 school year:

Grades K-8 Physical Education Teacher	1.0	FTE ¹
Grades K-8 Classroom Teacher	4.0	FTE

3. The Board resolved as follows:

- That due to the reduction or discontinuance of particular kinds of services pursuant to California Education Code Section 49955,² the legal number of certificated employees of the District not be [sic] re-employed for the 2010-2011 is as set forth above; and
- That the Superintendent is directed to give Notices of Recommendation Not to Re-Employ in accordance with the provisions of the California Education Code Section 44949 and Section 44955 to the appropriate certificated employees pursuant to Section 44955 and to otherwise implement this reduction in force pursuant to law; . . .

4. On February 26, 2010, the District served the following certificated employees with written notice, pursuant to Education Code sections 44949 and 44955, that their services would not be required for the next school year (Notice): Katharine Pelle; Rod Tayler; Debbie Ramey; Karen Everett; and Eren Linstadt. Each Notice set forth the reasons for the recommendation. The Notice states that, “[t]he reasons for this action are set forth in the attached resolution adopted by the Board of Trustees on February 9, 2010.” A copy of Resolution No. 10-08 was included with the Notice. The District served the employees by certified mail and personal delivery on February 26, 2010. Respondents Karen Everett and Eren Linstadt each acknowledged receipt of the Notice on February 26, 2010.

5. On February 26, 2010, respondent Everett submitted her request for hearing to determine if there is cause for not reemploying her for the 2010-2011 school year (Hearing Request). Respondent Linstadt submitted her Hearing Request on March 4, 2010. The Hearing Requests were timely.

6. On March 9, 2010, the Board adopted Resolution No. 10-09, which reduced and/or discontinued the following particular kinds of certificated services for the 2010-2011 school year:

Grades K-8 Classroom Teacher	2.0	FTE
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7. Resolution No. 10-09 contained the language set forth in Finding 3 (with typographical error corrected).

¹ “FTE” means full-time equivalent position.

² “49955” was a typographical error; the correct Education Code section is “44955.”

8. Prior to March 15, 2010, the District served a Notice on the following certificated employees as a result of the adoption of Resolution No. 10-09: Allison Peres, and Stacy Stroup. Neither Ms. Stroup nor Ms. Peres filed Hearing Requests.

9. On March 9, 2010, the Board adopted Resolution No. 10-09, which reduced and/or discontinued the following particular kinds of certificated services for the 2010-2011 school year:

Principal 1.0 FTE

10. Resolution No. 10-10 contained the language set forth in Finding 3 (with typographical error corrected).

11. Prior to March 15, 2010, the District served a Notice on certificated employee Shannon Jacinto as a result of the adoption of Resolution No. 10-10. Ms. Jacinto did not file a Hearing Request.

12. Any certificated employee who failed to file a request for hearing has waived his or her right to a hearing, and may be laid off by the District.

13. The Superintendent made and filed an Accusation against respondents, who were the only certificated employees who requested a hearing. The Accusation, dated April 6, 2010, along with required accompanying documents and blank Notices of Defense (Accusation packet) was timely served on respondents.

14. Respondents, through their counsel, timely filed a Notice of Defense.

15. Each respondent is presently a certificated permanent or probationary employee of the District.

16. The April 6, 2010 Accusation states, in pertinent part:

¶ . . . ¶

III.

On or about February 26, 2010 and March 9, 2010, the Governing Board of Foresthill Union Elementary School District (“the Governing Board”) was given written notice of my [the Superintendent’s] recommendations that notice be given to Respondents, pursuant to Education Code sections 44949 and 44955, that their services will not be required for the ensuing school year and stating the reasons therefor.

IV.

On or about February 26, 2010 and/or March 10, 2010, Respondents were given written notice of my recommendations pursuant to Education Code sections 44949 and 44955, that their services will not be required for the ensuing school year, and stating the reasons therefor.

[¶] . . . [¶]

VI.

