

BEFORE THE
GOVERNING BOARD
MADERA UNIFIED SCHOOL DISTRICT
COUNTY OF MADERA
STATE OF CALIFORNIA

In the Matter of the Reduction or Elimination
of Particular Kinds of Services and the
Employment Status of:

FOUR CERTIFICATED EMPLOYEES OF
THE MADERA UNIFIED SCHOOL
DISTRICT,

Respondents.

OAH No. 2012031243

PROPOSED DECISION

Administrative Law Judge Stephen J. Smith, Office of Administrative Hearings, State of California, heard this matter at the Madera Unified School District Office, Madera, California on April 19, 2012.

Kevin R. Dale, Attorney at Law, of Atkinson, Andelson, Loya, Ruud and Romo, Attorneys at Law, represented the Madera Unified School District. Michael J. Lennemann, Director of Personnel and Human Resources, appeared on behalf of the District.

Joshua Richtel, Attorney at Law, of Tuttle and McCloskey, Attorneys at Law, represented all certificated employee members of the Madera Unified Teacher's Association (MUTA). None of these respondents were serving in the Adult Education Program. All these respondents joined in the stipulation below (the Regular Education Program stipulation).

Tomas M. Sharpe, Attorney, of Bennett & Sharpe, Inc., Attorneys, represented respondents, members of the Madera Adult Educators (MEA), American Federation of Teachers-California Federation of Teachers, Local 6180.

The matter was heard on April 19, 2012, and the record was left open for the receipt of points and authorities from the parties and closing arguments in writing. The parties moved for an extension of time for the filing of post trial briefs and legal arguments. The parties agreed to extend and waive the statutory deadlines for the submission of the Decision and the Board's action on the Decision accordingly.

Simultaneous post hearing closing arguments and points and authorities were received from each counsel on May 18, 2012. Simultaneous replies were received on May 25, 2012.

The matter was submitted on May 25, 2012.

Due to the time waivers and extensions of time granted to complete the record in this matter, Education Code sections 44949 and 44955 permit the deadlines for the preparation and submission of the Proposed Decision and for the Board's consideration and action on the Decision to be accordingly extended. The stipulations entered in this matter amounted to extensions of 38 days¹ to prepare and submit the Proposed Decision, and an additional seven days for the Board to act. Thus, the Proposed Decision is due to the Board 38 days from May 11, 2102, the date the record finally closed, or June 18, 2012. The Board's time to consider the Decision and act is June 25, 2012.

FACTUAL FINDINGS

1. Gustavo G. Balderas, (Superintendent) made and filed the Accusation in his official capacity as Superintendent, Madera Unified School District (District).

2. All respondents are, and at all times relevant to this Decision were, certificated employees of the District.

3. On or just before March 14, 2012, in accordance with Education Code section 44949 and 44955, the Superintendent notified the Governing Board of the District (Board) in writing of the Superintendent's recommendation that certain particular kinds of services would have to be reduced or eliminated for the upcoming school year. The Superintendent's recommendation specified the particular kinds of services to be reduced or eliminated, as set forth below. The Superintendent also notified the Board that a corresponding number of certificated employees of the District, in this instance, 55.80 full time equivalents (FTE), would have to be laid off to effectuate the reduction or elimination of the particular kinds of services. The Superintendent notified the Board that respondents had been identified as persons to whom notice should be given that their services would not be required for the ensuing school year. The recommendation that respondents' services for the District would not be required for the upcoming school year was not related to their skills, abilities or competencies as teachers.

REDUCTIONS/ELIMINATIONS OF PARTICULAR KINDS OF SERVICES

4. The Board adopted Resolution 143-2011/2012 on March 14, 2012. The Board resolved to follow the Superintendent's recommendation to reduce 55.80 FTE Particular

¹ April 3 to April 29, first extension, April 29 to May 11, second extension (total time 38 days)

Kinds of Services (PKS). The stipulation between the District and the MEA (below) removed all issues saving end excepting those affecting Adult Education services. The Resolution authorized and directed the Superintendent to give notice to an equivalent number of certificated employees of the District that their services would not be required for the upcoming school year in order to effectuate the reduction.

