

BEFORE THE
GOVERNING BOARD
OF THE
MORENO VALLEY UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

OAH No. 2009070140

HILDA GARCIA AND
MARGARET KAZAN,

Respondents.

PROPOSED DECISION

Donald P. Cole, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Moreno Valley, California on July 30, 2009.

Melanie A. Petersen, Fagen Friedman & Fulfrost LLP, represented the Moreno Valley Unified School District.

Carlos R. Perez, Reich, Adell & Cvitan, A Professional Law Corporation, represented respondents Hilda Garcia and Margaret Kazan.

The matter was submitted on July 30, 2009.

FACTUAL FINDINGS

1. Rowena T. Lagrosa, Superintendent, Moreno Valley Unified School District (district), made and filed the accusation dated July 15, 2009, in her official capacity.
2. Respondents¹ are certificated district employees.
3. On July 13, 2009, the Board of Education of the Moreno Valley Unified School District (board) adopted revised Resolution No. 2009-10-04, determining that its total revenue limit per unit of average daily attendance (ADA) for fiscal year 2009-2010 (the

¹ The accusation identified eight certificated employees as respondents. As explained below, the district subsequently withdrew the preliminary notices of termination as to six of these employees. Accordingly, the only two remaining respondents are those identified in the caption of this proposed decision.

current fiscal year) had not increased by at least two percent (2%), and that it was, therefore, necessary to decrease the number of certificated employees in the district. The board determined that it would effectuate this decrease in the number of certificated employees by reducing certain particular kinds of services for the 2009-2010 school year, and that the particular kinds of services that would be so reduced were the following full-time equivalent (FTE) positions:

<u>Particular Kind of Service</u>	<u>Full-Time Equivalent</u>
Counselors	8.0
Total FTE	8.0

The board also adopted the following notice and hearing schedule in revised Resolution No. 2009-10-04:

- Send Layoff Notices and Accusation, Statement to Respondent, Notice of Defense, and Education Code and Government Code sections (July 15, 2009);
- Combined Request for Hearing Due (July 22, 2009);
- Hearing to be Conducted (July 29 and 30, 2009);
- Administrative Law Judge Serves Decision on District (Week of August 3, 2009);
- Final Board Action on Recommended ALJ Decision (August 4 through 11, 2009); and
- Final Layoff Notices to be Sent (August 14, 2009).

4. The board’s resolution was made because the district was “going through very severe financial difficulties due to the State budget crisis,” including the fact that “the Propositions in the May 2009 Special Election did not pass resulting in severe budgetary impacts to school districts across the state including ours.” The district determined that “it will be impossible to adequately reduce expenditures without further reducing or eliminating particular kinds of certificated services.”

More specifically, as a result of a continuing deterioration of the state’s finances and the district’s budget, the district determined that it would have to cut an additional \$20,000,000 for fiscal year 2009-2010 in order to meet its budget. This \$20,000,000 budget shortfall occurred after a spring lay-off proceeding instituted by the district pursuant to Education Code sections 44955 and 44949.²

² See Finding 20, below.

5. On July 15, 2009, the district timely served on respondents a written notice that their services would be terminated for the upcoming school year, “effective on the date that the Board adopts its final decision in this matter,” as well as the accusation and required accompanying documents. The notice set forth the reasons for the district’s action. The notice advised respondents of their right to a hearing, that each respondent had to deliver a request for a hearing in writing to the district by the date specified in the notice, and that the failure to request a hearing would constitute a waiver of the right to a hearing.

The decision to terminate respondents’ employment was not related to their competency as counselors.

6. Subsequent to the action the board took on July 13, 2009 to reduce particular kinds of services by 8.0 FTE positions, the district continued to evaluate its personnel needs. After taking into consideration, upcoming positively assured attrition, including resignations and retirements, and after making efforts to find other ways to reduce costs and the budget deficit for fiscal year 2009-2010, the district has now determined it can meet its fiscal needs by reducing services by a total of 2.0 FTE positions for the current fiscal year. To accomplish this reduction of services, the district must give final notices of termination to the two remaining respondents.

