

BEFORE THE
BOARD OF EDUCATION
LOS NIETOS SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

Certificated Employees of the
Los Nietos School District,

Respondents.

OAH Case No. 2009030896

PROPOSED DECISION

Nancy Beezy Micon, Administrative Law Judge, Office of Administrative Hearings, heard this matter on April 24, 2009, in Whittier, California.

Atkinson, Andelson, Loya, Ruud & Romo, by James C. Romo, Attorney at Law, represented Lillian Maldonado French (French), Superintendent of the Los Nietos School District (District).

Reich, Adell & Cvitan, by Kent Morizawa, Attorney at Law, represented Dulce Alvarado, Annie Anderson, Teri Applebaum, Cynthia Avena, Elsa Avina, Hanh Bui, John Bustamante, Karen Ditota, Don Fulton, Sara Gardner, Monica Goco, Jennifer Gomez, Laurie Hidy, Kelly Kidwell Collazo, Marion Lam, Julie Little, Stacy Moody, Carlee-Anne Moyer, Jessica Sullivan, Melody Toral, Elizabeth Valenzuela, and Stacy Wolf (Respondents).

Although Teri Applebaum did not timely return a Notice of Defense form, she appeared at the hearing and the District did not challenge her status as a Respondent. Respondents John Bustamante and Stacy Moody were not present at the hearing. The absent Respondents were in default, and the hearing proceeded in their absence.

District has decided to reduce or discontinue certain educational services and has given Respondents notice of its intent not to reemploy them for the 2009-2010 school year. Respondents requested a hearing for a determination of whether cause exists for not reemploying them for the 2009-2010 school year.

Oral and documentary evidence was presented at the hearing. The record was held open until April 28, 2009, for the submission of written closing briefs. On April 27, 2009, counsel for Respondents submitted a letter dated April 25, 2009, which is marked for identification as Respondents' Exhibit A. On April 28, 2009, counsel for the District submitted a post-hearing brief, which is marked for identification as District's Exhibit 10.

The record was closed and the matter was submitted for decision on April 28, 2009.

FACTUAL FINDINGS

1. Superintendent French filed the Accusation in her official capacity.
2. Respondents are certificated employees of the District.
3. a. On March 4, 2009, the Governing Board of the District (Governing Board) adopted Resolution Number 8/08-09, reducing or discontinuing the following services for the 2009-2010 school year:

<u>Service</u>	<u>FTE¹ Reduction</u>
1. K-8 Physical Education	2.0
2. K-5 Classroom Teaching, or 6-8 Language Arts/Social Studies, or 6-8 Mathematics/Science	25.0
3. Special Education Resource Specialist	<u>1.0</u>
Total	28.0

b. The Resolution provided that the Superintendent was delegated “the authority to determine among the reduction of K-5 Classroom Teaching, 6-8 Mathematics/Science and 6-8 Language Arts/Social Studies Services how the allocation of full-time equivalent certificated staff reductions will occur.”

4. Superintendent French thereafter provided written notice to the Governing Board and to Respondents that she recommended the termination of Respondents’ services for the 2009-2010 school year due to the reduction of particular kinds of services.

5. On March 12, 2009, the District provided notice to the employees affected by the reduction in services that their services would not be required for the 2009-2010 school year due to the reduction of particular kinds of services. Notices of Defense were timely filed by some of the employees, who are the Respondents in this matter.

6. On or about March 30, 2009, the District filed and served the Accusation and other required documents on Respondents. The Accusation set forth the names of which Respondents, by category of service, would be affected by the reduction of K-5 Classroom Teaching services, K-8 Physical Education services, 6-8 Language Arts/Social Studies services, and 6-8 Math/Science services. Respondents thereafter timely requested a hearing to determine

¹ Full-time equivalent position.

if there is cause for not reemploying them for the 2009-2010 school year.

7. All pre-hearing jurisdictional requirements have been met.

8. The services set forth in factual finding number 3 are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 44955.²

9. The Governing Board's decision to reduce or discontinue the services set forth in factual finding number 3 is not arbitrary or capricious but is rather a proper exercise of the District's discretion.

10. The reduction of services set forth in factual finding number 3 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 Governing Board.

11. In determining the number of layoff notices to issue, the District took into account the anticipated retirement of one certificated employee, and the non-reelection of two others.

12. The District did not retain any certificated employee junior to Respondents Dulce Alvarado, Annie Anderson, Teri Applebaum, Cynthia Avena, Elsa Avina, Hanh Bui, John Bustamante, Karen Ditota, Don Fulton, Sara Gardner, Monica Goco, Jennifer Gomez, Laurie Hidy, Kelly Kidwell Collazo, Marion Lam, Julie Little, Stacy Moody, Carlee-Anne Moyer, Jessica Sullivan, Melody Toral, Elizabeth Valenzuela, and Stacy Wolf, to render a service which these Respondents are certificated and competent to render.

