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Education Law News

Upcoming Legal Deadlines For Personnel Action

The purpose of this memorandum is to inform management of school districts with average daily attendance of 250 or more of approaching *legal deadlines which must be met* in the event district leadership is contemplating *any* of the actions described below. **Each of these actions has legal exposure associated with it; therefore, we strongly recommend that you contact legal counsel *now* regarding analysis of the specific matter, compliance with the Brown Act and other relevant laws, and the drafting of all board resolutions and notices to employees and unions.**

Non-re-election of Probationary Certificated Employee Effective the End of the School Year

Education Code §44929.21 requires (a) governing board action approving non-re-election of a specific probationary certificated employee and (b) delivery of a written notice of non-re-election to the employee *no later than March 15 of the employee's second "complete consecutive school year of employment."* Because Section 44929.21 could be construed as requiring that the written notice of non-re-election be received by the employee by March 15 (not just mailed by the 15th), conservative practice dictates that the district make sure the employee actually receives the written notice by the 15th of March.

If non-re-election is going to occur at the end of the first probationary school year, while there is no deadline during the first probationary year stated in the law for board of trustees' action and notice to the employee, we recommend that the governing board make that decision and provide the notice to the employee as early as is administratively feasible. Board action and written notice delivered to the employee by March 15 would be a good practice to follow even in the first year, but a later decision and notice (i.e., between March 15 and June 15) should be sustainable.

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available to assist
you with upcoming
personnel
deadlines.

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Make sure that the district's performance evaluation procedure applicable to probationary employees has been followed. The collective bargaining agreement should also be reviewed to determine compliance with any other provisions applicable to probationary employees.

SPECIAL NOTE: Non-reelection of a probationary employee cannot legally be used as an alternative to the certificated employee layoff process; in other words, it is not to be used simply to reduce the number of teachers for the next year. It is appropriate to use non-reelection in instances when the district is not satisfied with the quality of the probationer's services.

Suspension Without Pay or Termination of Probationary Certificated Employee During the School Year for Specified Reasons

Education Code §44948.3 authorizes suspension without pay or termination of a probationary certificated employee *during the school year* under the following circumstances.

1. The "causes" for such action are limited to (1) "unsatisfactory performance" determined through the regular evaluation process or (2) "cause" set forth in Ed. Code §44932 (which lists most of the causes used to terminate tenured employees). Under these causes, the district must allege (and be prepared to prove) specific factual charges which would justify a finding that "cause" exists for suspension or termination of the employee's employment.
2. The superintendent or designee must give the probationary employee at least 30 calendar days prior written notice of the suspension or dismissal (no later than March 15 for a second-year probationer). The contents of the notice are specified in §44948.3.
3. Within 15 calendar days after receiving the notice of suspension or dismissal, the employee may file with the governing board a request for hearing on the charges specified in the written notice.
4. The board may establish procedures for appointment of an administrative law judge to hear the evidence and prepare a proposed decision for board review and action, or the board may hold the hearing itself.

Layoff of Probationary and Permanent Certificated Employees

In order to layoff probationary and permanent (tenured) certificated employees, the superintendent or designee must give the board of trustees written notice of recommendation of layoff, the board must adopt a "resolution of necessity", and the district must provide preliminary written notice of layoff to each affected employee, *all no later than March 15*. (Education Code, §§ 44949, 44955.)

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Much administrative and legal planning needs to occur long before March 15 in order to successfully accomplish a layoff. *If your district intends to initiate a layoff, please contact legal counsel immediately.* For example, action must be taken on criteria for breaking ties in seniority; criteria for determining “competency” to allow for bumping; establishing and posting the seniority list; notifying individual employees of their seniority and credentialing and requiring verification of same; preparation of board resolutions and the Superintendent’s written recommendation regarding persons to receive notices of layoff; preliminary notices of layoff with formal request for hearing; documents for compliance with the Administrative Procedures Act (accusation, notice of defense, notice of hearing, laws which must be enclosed); and final notices of layoff with unemployment insurance code compliance.

It should be noted that limited legal authority exists which would enable a school district to initiate a layoff *after* March 15, i.e., engage in a so-called “summer” layoff. (Education Code §44955.5) Specifically, such authority exists where the governing board determines that its total revenue limit per unit of average daily attendance for the fiscal year of the Budget Act has not increased by at least 2 percent. The window period for initiating a summer layoff under such circumstances is between five days after enactment of the Budget Act and August 15 of the fiscal year to which the Budget Act applies.