Cause exists within the meaning of Education Code sections 44949 and 44955 for not reemploying Respondents for the ensuing [sic] school year in that the Governing Board has decided to reduce or discontinue particular kinds of services of the District beginning not later than the commencement of the 2010-2011 school year as set forth in the Governing Board Resolution No. 10-09 and Resolution 10-10, attached hereto and incorporated by reference

In the opinion of the Governing Board, it will be necessary to decrease the number of certificated employees in the District on account of the above reduction or discontinuance of services. As a consequence, the Governing Board has determined that the services of certified employees, equal in number to those employees providing services to be reduced or discontinued, shall be terminated at the close of the current 2009-2010 school year.

[¶] . . . [¶]

17. As set forth above, the April 6, 2010 Accusation did not refer to, attach or incorporate by reference Resolution No. 10-08, adopted by the Board on February 9, 2010.

18. On April 23, 2010, respondents filed a Motion to Dismiss with OAH, based on their contention that the April 6, 2010 Accusation does not apply to them, and that Resolution No. 10-09 (2.0 FTE Grades K-8 Classroom Teacher) had superseded Resolution No. 10-08 (4.0 FTE Grades K-8 Classroom Teacher).

19. On April 23, 2010, the District filed an Amended Accusation, which states in pertinent part:³

³ Changes from the April 6, 2010 Accusation are noted in bold type.

[¶] . . . [¶]

III.

On or about **February 9, 2010**, February 26, 2010 and March 9, 2010, the Governing Board of Foresthill Union Elementary School District (“the Governing Board”) was given written notice of my recommendations that notice be given to Respondents, pursuant to Education Code sections 44949 and 44955, that their services will not be required for the ensuing school year and stating the reasons therefor.

IV.

On or about **February 9, 2010**, February 26, 2010 and/or March 10, 2010, Respondents were given written notice of my recommendations pursuant to Education Code sections 44949 and 44955, that their services will not be required for the ensuing school year, and stating the reasons therefor.

[¶] . . . [¶]

VI.

Cause exists within the meaning of Education Code sections 44949 and 44955 for not reemploying Respondents for the ensuing [sic] school year in that the Governing Board has decided to reduce or discontinue particular kinds of services of the District beginning not later than the commencement of the 2010-2011 school year as set forth in the Governing Board **Resolutions No. 10-08, 10-09 and 10-10**, attached hereto and incorporated by reference

In the opinion of the Governing Board, it will be necessary to decrease the number of certificated employees in the District on account of the above reduction or discontinuance of services. As a consequence, the Governing Board has determined that the services of certified employees, equal in number to those employees providing services to be reduced or discontinued, shall be terminated at the close of the current 2009-2010 school year.

[¶] . . . [¶]

20. Respondents’ Motion to Dismiss is addressed below.

Services to be Reduced or Eliminated

21. The District provides educational services to approximately 480 students from kindergarten through the eighth grade (K-8) at two school sites. As reflected on the District's Certificated Employees Seniority List for 2009-2010, the District employs 25 certificated employees. The District has experienced declining enrollment since the 1996-1997 school year (823 students), and enrollment has dropped from 582 students in the 2005-2006 school year to its current level. The District expects the average daily attendance (ADA) for next year to be approximately 462 students. As a result of the decline in ADA, revenue to the District has been substantially reduced. In addition, there have been cutbacks in categorically funded programs, and in general fund revenues, as a consequence of the budget crisis affecting the State of California.

22. According to Mr. Roberts, his initial recommendation to the Board, as reflected in Resolution No. 2010-08, contemplated a reduction in classroom teaching staff from 21 teachers to 17 teachers. However, Mr. Roberts thereafter concluded that the District "needed other options" in case revenue did not meet projections. Therefore, he recommended additional reductions in certificated services, namely a further reduction in classroom teaching staff to 16 classroom teachers, and elimination of a principal position. Since the certificated employee in the principal position had return rights to the classroom, this resulted in the reduction of an additional 2.0 FTE K-8 classroom teachers (Resolution No. 2010-09) in conjunction with the reduction of the 1.0 FTE principal position (Resolution 2010-10).

23. When the Board adopted Resolutions No. 2010-09 and 2010-10, it did not direct the Superintendent to rescind Resolution No. 2010-08. The combined total of the three resolutions resulted in a proposed reduction in the certificated staff by 8.0 FTE positions. As of the date of hearing, the District has not rescinded any of the Notices sent to certificated employees.

