

BEFORE THE
GOVERNING BOARD
OF THE
LEMON GROVE SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Layoff/Accusation
Against:

36 CERTIFICATED EMPLOYEES,

Respondents.

OAH No. 2008030256

PROPOSED DECISION

This matter came on regularly for hearing before Roy W. Hewitt, Administrative Law Judge, at Lemon Grove, California on May 2, 2008.

Anthony P. De Marco, Esq. of the Law Offices of Atkinson, Andelson, Loya, Ruud & Romo, represented the Lemon Grove School District (the district).

During the course of the hearing the district dismissed the accusation against the following 22 respondents: Hillary Anelli; Denise Baldreaux-Hernandez; Kelly Campbell; Pablo Charavin; Darryl Cooke; Ellen Davis; Susan Farnsworth; Kyle Griffith; James Haynes; Kellie Labor; Shari Mathes; Kristine Morgan; Melvetta Owens; Sarah Ponce; Irma Poulin; Sylvia Sana; Michelle Silverio; Veronica Siordia; Cynthia Smith; Sandra Smith; Trisha Stack; and Joseph Walters.

One of the remaining 14 respondents, Diane Gibson, waived her right to a hearing by failing to file a notice of defense.

Fern M. Steiner, Esq. of Tosdal, Smith, Steiner & Wax, represented 11 of the 14 remaining respondents and two of the 14 respondents, Kristina Luchtel (a.k.a. Kristina Rhoades) and Cynthia Piligian represented themselves.

Oral and documentary evidence was received and the matter was submitted on May 2, 2008.

FACTUAL FINDINGS

1. On February 26, 2008, the Superintendent of the district recommended, with regard to the ensuing school year, that the Governing Board of the district (the board) reduce or eliminate particular kinds of services (PKS) provided by the district for the 2008-2009 school year.

2. On February 26, 2008, the board adopted Resolution number 07-08-09, determining that it would be necessary to reduce or discontinue particular kinds of services at the end of the current school year. The board determined that the particular kinds of services that must be reduced for the 2008-2009 school year were the following full time equivalent (FTE) positions:

<u>PKS</u>	<u>FTE</u>
Administrative Services	3
K-5 Program Reduction	15
Middle School English Language Arts	2
Middle School Math	2
Middle School History/Social Sciences (Social Studies)	2
Middle School Science	2
Physical Education Grades 6-7-8	1
Physical Education Support	2
Categorical Program Support	3
Psychologist	1
Social Worker	2
RSP	1
Total FTE positions to be reduced or eliminated	<hr/> 36

The parties do not dispute the fact that the services listed above are PKS, which may be reduced or discontinued within the meaning of Education Code section 44955.

3. The district's recommendation and the board's decision to reduce or discontinue the services listed in Finding 2, above, were neither arbitrary nor capricious; rather, the recommendation and decision were due to "the financial constraints resulting from revenue being insufficient to maintain current levels of programs and necessary program changes resulting therefrom." (Exhibit 1.) Thus the board's decision represents a proper exercise of its discretion.

4. The reduction and discontinuation of services 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 board.

5. On March 5, 2008, all respondents affected by the layoffs received written notice notifying them that "pursuant to Education Code sections 44949 and 44955, the Governing Board has directed that notice be given to you that your services will not be required for the ensuing 2008-2009 school year." (Exhibit 2.) That same date, March 5, 2008, respondents were also served with a copy of the Board's resolution number 07-08-09, a list of the tie-breaking criteria, copies of Education Code sections 44949 and 44955, and a blank "Request for Hearing." Additionally, the March 5, 2008 notice advised respondents that they must file their requests for hearing with the district by March 14, 2008 and that "Failure to request a hearing on or before the date specified above will constitute a waiver or the chance to participate in a hearing, and to an advisory determination by an administrative law judge regarding your release." (Exhibit 2.)

6. On April 4, 2008, the Superintendent of the district made and filed an accusation in his official capacity. That same date, the accusation, a blank notice of defense, a notice of hearing and copies of Education Code sections 44949 and 44955 and Government Code sections 11500, 11505, 11506, 11507.5, 11507.6, 11507.7, 11509, and 11520 were served on respondents.

7. Thirty-four (34) of the 36 respondents timely submitted their requests for a hearing and notices of defense requesting a hearing to determine if cause exists for not re-employing them for the ensuing year. Two respondents, Diane Gibson and Irma Poulin, failed to file notices of defense.¹

8. Each of the 34 respondents who requested a hearing and filed notices of defense was properly noticed of the date, time and place of the instant hearing.

9. All prehearing jurisdictional requirements were met.

10. Respondents are certificated employees of the district.

11. As part of the overall reduction in PKS, the district is releasing its temporary certificated employees. As a general rule, the district releases all temporary certificated employees prior to releasing probationary or permanent certificated employees. District temporary certificated employees are employed pursuant to Education Code section 44909. Education Code section 44909 allows categorically funded employment under specific terms and conditions. Education Code section 44909 provides, "The terms and conditions under which such persons are employed shall be mutually agreed upon by the employee and the governing board and such agreements shall be reduced to writing."