5. The Resolution authorized the elimination of 5.0 FTE “Adult Education Instructional Services” now offered in the District. The elimination of the 5.0 FTE Adult Education Instructional Services, in conjunction with the end of 13 temporary contracts between the District and part-time employees serving in the Adult Education Program, had the effect of eliminating all adult education instructional services now being offered by the District. At the time of the issuance of the Preliminary Notices of Layoff (below), all Adult/Alternative Education instructional services being offered by the District were provided by the five full-time certificated employees of the District who received Preliminary Notices of Layoff, as well as by 13 part-time employees, each of whom provided less than .6 FTE Adult/Alternative Education services. Each of the 13 part-time employees who provided services pursuant to temporary contracts did so pursuant to contracts having a term of one school year or less in duration with the District. There was no evidence that any of the 13 part-time employees providing Adult/Alternative Education services to the District have had their temporary contracts renewed for the upcoming school year. Whether any such temporary employee will receive a renewal of his or her temporary contract to provide Adult/Alternative Education services in the District in the upcoming school year remains an open question, subject to the future condition of the District’s budget, that may not be ascertainable until much closer to the commencement of the upcoming school year, and could not be determined as of the time of the issuance of the Preliminary Notices of Layoff. As none of the 13 part-time employees providing Adult/Alternative Education services pursuant to temporary contracts have any seniority status with the District, none of those 13 part-time employees received Preliminary Notices of Layoff.

6. The total FTE reduction/elimination of PKS addressed in this Decision are the 5.0 FTE of Adult/Alternative Educational Instructional Services now offered in the District. All other issues and PKS reduction/eliminations and FTE’s to be reduced or eliminated that were raised by the Resolution were resolved by the stipulation detailed below in Paragraph 14.

7. The Superintendent caused each of the five full-time certificated employee respondents serving in the Adult/Alternative Education Program to be served with a written Notice of Intention to Dismiss (Preliminary Notice of Layoff) on March 14, 2012. The written Preliminary Notices of Layoff advised respondents that their services would not be required for the upcoming school year. The Preliminary Notices of Layoff set forth the reasons for the recommendation and appended a copy of the Resolution.

8. Four of the five certificated employees of the District serving as full-time employees in the Adult/Alternative Education program who were served with a Preliminary Notice of Layoff timely filed Requests for a Hearing with the District.

9. The Superintendent caused each of the four respondents who timely filed a Request for a Hearing with the District to be served with an Accusation and required attachments. The parties stipulated that all prehearing jurisdictional requirements were met.

10. The remaining four respondents subject to this action, all of whom were serving in the Adult Education/Alternative Education Instructional Services Program, who were served with an Accusation and timely filed Notices of Defense, seeking an evidentiary hearing, together with their seniority dates, were as follows:

Pattie Horn	September 1, 1971
Madellyn Jones	October 1, 1988
Richard Mann	March 24, 1999
Renée Smith	June 1, 1990

11. The District is facing budget shortfalls, resulting in financial pressure, due to declines in attendance and reductions in State funds coming to the District. The District's poor financial condition projected forward into the upcoming two school years, is not expected to materially improve, necessitating the reduction or elimination of the particular kinds of services set forth in the Resolution. The reductions and eliminations of particular kinds of services as set forth in the Resolution are therefore in the best interests of the District and its students.

12. The Superintendent, on behalf of the District, considered all known attrition, resignations, retirements and requests for transfer in determining the actual number of necessary Preliminary Notices of Layoff to be delivered to its employees.

13. There was no evidence that the District proposes to eliminate any services that are State or federally mandated. None of the Adult/Alternative Education services being eliminated by the Resolution are mandated by either federal or state law.

*THE STIPULATION BETWEEN THE DISTRICT AND THE MUTA RESPONDENTS
SERVING IN THE DISTRICT'S REGULAR EDUCATION PROGRAM*

14. Exhibit 1A, attached to this Decision, but submitted separately to the Governing Board for review and approval, sets forth the terms of the stipulation between the District and the Madera Unified Teachers' Association. As set forth above, the stipulation resolved all issues pending in this matter, saving and excepting the issues relating to the four respondents serving in the Adult Education Programs identified by name above.