Release and Reassignment of Persons in Certificated Positions Requiring an Administrative or Supervisory Credential

Education Code §44951 requires that if the district intends to release a person (effective the end of the school year) from a certificated position which requires the holder to have an administrative or supervisory credential and intends to reassign that person to any other position (including but not limited to classroom teaching or another management or supervisory position) for the next school year, the board of trustees must take action to accomplish that result and give written notice of that action to the employee *no later than March 15.*

The specific governing board action (by March 15) is defined in Section 44951, viz., the board must determine that the employee “may be released” from his/her position for the following school year. Since this required language merely states that it is *possible* the employee may be released, a second governing board action must occur after the so-called March 15 notice *but before the end of the school year* in order to accomplish the release and reassignment. In this second board action, the board *actually* releases and reassigns the person effective the end of the school year (i.e., the end of the day June 30), and a second notice must be given to the employee prior to July 1 notifying the employee of the actual release and reassignment.

The March 15 written notice to the administrator *may be given only in two very*

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specific ways: (1) postage pre-paid Registered or Certificated U.S. Mail mailed on or before March 15 and addressed to the employee's last known address, or (2) obtaining the signature of the employee on the District's copy of the written notice. Nothing prevents the district from giving notice in both ways; however, no deviation from the statutorily prescribed method of delivery of the notice is allowed, and failure to give notice properly will result in the employee having the right to continue in the administrative position for the next year.

If the district intends to release and reassign an administrative employee to a teaching position, additional special rules related to a statement of reasons for the action and the necessity of a prior evaluation may apply. (Education Code §44896.) Penalties will be applicable for failure to follow these rules.

If misconduct of an administrator occurs after March 15 and the district desires to release the person and reassign him/her to classroom teaching for the next year, you are encouraged to consult legal counsel immediately. Section 44951 has been held inapplicable to post-March 15 release and reassignment of an administrator to the classroom based on post-March 15 misconduct, i.e., for cause.

Termination (Release) of Temporary Certificated Employees

Governing boards of school districts may "release" a temporary certificated employee *during the school year prior to the employee serving 75% of the school year*. After the employee has served 75% of the school year, the board may release the "temp" effective the end of the year provided the temporary employee is notified in writing *before the end of the school year* of the governing board's decision not to "reelect" the employee for the next school year. (Education Code § 44954.)

Special rules apply to a "75% er" temporary employee who was non-reelected in accordance with the above process (§44954(b)) but nevertheless has been retained as a temporary or substitute employee for a second year, has served in each year for at least 75% of the number of days the regular schools of the district are maintained, and has performed the duties normally required of a regular teacher. (Education Code §44918.)

Termination of Permanent Certificated Employees for Cause

1. Unprofessional Conduct or Unsatisfactory Performance

District personnel specialists should be aware of special timelines and notices applicable if they intend to seek the dismissal of a tenured certificated employee based upon the causes of "unsatisfactory performance" or "unprofessional conduct." Education Code §44938 requires that an employee be given written

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notice (commonly referred to as a “notice of deficiencies”) by the board or its authorized representative of specific instances of behavior constituting “unsatisfactory performance” at least 90 calendar days prior to the filing of charges seeking the employee’s dismissal. Similarly, an employee must be given written notice of instances of behavior constituting “unprofessional conduct” at least 45 calendar days prior to the filing of charges based on that conduct. Any such notice of deficiencies must have attached to it a copy of the latest completed “Stull Bill” performance evaluation. Failure to attach the evaluation will render the notice legally defective. Since the content of the notice is somewhat technical and legally quite critical, we recommend that you consult with legal counsel in its preparation.

Please note that a §44938 notice of deficiencies can be issued anytime so long as the appropriate Stull evaluation is included with it. The 90 or 45 calendar day time periods, however, should run during the regular school year to allow for the possibility of correction of the conduct. For example, if the §44938 notice was delivered to the employee on July 1, it would be best to consider the 90 or 45 calendar day period to commence running when school begins in August or September. [This would of course change in a year-round school situation.]

Remember also that even though the §44938 notice can be issued anytime, the board’s action actually initiating the dismissal cannot occur between May 15 and September 15, unless the “cause” is one or more of those “special” causes set out in Education Code §44939. (Education Code §44936.)

2. Causes Other Than Unprofessional Conduct or Unsatisfactory Performance

There are several other statutory “causes” that may be used to dismiss a permanent certificated employee which do not require a prior Section 44938 notice. See sections 44932 and 44939.

Brown Act Involvement

It is important to carefully comply with the Brown Act whenever the board of trustees is going to meet to consider or take action on any of the above matters. The statutory deadlines are generally jurisdictional, and if an error is made in a board meeting which requires the board to attempt to “cure and correct” the error, a statutory deadline may make it legally impossible to do so. Careful agenda preparation and plans for board action are clearly indicated.

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