7. Respondents timely filed written requests for hearing to determine if there was cause for not reemploying them for the upcoming school year. Respondents timely filed a notice of defense. All pre-hearing jurisdictional requirements were met.

8. Respondents are probationary or permanent certificated employees of the district.

9. The district’s total base revenue limit per unit of average daily attendance for fiscal year 2009-2010 has not increased by at least two percent. In fact, it has decreased.

10. The district’s revenue limit calculation was determined by applying the cost-of-living adjustment (COLA) and a State-imposed deficit factor to the base revenue limit per unit of ADA. The district’s total base revenue limit per unit of ADA, after applying the COLA and the deficit factor, was \$5,442 for fiscal year 2008-2009, and \$5,255 for fiscal year 2009-2010. The difference between these figures represented a decrease of about 3.5 percent (3.5%) in total revenue limit funding per unit ADA for fiscal year 2009-2010.

The district’s revenue limit did not include stimulus funding or other aggregate funds received by the district.

11. The services the board addressed in revised Resolution No. 2009-10-04 were “particular kinds of services” that could be reduced or discontinued within the meaning of Education Code section 44955. The board’s decision to reduce or discontinue these particular kinds of services was not arbitrary or capricious and constituted a proper exercise

of discretion. No particular kinds of services were lowered to levels less than those levels mandated by state or federal law.

12. The district has received or will receive the following stimulus funds for fiscal year 2008-2009: (i) Federal Title I funds (about \$5,000,000); (ii) special education funds (about \$7,000,000); and (iii) general stimulus funds (about \$12,000,000). The district has received no additional stimulus funds for fiscal year 2009-2010, but intends to apply some of the foregoing amounts to the current fiscal year.

The district has already received about one-half of the \$5,000,000 Title I funds, and expects to receive the remainder during the current fiscal year. The district has received about one-tenth (1/10) of the special education funds, and expects to receive the remainder during the current fiscal year. The district has already received all of the \$12,000,000 general stimulus funds.

Title I funds must be used for specified Title I programs at specified Title I schools. Counselors are within the permitted expenditures; accordingly, the district is permitted to use the Title I funds to fund counselor positions. One-half (1/2) of the special education funds are permitted to be and have been used to help bridge the budget gap. The district has already spent about \$7,000,000 to \$8,000,000 of the general stimulus funds, which may be used however the district deems appropriate, to help close the current year budget gap. The district intends to save the remainder of the \$12,000,000 for use in fiscal year 2010-2011.

13. The eight counselor positions identified for elimination in revised Resolution 2009-10-04 were budgeted out of categorical funds. However, in an effort to help school districts deal with budget shortfalls, the State has authorized them to use some of these categorical funds in other ways, i.e., outside the scope of their originally-earmarked purpose. The district thus decided to apply some of these categorical funds to help reduce the \$20,000,000 deficit for the current fiscal year. These categorical funds included those earmarked for school counselors, but also funds earmarked for other purposes/programs. The district considered using some of the general stimulus money to “shore up” the categorically-funded programs from which funds were “swept” (i.e., taken away for use elsewhere) to help balance the budget, but decided to save such funds for fiscal year 2010-2011.

14. The district has taken a number of measures to address the \$20,000,000 deficit that occurred after the spring layoff proceeding, e.g., the institution of two furlough days for certain district employees, a reduction in the number of administrators at the district offices and in the number of assistant principals, and the elimination of an on-campus suspension program. All in all, reductions were instituted in about 20 to 30 different areas, including the elimination of the two counselor positions, which will save an estimated \$200,000. As noted above, about \$7,000,000 to \$8,000,000 of the general stimulus money was also applied to the current fiscal year. Through these means, the \$20,000,000 budget gap has been closed. The district elected to save the remaining \$4,000,000 to \$5,000,000 of stimulus money for the next fiscal year.

15. Restoration of six of the eight counselor positions after issuance of Resolution No. 2009-10-04 occurred as a result of the district giving affected school administrators the option to find other ways to cut expenses at their school sites in order to retain counselors. As a result, some administrators were able to find other funding sources for counselors. This permitted the rescission of the notices as to the six counselors, leaving two for layoff. Respondents are the two counselors with the least district seniority.