*REMAINING PORTION OF THE ACTION-THE 5.0 FTE ADULT/ALTERNATIVE
EDUCATION*

15. As set forth above, the 5.0 FTE PKS reduction set forth in the Resolution eliminates all full-time certificated positions in the District's Adult/Alternative Education Program staffed by full-time District certificated employees. The District hopes to offer at

least some portion, if not all, of the adult education services it currently offers in the upcoming school year. However, whether funds will be available to staff any or all of the Adult Education services the District hopes to provide in the upcoming school year was uncertain at the time the Preliminary Notices of Layoff were issued, and continued to be uncertain at the time of the evidentiary hearing. The District has not made a final decision as of the time of the evidentiary hearing regarding whether the District will be in a financial position to be able to offer any Adult Education services in the upcoming school year.

16. The District's Director of Human Resources and Labor Relations, Mr. Lennemann, testified as follows:

A. There has been no board action at this time to terminate the Adult Education program, you're correct.

Q: As a matter of fact, there's been no identification of any programs to be eliminated, correct?

A: In Adult Education?

Q: Yes

A: That is correct.

Q: There is been no determination to eliminate any of the classes that are included in any of those programs?

A: At this time, having to look at our budget and what we can offer, we haven't really determined what courses, but we would try to provide the services that we have done in the past.²

17. Ms. Porterfield, the District's Associate Superintendent, Business Services, corroborated Mr. Lennemann's testimony by confirming that it is the District's intention to attempt to offer as much of the current Adult Education program as possible, within the constraints of their budget. She reiterated that there has been no final decision by the district as to whether any portion of the existing Adult/Alternative Education will be offered in the upcoming school year, whether just a portion will be offered, or whether it will be offered in roughly the same fashion that it was in the school year. Ms. Porterfield confirmed that it is possible that no Adult/Alternative Education will be offered in the District next year if the District finds that it's budget does not permit it, but that the District's goal is to avoid that outcome, if possible. She also confirmed that the District is in "Qualified Status" with the Department of Education, which she explained as the fact that the District is expected to operate in a deficit in the upcoming two school years, and must bring its budgets into balance or risk being taken over and operated by a financial overseer appointed by the Department of

² RT: 37: 20-25, 38: 1-10.

Education. In other words, the District's fiscal situation going forward is serious and requires immediate remedial action. Ms. Porterfield testified that the District's rationale in laying off all the full-time certificated employees, the entire full-time staff of the Adult/Alternative Education Program in the District, and not renewing at present any of the temporary contracts of the 13 other part-time employees who serve in the program, is predicated upon a general, District-wide financial shortfall estimated at \$7 million, requiring the larger layoff action, of which elimination of all Adult/Alternative Education services is just a small part, less than ten per cent of the total layoff action.

18. The District offers through its Adult/Alternative Education program a variety of services, including both core and peripheral classes, technical programs and courses, including, but not limited to, English as a Second Language (ESL) classes, Adult Remedial Education (ARE) classes, a GED, High School Equivalency Diploma (HSD) program, and peripheral programs, such as technical skills education and an EMT training program. The Resolution eliminates all of these classes, programs and services, however characterized.

19. Since all of the full-time certificated employees serving in the Adult/Alternative Education Program with seniority status in the District received Preliminary Notices of Layoff, none of the named respondents have any rights to bump any other certificated employees being retained to teach in the Adult/Alternative Education program. No certificated employees providing Adult/Alternative Education services were skipped who are junior to any of the named respondents.

20. The parties stipulated and agreed that the four respondents listed above are certificated and competent to perform some, but not all, of the Adult/Alternative Education Program services, classes or courses being provided by the District in this program during this current school year by part-time employees serving under temporary contracts..