In the present instance, all temporary certificated employees signed a written employment contract that specifically and unequivocally set forth the term of employment and stated, "The anticipated length of employment, if specified above, is not to be construed

¹ Notwithstanding this failure, as noted in the procedural section of this proposed decision, the accusation was dismissed as to respondent Irma Poulin.

as a promise or agreement of employment for a particular length of time." The contract for these employees further defined "temporary." The temporary certificated employees who signed the contract were informed that they were considered temporary because "You are employed to perform services in a categorically funded project (or to replace a regular teacher who is performing services in a categorically funded project) which is not required by federal or state statute pursuant to and under the terms and conditions of Education Code section 44909." (Exhibit 9.)

All teachers who signed the temporary certificated employee contracts understood that there was no guarantee that categorically funded programs would be continued from year to year because the continuation of categorically funded programs depended on whether they would be funded in the future. Funding of categorically funded programs is not controlled by the district. For example, there are federal, state, county, and city categorically funded programs which are dependent on the availability of funds from the federal, state, county and city funding sources. If the funds are depleted and not replenished, the programs end and there are no longer positions for the teachers employed to provide the programs.

12. Three respondents, Lauren Keane, Cynthia Piligian, and Stephanie Webster are classified by the district as temporary certificated employees. All three are "backfilling" for teachers participating in categorically funded programs. For example, Nina Drammissi, a certificated employee with a first date of paid service of September 2, 1987, is currently "on loan to Ruben H. Fleet" participating in a grant program. Respondent Stephanie Webster was hired by the district to teach respondent Drammissi's classes while Drammissi was working in the grant program. Obviously, when the Ruben H. Fleet grant program ended Webster knew that Drammissi would return to the district and Webster's services would no longer be required to fill Drammissi's position.

13. The parties stipulated that as to respondent Kristina Luchtel (a.k.a. Rhoades) the district was not seeking elimination of her position, it was only eliminating .2FTE of her position, thus reducing her position from 1 FTE to .8 FTE.

LEGAL CONCLUSIONS

1. Jurisdiction for the instant proceedings exists pursuant to Education Code sections 44949 and 44955, and all notices and other requirements of those sections have been provided, as required.

2. The services listed in Factual Finding 2 are PKS within the meaning of Education Code section 44955.

3. Based on the Factual Findings, considered in their entirety, cause exists to reduce the number of certificated employees of the District by 36 FTE positions, due to the budget crisis described in Factual Finding 3.

4. Cause to reduce or discontinue services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949.

5. Respondents assert that the certificated teachers who were working for the district under contracts of employment as temporary certificated employees should be classified as probationary employees. Respondents are incorrect. As noted in Finding 11, Education Code section 44909 expressly allows the district to hire personnel for categorically funded programs under contracts that specify the terms and conditions of their temporary employment. Respondents Lauren Keane, Cynthia Piligian, and Stephanie Webster were not hired to work on categorically funded projects. They were, however, hired to "backfill" or substitute for teachers who were working in categorically funded programs. Respondents signed temporary certificated employee contracts with the district and knew that their employment was contingent on continuation of the categorically funded programs. Respondents were, therefore, properly categorized as temporary certificated employees by the district and are appropriately slated for lay-off.

6. As set forth in Finding 13, the district is not seeking complete elimination of Kristina Luchtel's (a.k.a. Rhoades) position; rather, it is only eliminating .2 FTE of her position, thus reducing her position from 1 FTE to .8 FTE.

7. As set forth in the introductory portion of this proposed decision, the district dismissed the accusation against the following 22 respondents: Hillary Anelli; Denise Baldreaux-Hernandez; Kelly Campbell; Pablo Charavin; Darryl Cooke; Ellen Davis; Susan Farnsworth; Kyle Griffith; James Haynes; Kellie Labor; Shari Mathes; Kristine Morgan; Melvetta Owens; Sarah Ponce; Irma Poulin; Sylvia Sana; Michelle Silverio; Veronica Siordia; Cynthia Smith; Sandra Smith; Trisha Stack; and Joseph Walters.

8. Based on the modifications set forth in Legal Conclusions 6 and 7, above, cause exists to notify the remaining respondents that their services will not be needed during the 2008-2009 school year due to reduction or discontinuance of PKS.

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ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

1. The Accusation is sustained, in part. The district shall notify the following 13 respondents that their services will not be needed during the 2008-2009 school year due to lack of funds and the resulting need to reduce or discontinue PKS:

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| 1. Andreen, Kevin | 2. Gibson, Diane |
| 3. Keane, Lauren | 4. Lacsamana, Francisco |
| 5. Lamp, Hanya | 6. Menikoff, Stacy |
| 7. Nunez, Susan | 8. Piligian, Cynthia |
| 9. Stathis, Esme | 10. Walker, Erin |
| 11. Warren, Adrienne | 12. Webster, Stephanie |
| 13. Wulftange, Frank | |

2. The district shall notify respondent Kristina Luchtel's (a.k.a. Rhoades) that her position is being reduced from 1 FTE to .8 FTE.

3. The Accusation is dismissed as to the 22 respondents listed in Legal Conclusion 7, above, and the district may not notify those respondents that their services will not be needed during the 2008-2009 school year.

DATED: May 6, 2008



ROY W. HEWITT
Administrative Law Judge
Office of Administrative Hearings