16. The district clearly and carefully explained its rationale for reducing the certificated positions identified in revised Resolution 2009-10-04. It also clearly and carefully explained its rationale for the use of additional stimulus and other aggregate funds. The evidence affirmatively established that the district acted neither arbitrarily nor capriciously with regard to these fiscal decisions. Further, its decision to eliminate eight — and ultimately two — counselor positions was necessary to decrease the number of permanent employees in the district, and was well within its sound discretion.³

17. The reduction or discontinuation of particular kinds of services 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.

18. The board considered attrition, including resignations, retirements and requests for transfer, in determining the actual number of necessary layoff notices to be delivered to its employees. No evidence was presented that any known positively assured attrition was not considered.

19. No certificated employee junior to any respondent was retained to perform any services which any respondent was certificated and competent to render.

20. In the spring of 2009, the district instituted proceedings to reduce particular kinds of services pursuant to Education Code sections 44955 and 44949. On May 1, 2009, Administrative Law Judge Mary Agnes Matyszewski issued a proposed decision in OAH No. 2009030216 (the spring proceeding), which was subsequently adopted by the board. Pursuant to that decision, about 20 of the district's 55 counselors were laid off. None of the 20 laid-off counselors have been recalled by the district for the upcoming school year.

21. Hilda Garcia was a named respondent in the spring proceeding. She was dismissed as a respondent, based on the determination of Judge Matyszewski that she was not properly served with a preliminary layoff notice and accusation packet.

³ Respondent Margaret Kazan submitted a letter at the hearing, in which she advocated with sincerity and effectiveness with regard to the vital and necessary service that school counselors provide on behalf of students. The letter also made reference to some of the matters set forth above in this Proposed Decision. Ms. Kazan's letter has been considered.

22. Margaret Kazan was not a named respondent in the spring proceeding, even though Kazan had less seniority than certain other counselors who were named as respondents. The failure to name Kazan as a respondent was due to an error on the district's part, i.e., she was skipped based on the district's erroneous belief that she possessed an up-to-date mathematics authorization.

23. The evidence did not support the assertion that Garcia and Kazan were designated for lay off in the present proceeding in order to correct "mistakes" that saved them from lay off during the spring proceeding.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education Code sections 44949 44955, and 44955.5. All notices and jurisdictional requirements contained in those sections were satisfied.

2. Education Code section 44955.5 states in part:

"During the time period between five days after the enactment of the Budget Act and August 15 of the fiscal year to which that Budget Act applies, if the governing board of a school district determines that its total revenue limit per unit of average daily attendance for the fiscal year of that Budget Act has not increased by at least 2 percent, and if in the opinion of the governing board it is therefore necessary to decrease the number of permanent employees in the district, the governing board may terminate the services of any permanent or probationary certificated employees of the district, including employees holding a position that requires an administrative or supervisory credential. The termination shall be pursuant to Sections 44951 and 44955 but, notwithstanding anything to the contrary in Sections 44951 and 44955, in accordance with a schedule of notice and hearing adopted by the governing board."

3. Based on the statutory language,⁴ it appears that when, as in the present case, the total revenue limit per unit of average daily attendance for the fiscal year has not increased by at least two percent, a district's governing board is granted the discretion to determine the necessity of decreasing the number of permanent employees in the district and to institute lay-off proceedings pursuant to that determination.

Notably, the "necessity" language of section 44955.5 is substantially identical to that contained in section 44955. Accordingly, the determination of the necessity to reduce or discontinue particular kinds of services should, for section 44955.5 layoffs as is the case for those instituted pursuant to section 44955, be reserved to the discretion of the board. The policymaking decisions of a district governing board, an elected legislative body, should not be subject to arguments as to the wisdom of their enactment, the necessity of the resolution, the selection of services, or questions as to the board's motivation. (*California Teacher's*

⁴ No judicial authority as to the proper interpretation of section 44955.5 has been found.