CONTENTIONS

21. Respondents contend that the resolution terminating the entire Adult/Alternative Education program is not really a genuine PKS action; to wit, a subterfuge and a fraud, imposed because respondents refused to accept a negotiated diminution in pay and benefits for the upcoming year. Respondents contend the District seeks to eliminate all full-time certificated Adult/Alternative Education program employees because those full-time certificated employees receive a full benefit package, including paid healthcare. Respondents contend that the District's motivation in eliminating the entire Adult/Alternative Education program's complement of full-time certificated employees is to terminate full-time employees receiving full benefits and then continue to offer the same services in the upcoming school year at much lower cost by providing those identical services now being provided by respondents through the use of part-time, temporary contract employees who do not receive benefits. Respondents contend that since the District intends to offer some form of Adult Education again in the upcoming school year, the Resolution's elimination of the all the full-time, tenured and certificated Adult Education Program employees is a subterfuge, cost savings play; and that the true motivation for the action is to lay off certificated full-time

employees with tenure and full benefits, in favor of staffing the positions in the future with much less expensive temporary employees to whom the District need not pay benefits.

22. Respondents contend that support exists for their position in a 2009 Decision by Judge Mary Margaret Anderson, *In the Matter of the Reduction in Force of the Metropolitan Education School District*, (OAH case number 2009031072), contending that the decision in *Metropolitan* supports respondents' contention that the District failed here to engage in "a reasoned and fact-based analysis" to determine which Adult/Alternative Education services it is likely to reduce or eliminate for the upcoming school year. Respondents contend that because the District has not yet decided whether any Adult/Alternative Education services will be offered in the upcoming school year, or whether some, but not all,^a of those services will be offered, the layoff must fail because the District has failed to engage in the required reasoned and fact-based analysis that is a condition precedent to elimination of those services.

23. The District counters that its actions need only be "reasonable under the circumstances,"³ and there is no evidence in this record that the District's actions in this matter were not reasonable under the circumstances. The Resolution's action with respect to the Adult/Alternative Education program constitutes the District's attempt to provide itself maximum flexibility in determining staffing for its Adult/Alternative Education program for the upcoming school year, in light of the uncertainty of resources projected to be available to the District. Once resources available are better known, those resources must be balanced against mandates, requirements and priorities at the time. The District contends that the action that it has taken is well within the range of discretion provided the District by Education Code section 44955 and the numerous cases interpreting it.

24. Both parties offered in evidence provisions of the Collective Bargaining Agreement (CBA) between the District and its adult/alternative educators that covers the time period July 1, 2010, through June 30, 2012. Article 10, Paragraph 1.2 (10.1.2) provides as follows:

Unit members who are permanent, full-time employees will be scheduled to work the amount of hours in which they receive tenure. Future hours may not be reduced except by mutual consent of both parties or by the layoff procedure. Note: unit members who are affected by a layoff will be on the 39 month rehire list per California Education Code section 44955.

25. Respondents' contentions lack merit, and are anticipatory and speculative. Respondents seek to fast-forward a potential staffing/rehiring issue anticipated to occur in the near future, based upon the District's expression of intention to offer at least some form of Adult Education services in the upcoming school year. Respondents anticipate that if the District does indeed determine to offer some Adult Education services in the future,

³ *Campbell Elementary Teachers' Association v. Campbell Union School District* (1978) 76 Cal.App.3d 796, 808.

respondents will not be rehired, and those same services will be provided by part-time employees serving under temporary contracts, excusing the District from the obligation to pay respondents full-time benefits and furnishing the District a convenient method for avoiding the cost of full-time employees' benefit packages, as well as enabling the District to disregard respondents' seniority rights. The concerns advanced by respondents here may or may not ripen; no one knows for certain at the present time. The contention is speculative and anticipatory due to the fact that, as at the time of the writing of this Decision, no one knows whether any Adult/Alternative Education services will be offered in the District in the upcoming school year, and no one knows at the present time whether the District's financial condition at the beginning of the upcoming school year will permit the District to offer any of the Adult/Alternative Education services it hopes to be able to provide. If the District decides to offer Adult/Alternative Education services in the upcoming school year, then a rehire issue may occur that may need to be dealt with at that time. However, it is not within the jurisdiction of this matter to decide any rehire issue in these proceedings, and especially not when that issue has not yet matured.