24. The above-described services are "particular kinds of services" (PKS) that can be reduced or discontinued within the meaning of Education Code section 44955. The PKS reductions and eliminations are based solely upon financial reasons, and are not related to the skills, abilities or work performance of the affected faculty members.

Motion to Dismiss

25. Respondents hold multiple subject (MS) credentials. Respondent Everett teaches fourth grade, and respondent Linstadt teaches eighth grade. Respondents contend that, by adopting Resolution No. 2010-09, the Board passed a superseding resolution for a reduction of 2.0 FTE grades K-8 classroom teacher positions, and that the April 6, 2010 Accusation sought to effectuate only a reduction of 2.0 FTE K-8 classroom teachers and 1.0 FTE principal, by its failure to reference Resolution No. 2010-08. As reflected on the

District's seniority list, Katharine Pelle, Roderick Tayler, and Debbie Ramey have less seniority than respondents;⁴ thus, if only 2.0 FTE K-8 classroom teachers are subject to layoff, neither respondent would be affected.

26. In support of their argument that Resolution No. 2010-08 was superseded by Resolution No. 2010-09, respondents rely on the language in Resolution No. 2010-09, which stated: "NOW, THEREFORE, BE IT RESOLVED by the Board of Trustees of the Foresthill Union School District as follows: That due to the reduction or discontinuance of particular kinds of services pursuant to California Education Code Section 44955, the legal number of certificated employees of the District not be re-employed for the 2010-2011 is as set forth above," namely, 2.0 FTE Grades K-8 Classroom Teacher. (Emphasis added.)

27. Respondents' contention is not persuasive. As set forth in Findings 3, 7, and 10, this same language appeared in all three resolutions adopted by the Board. If respondents are correct, then Resolution No. 2010-10 would have superseded both Resolution No. 2010-08 and 2010-09, which was clearly not the case. Instead, the language cited by respondents refers to the number of certificated employees that may legally be subject to layoff under each resolution. There is nothing in Resolution No. 2010-09 to indicate that it intended to replace Resolution No. 2010-08. As established by the testimony of Mr. Roberts, Resolutions No. 2010-09 and 2010-10 were adopted by the Board in anticipation of a possible worsening of the District's financial situation, and reflect the need for additional reductions in certificated staff. The District's position is buttressed by the fact that the District sent Notices to additional certificated staff as a consequence of the adoption of Resolution No. 2010-09. If the District had intended to lay off fewer teachers as a result of the adoption of Resolution No. 2010-09, it would have rescinded Notices, not issued additional Notices.

28. Furthermore, respondents were not prejudiced by the District's failure to initially refer to Resolution No. 2010-08 in the April 6, 2010 Accusation. Respondents received proper notice under Education Code section 44949, subdivision (a), that their services will not be required for the 2010-2011 school year, and stating the reasons therefor. As set forth in Finding 4, the Notice attached Resolution No. 2010-08, listing a reduction of 4.0 FTE Grades K-8 Classroom Teacher positions.

29. The District's failure to cite Resolution No. 2010-08 in the April 6, 2010 Accusation was a "nonsubstantive procedural error committed by the school district" which was not prejudicial error, within the meaning of Education Code section 44949, subdivision (c)(3). This procedural error was corrected by the District when it filed the Amended Accusation on April 23, 2010. Education Code section 44949, subdivision (c), states in pertinent part: "In the event a hearing is requested by the employee, the proceeding shall be

⁴ Ms. Pelle holds a credential to teach physical education, and would be subject to layoff under Resolution No. 2010-08 for 1.0 FTE Physical Education Teacher. If Resolution No. 2010-08 was superseded by Resolution No. 2010-09, that reduction presumably would be eliminated. Mr. Tayler and Ms. Ramey hold MS credentials; Mr. Tayler teaches seventh grade, and Ms. Ramey teaches sixth grade, and would account for 2.0 FTE.

conducted and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code and the governing board shall have all the power granted to an agency therein, . . .” with certain limited exceptions not pertinent to respondents’ argument. Government Code section 11507 specifically allows for amendment of the Accusation.⁵