Assn. v. Huff (1992) 5 Cal.App.4th 1513, 1529; *Horwath v. Local Agency Formation Comm. of San Mateo County* (1983) 143 Cal.App.3d 177, 182.) The board's action need only be reasonable under the circumstances. (*Campbell Elementary Teachers Assn. v. Abbott* (1978) 76 Cal.App.3d 796.)

4. The district argues that its determination of necessity is essentially unreviewable. That contention is rejected. Instead, review is appropriate—but that review is narrowly circumscribed to a determination whether the district acted arbitrarily and capriciously, as opposed to pursuant to its sound discretion. No evidence was presented that the board acted arbitrarily or capriciously in passing revised Resolution No. 2009-10-04. Instead, the evidence clearly established that the board and the district acted within their sound discretion with regard to the decision to reduce the number of certificated personnel and the implementation of that decision.

5. Respondents contend that the district failed to demonstrate that it was financially necessary to reduce certificated employees by 2.0 FTE. In connection with this contention, respondents assert that a layoff proceeding pursuant to Education Code section 44955.5 may only be instituted “to avert a fiscal disaster.” Further, respondents contend that section 44955.5 allows layoffs for only one reason – necessity due to a shortfall in the district’s revenue limit – and that a district should not be allowed to proceed with layoffs for the reasons stated in section 44955, e.g., as a reduction of particular kinds of services. They argue that to interpret section 44955.5 otherwise would impermissibly infringe upon the reach of section 44955, which respondents claim permits a school district to lay off employees due to the type of long-term programmatic changes in how the school district will conduct its operations such as decreases in average daily attendance, decisions to reduce or discontinue a particular kind of service, and state law mandated changes in a district’s curriculum. Respondents argue that to proceed with such layoffs necessitated by long-term programmatic changes, the district must comply with a timeline designed to give employees notice in advance of the next school year of their employment status, and that requiring such advance notice is the “quid pro quo” for allowing school districts to make such programmatic reductions in force.

However, section 44955.5 explicitly incorporates section 44955 by reference. The requirement that the base revenue limit per average unit of daily attendance has not increased by more than two percent serves in essence as an event “trigger,” which allows the district to account for fiscal changes occurring after the statutorily-prescribed time table for a spring lay off, and to make additional reductions in force, including those based on the reasons specified in section 44955, as the budget revenue picture changes. Respondents’ characterization of section 44955 layoff as being limited to long-term programmatic changes is not persuasive. The board is certainly authorized to make programmatic changes, even long term, when changes in fiscal circumstances dictate that such is necessary. The administrative law judge then performs much the same evaluation under section 44955.5, as under sections 44949 and 44955. The same consideration is given to issues relating to seniority, bumping, skipping, tie-break criteria, teacher certification, competency and classification. In contrast, and as already noted, review of the necessity or wisdom of the governing board’s decision is very limited. Board actions should not be subject to

independent *de novo* review. Rather, the administrative law judge should look only to whether there is any evidence that a board's decision was arbitrary or capricious. In this case the action taken by the board was reasonable under the circumstances.

6. Respondents make the related claim that the board must consider not only the total revenue limit per unit of ADA, but also other revenue sources, such as stimulus funds, in determining fiscal necessity. However, section 44955.5 makes no mention of the need to also consider such other sources of revenue, and respondents' contention is rejected.

7. A preponderance of the evidence sustained the charges set forth in the accusation. Cause exists under Education Code sections 44949, 44955, and 44955.5 for the district to reduce or discontinue particular kinds of services. The cause for the reduction or discontinuation of particular kinds of services related solely to the welfare of the schools and the pupils thereof. Cause exists to reduce the number of certificated employees of the district due to the reduction and discontinuation of particular kinds of services. The district identified the certificated employees providing the particular kinds of services that the board directed be reduced or discontinued. It is recommended that the board give respondents notice before August 14, 2009, that their services are no longer required by the district.

ADVISORY DETERMINATION

The following advisory determination is made:

1. The accusations served on respondents Hilda Garcia and Margaret Kazan are sustained. Notice may be given to such respondents before August 14, 2009, that their services will not be required because of the reduction or discontinuation of particular services as indicated.

DATED: _____

DONALD P. COLE
Administrative Law Judge
Office of Administrative Hearings