13. The District corrected the status for teacher Jennifer Gomez from that of a first year probationary teacher, to that of a second year probationary teacher. The correction of the status, however, will not affect the order of layoff.

14. Julie Little established that, instead of a seniority date of August 30, 2007, her seniority date should be August 27, 2007. The District agreed to make this correction. The correction of the date, however, will not affect her layoff.

LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists pursuant to sections 44949 and 44955, by reason of factual finding numbers 1 through 7.

2. The services listed in factual finding number 3 are determined to be particular

² All further references are to the Education Code.

kinds of services within the meaning of section 44955, by reason of factual finding numbers 3 and 8.

3. Cause exists under sections 44949 and 44955 for the reduction of the particular kinds of services set forth in factual finding number 3, which cause relates solely to the welfare of the District's schools and pupils, by reason of factual finding numbers 1 through 10.

Respondents argue that the description reducing 25 full-time equivalent “K-5 Classroom Teaching, or 6-8 Language Arts/Social Studies, or 6-8 Mathematics/Science” positions in the preliminary layoff notices is defective for lack of specificity because it failed to give Respondents information necessary to reasonably assess the probability that they will not be reemployed and that, therefore, the layoff of Respondents that correlate with these positions should be invalidated.

Respondents rely upon *Karbach v. Board of Education* (1974) 39 Cal.App.3d 355, 362, to support this argument. In *Karbach*, the court noted that because the March 15th notice date is intended to insure that the affected employees are informed of the facts upon which they can reasonably assess the probability they will not be reemployed, the preliminary notice must state the reasons for the recommendation. (*Id.*, at 361-363.) If the notice specifies only one of the two statutory reasons for dismissal (ADA or PKS), the district may not later at the hearing attempt to justify dismissal on the other ground not stated in the preliminary layoff notice. (*Id.*) Here, the preliminary notice stated the reduction or discontinuance of particular kinds of service as the reason for its recommendation. The reason did not change at the time of hearing. The *Karbach* decision is therefore not applicable to the facts presented here.

Further, in *Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App3d 831, 841 (*Santa Clara*), the court found that the March 15th notice is “only the first step in the termination process, and that the *Karbach* decision does not require that the preliminary notice specify the precise number of teachers to be terminated or the specific positions to be eliminated; those details emerge as the administrative hearing process progresses. It is enough that the Board specify in the March 15th notice the statutory grounds set forth in section 13447 (now section 44955) for staff reduction.” (*Id.*)

It was not established that any teacher was unable to determine whether he or she should seek new employment upon receipt of the District’s preliminary notice. The very receipt of the notice would indicate to a reasonable employee that his or her services would not be required for the following year. The District specified the statutory grounds for the staff reduction in the preliminary layoff notice. The layoff resolution also notified Respondents that the Superintendent had the authority to determine the allocation of the reduction of full-time positions among K-5 Classroom Teaching, 6-8 Mathematics/Science, and 6-8 Language Arts/Social Studies services. The Accusation then put Respondents on notice of how the

allocation was applied. Respondents were thus given specific information necessary to reasonably assess the probability of their reemployment.

4. Cause exists to terminate the services of Respondents Dulce Alvarado, Annie Anderson, Teri Applebaum, Cynthia Avena, Elsa Avina, Hanh Bui, John Bustamante, Karen Ditota, Don Fulton, Sara Gardner, Monica Goco, Jennifer Gomez, Laurie Hidy, Kelly Kidwell Collazo, Marion Lam, Julie Little, Stacy Moody, Carlee-Anne Moyer, Jessica Sullivan, Melody Toral, Elizabeth Valenzuela, and Stacy Wolf, by reason of factual finding numbers 1 through 12, and legal conclusion numbers 1 through 3.

RECOMMENDATION

1. It is recommended that the Accusation be sustained, and that the District may notify Respondents Dulce Alvarado, Annie Anderson, Teri Applebaum, Cynthia Avena, Elsa Avina, Hanh Bui, John Bustamante, Karen Ditota, Don Fulton, Sara Gardner, Monica Goco, Jennifer Gomez, Laurie Hidy, Kelly Kidwell Collazo, Marion Lam, Julie Little, Stacy Moody, Carlee-Anne Moyer, Jessica Sullivan, Melody Toral, Elizabeth Valenzuela, and Stacy Wolf that their services will not be needed during the 2009-2010 school year due to the reduction of particular kinds of services.

DATED: _____

Nancy Beezy Micon
Administrative Law Judge
Office of Administrative Hearings