30. Respondents’ citation of *Karbach v. Board of Education* (1974) 39 Cal.App.3d 355 (*Karbach*) does not support their argument. In *Karbach*, the district sent notice to teachers prior to March 15 of the then-current school year that they would not be reemployed for the ensuing school year due to a decline in ADA, under the predecessor statute to what is now Education Code section 44955. The accusation filed and served by the district likewise referred to a drop in ADA as the reason for terminating the teachers. At the hearing, the district sought to introduce evidence supporting the termination of teachers due to a reduction in PKS. The court held that the teachers were not lawfully subject to termination for a reason (reduction of services) not specified in the notice of recommendation served on or before March 15, 1972. (*Id.*, at p. 363.) The court found that notice of the reason for the termination of services by March 15 of the then-current school year was jurisdictionally mandatory, not directory. (*Id.*, at p. 364.) In contrast, the court found that the failure of the accusation to adequately state the reasons for termination would not require dismissal of the accusation and retention of the employees:

The Administrative Procedure Act relates to the hearing stage which is “initiated by filing an accusation.” (Gov. Code, § 11503.) Section 13447 of the Education Code, insofar as it adopts the requirement of a notice of recommendation, states a condition precedent to any hearing being called for. Both may operate in a given case. **An accusation might well be filed which did not set forth facts supporting reasons adequately specified in the original notice of recommendation. Under such circumstances, an amendatory accusation would be appropriate under conditions stated in section 11507 of the Government Code.**

(*Id.*, at p. 363; emphasis supplied.)

⁵ Government Code section 11507 states:

At any time before the matter is submitted for decision the agency may file or permit the filing of an amended or supplemental accusation. All parties shall be notified thereof. If the amended or supplemental accusation presents new charges the agency shall afford respondent a reasonable opportunity to prepare his defense thereto, but he shall not be entitled to file a further pleading unless the agency in its discretion so orders. Any new charges shall be deemed controverted, and any objections to the amended or supplemental accusation may be made orally and shall be noted in the record.

31. Unlike the situation in *Karbach*, the respondents in this case received timely and proper notice of the reason for their proposed non-reemployment for the 2010-2011 school year. The District was entitled under the Administrative Procedure Act to file the Amended Accusation to correct a nonsubstantive procedural error in its pleading, by including facts supporting the reasons for non-reemployment set forth in the Notice received by respondents. Under all of the facts and circumstances, the Motion to Dismiss is denied.

ADA vs. PKS Layoff

32. Respondents contended that the testimony of the Superintendent, as well as the plain language of the resolutions adopted by the Board, established that the reason for the layoff was a decline in ADA, and not a reduction in PKS. Education Code section 44955, subdivision (b), states in pertinent part: “Whenever in any school year the average daily attendance in all of the schools of a district for the first six months in which school is in session shall have declined below the corresponding period of either of the previous two school years, ...[or] whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, ... and when in the opinion of the governing board of the district it shall have become necessary by reason of any of these conditions to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year.” Respondents contended that the District did not perform the mathematical calculation necessary to determine the percentage decline in ADA in order to calculate the number of teachers whose services were to be terminated. Thus, respondents argue that number of teachers slated for layoff is excessive, in that it is not supported by the decline in ADA.

33. Respondents’ contention is not persuasive. While Mr. Roberts stated that the decline in ADA was one of the primary justifications for the layoff, the resolutions themselves reference not only declining enrollment, but also “the necessary cutbacks in general fund and categorical programs.” Declining enrollment is tied to a loss of revenue by the District. The District chose to address this financial crisis by identifying PKS to be reduced or eliminated, rather than by eliminating teaching positions on a strict percentage basis corresponding to a decline in ADA. The District properly exercised its discretion by implementing a PKS layoff. The fact that the resolutions acknowledge declining enrollment as an underlying cause of the financial deficit did not transform the proceedings into an ADA layoff.