26. In determining whether the decision of a school board is reasonable as distinguished from fraudulent, arbitrary, or capricious, its action is measured by the standard set by reason and reasonable people, bearing in mind that such a standard may permit a difference of opinion on the same subject.⁴ School districts have the discretion to determine particular kinds of services that will be eliminated, even though a service continues to be performed or will be provided in a different manner by the district in the upcoming school year.⁵

27. It was not proved that the District's action to eliminate its entire Adult Education program under the circumstances proved in this matter was arbitrary, capricious, fraudulent, deceitful or represented subterfuge. The District action constitutes the reduction and elimination of the District's Adult/Alternative Education Program that is composed of a variety of non-mandated courses, classes and services, within the District's lawfully allocated discretion, within the authority provided to the District by Education Code section 44955. The matter of whether and how the District intends to staff its Adult/Alternative Education Program in the upcoming school year, if the District elects to offer any Adult/Alternative Education Program services or classes at all, is an issue reserved for another day, if the issue arises at all.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists pursuant to Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied. The District has the burden of proving by a preponderance of the evidence that the

⁴ *Id.*

⁵ *Hildebandt v. St. Helena Unified School District* (2009) 172 Cal.App.4th 334, 343.

proposed reduction or elimination of particular kinds of services and the preliminary notice of layoff served on respondents is factually and legally appropriate.⁶

2. The services the District seeks to eliminate in this matter are “particular kinds of services” that may 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 demonstrated to be arbitrary or capricious, but constituted a proper exercise of discretion.

3. There is no evidence a less senior employee is being retained to teach any Adult/Alternative Education Instructional Program position in the upcoming school year. The claims of respondents attacking the layoff as fraudulent and a subterfuge lack merit, as these claims are anticipatory and speculative, requiring a conclusion both that Adult Education services will indeed be offered again in the upcoming school year, which is neither certain nor even necessarily likely, considering the districts dire financial circumstances, and that if Adult Education services are offered in the upcoming school year, part-time employees teaching pursuant to temporary contracts will be hired by the District in favor of respondents in the staffing of those positions. There is no basis to conclude that the state of affairs that is required in order to consider and rule upon respondents’ contentions has yet or will occur.

4. The reduction or discontinuation of particular kinds of services related to the welfare of the District and its pupils. The District is facing a projected deficit related to the loss of enrollment and funding, and now is on Qualified Status (a form of fiscal probation) with the Department of Education. The reduction in particular kinds of services proposed is necessary to avert the District operating in a deficit in the upcoming school year.

5. The provision of the CBA quoted in the Factual Findings provides that respondents bargained for the application of this particular process in the event that the District elected at any time during the course of the validity of the CBA to reduce or eliminate any of respondents services in the Adult/Alternative Education Program.

6. Education Code section 44955 generally requires layoffs to take place in inverse order of seniority. There was no evidence any person receiving a Preliminary Notice of Layoff is being laid off in favor of a junior employee being skipped, or that any employee being laid off is entitled to bump into a position held by a more junior employee where the employee being laid off has the credentials and competence to take the position of the more junior employee being retained. There was no evidence that any certificated employee of the District is being retained to provide a service any of the respondents who received Preliminary Notices are certificated and competent to render.

7. Legal cause exists pursuant to Education Code sections 44949 and 44955 for the Madera Unified School District to reduce or discontinue 5.0 FTE of particular kinds of

⁶ Education Code section 44949.

Adult/Alternative Education Instructional Services, as set forth in the District's Resolution. The cause for the reduction or discontinuation of particular kinds of services relates solely to the welfare of the schools and the pupils thereof. Legal cause therefore exists to sustain the Accusations. The Board may give respondents final notices that their services will not be required by the District in the upcoming school year, in inverse order of seniority.

ORDER

The Accusations are SUSTAINED.

The Madera Unified School District action to reduce or eliminate 5.0 FTE of particular kinds of Adult/Alternative Education Instructional Program services for the 2012-2013 school year is AFFIRMED.

Final notice may be given to respondents by the District that their services will not be required for the upcoming school year. Notice shall be given in inverse order of seniority.

DATED: June 4, 2012

STEPHEN J. SMITH
Administrative Law Judge
Office of Administrative Hearings