Milestones Cooperative Charter School

34. The District is in the process of considering whether to create a charter school for the 2010-2011 school year. Mr. Roberts has developed a draft proposal tentatively called Milestones Cooperative Charter School. As of the date of hearing, no petition to establish the charter school has been presented to the Board. No public hearings have been held on the issue of whether a charter school should be established, or the proposed terms of the charter

school. If the Board approves a charter school petition, the District would still need to obtain approval from the State Department of Education before the charter school could be established.

35. Respondents contend that, if Milestones Cooperative Charter School is established, there will be vacancies in teaching services that they are certificated and competent to render. They argue that they cannot be laid off when the District is seeking to hire additional personnel for the charter school.

36. Respondents' arguments are not persuasive. A proposal for the charter school has not been presented to the Board, and its approval is uncertain. Element 13 of the proposed charter states that, "[t]he Milestones Cooperative Charter School shall be considered the employer for all employees working at the charter School." While some employment rights of District employees will be protected for a two-year period if they are accepted to teach at the charter school, the collective bargaining agreements between the District and its employees would not be applicable to the charter school, and "[j]ob applicants for positions may be considered through an open process, and, if hired, will enter into a contractual agreement with the Milestones Cooperative Charter School Director and Charter Council."

37. If and when Milestones Cooperative Charter School is established, respondents may apply for vacant positions; however, they cannot be guaranteed employment at the charter school, and their layoff from the District is completely separate and unrelated to any employment possibility at the charter school.

Welfare of the District and Its Students

38. The Board's decision to reduce or discontinue the particular kinds of services identified in Resolutions No. 2010-08, 2010-09, and 2010-10, was not arbitrary or capricious, but constituted a proper exercise of discretion.

39. The reduction or discontinuation of particular kinds of services is 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.

40. Except as previously noted, 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. The anticipation of receiving less money from the state for the next school year is an appropriate basis for a reduction in services under Education Code section 44955. As stated in *San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627, 638-639, the reduction of particular kinds of services on the basis of financial considerations is authorized under that section, and, “in fact, when adverse financial circumstances dictate a reduction in certificated staff, section 44955 is the only statutory authority available to school districts to effectuate that reduction.” The District must be solvent to provide educational services, and cost savings are necessary to resolve its financial crisis. The Board’s decisions were a proper exercise of its discretion. As set forth in Findings 32-33, respondents’ arguments to the contrary are without merit.

3. The services identified in Resolutions No. 2010-08, 2010-09, and 2010-10, are particular kinds of services that could be reduced or discontinued under section Education Code section 44955. Cause exists to reduce the number of certificated employees of the District due to the reduction or discontinuance of PKS. Cause for the reduction or discontinuance of services relates solely to the welfare of the District’s schools and pupils within the meaning of Education Code section 44949.

4. A District may reduce services within the meaning of section 44955, subdivision (b), “either by determining that a certain type of service to students shall not, thereafter, be performed at all by anyone, or it may ‘reduce services’ by determining that proffered services shall be reduced in extent because fewer employees are made available to deal with the pupils involved.” (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)

5. The notices sent to respondents indicated the statutory basis for the reduction of services and, therefore, were sufficiently detailed to provide them due process. (*San Jose Teachers Association v. Allen, supra*, 144 Cal.App.3d 627; *Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831.) The description of services to be reduced, both in the Resolutions and in the Notices, adequately describe particular kinds of services. (*Zalac v. Ferndale USD* (2002) 98 Cal.App.4th 838; see also, *Degener v. Governing Board* (1977) 67 Cal.App.3d 689.)

6. As set forth in Findings 34-37, respondents did not establish that they should be retained by the District due to the possibility that a charter school may be established for the 2010-2011 school year.

7. As set forth in Findings 25-31, respondents’ Motion to Dismiss is denied

8. No employee with less seniority than any respondent is being retained to render a service which any respondent is certificated and competent to render. The Board may give respondents final notice before May 15, 2010, that their services will not be required for the ensuing school year, 2010-2011.

ORDER

The Accusations served on respondents are sustained. Notices shall be given to respondents that their services will not be required for the 2010-2011 school year because of the reduction or discontinuation of particular kinds of services. Notice shall be given to respondents in inverse order of seniority.

Dated: _____

CATHERINE B. FRINK
Administrative Law Judge
Office of Administrative Hearings