

BEFORE THE
GOVERNING BOARD
PASADENA UNIFIED SCHOOL DISTRICT

In the Matter of the Layoffs of:

Certain Certificated Employees of the
Pasadena Unified School District,

Respondents.

OAH No. 2012030309

PROPOSED DECISION

This matter was heard by Mark Harman, Administrative Law Judge of the Office of Administrative Hearings, on April 25, 2013, in Pasadena, California.

Elizabeth Zamora-Mejia, Attorney at Law, represented the Pasadena Unified School District (District).

Respondents are 47 individuals who requested a hearing on the Accusation, as follows: Datevik Debbie Afsharian, Nallely Arteaga, Brooke A. Autry-Deguzman, Charel Bailey, Courtney Leanne Barrett, Alyson B. Beecher, Maruzèlla Bognoli, Michelle Pauline Bradshaw, Francisco Medina Caro, Lisa Collins, Brian James Covey, Yvette C. Cuara, Deborha Marie Curtin, Al Davidian, Sara J. Dickerson, Jonathan D. Durfee, Ella Farinas, Jacqueline Francia, Monique K. Garza, Luisa Geiger, Kristine K. Gonzales, Michael M. Harrison, Dana Lynnette Hill, Vivian Wen Huang, Brooke Elizabeth Kent, Denine L. Kohl, Bryan Jonathan Lantz, Maura M. Large, Hanh Thuan Le, Erica Civitate Linares, Sean Eric Magallanes, Chaneika T. Martin, Julie Aurelia Martinez, Kyle Joseph Michaelson, Anne Montiglio, Jamie B. Munro, Erin D. Musick, Sheryl Orange, Jeffrey Michael Salmon, Linda C. Saucedo, Veronica Serrano, Lisa Tamiko Takemura, Martha L. Gonzalez Tovar, Rosa Marie C. Valdez, Donnetha Alexander Wallace, Keisha Denise Wallace, and Kimberly D. Winckler.

Glenn Rothner, Attorney at Law, represented the 35 Respondents identified in Exhibit A; however, during the hearing, a conflict of interest developed which caused Mr. Rothner to cease representation of Respondents Dana Lynette Hill (Hill) and Jacqueline Francia (Francia), who thereafter represented themselves. Respondents Deborha Marie Curtin, Brooke Elizabeth Kent, Rosa Marie C. Valdez, and Donnetha Alexander Wallace also represented themselves during the hearing. There were no appearances by or on behalf of Respondents Datevik Debbie Afsharian, Charel Bailey, Maruzèlla Bognoli, Yvette C. Cuara, Denine L. Kohl, Sheryl Orange, or Kimberly D. Winckler.

At the hearing, the District withdrew the Accusation as to Respondents Brooke A. Autry-Deguzman, Francisco Medina Caro, and Kyle Joseph Michaelson.

Oral and documentary evidence was received. The matter was submitted for decision on April 25, 2013.

FACTUAL FINDINGS

1. Yolanda Mendoza (Mendoza) made and filed the Accusation in her official capacity as the District’s Chief Human Resources Officer.

2. Respondents were at all times mentioned certificated District employees.

3. On February 26, 2013, the Governing Board of the District (Board) adopted Resolution No. 2232, which proposed to reduce or discontinue the particular kinds of services encompassing 81.5 full-time equivalent (FTE) positions by the close of the 2012-2013 school year.

4. Resolution No. 2232 specifically provides for the reduction or elimination of the following particular kinds of services:

<u>Particular Kinds of Services</u>	<u>Full Time Equivalent (FTE) Positions</u>
Elementary Teacher (Multiple Subject)	18
Middle School Art Teacher	2
Middle School Teacher (Spanish)	1
Middle School Teacher (English)	3
High School Teacher (English)	4
Middle School Teacher (Mathematics)	6
Middle School Teacher (Social Studies)	2
High School Teacher (Social Studies)	2
High School Teacher (History)	1
High School Teacher (Physical Education)	1
Nurses (Special Education & Health Programs)	4
Special Education (Mild/Moderate)	3
Career Technical Education Teacher	22.2
TOSA II, Technology and Assessment	1
Counselor (Middle & High School)	5.3
Counselor/Social Worker	2
High School Librarians	2
Drop Out Prevention Specialist (CWAS)	1
Coordinator (Academy for Success)	1
 Total FTE positions to be reduced or eliminated:	 81.5

5. On March 12, 2013, the Governing Board of the District (Board) adopted Resolution No. 2236, which proposed to reduce or discontinue the particular kinds of services encompassing 12 full-time equivalent (FTE) positions by the close of the 2012-2013 school year.

6. Resolution No. 2236 specifically provides for the reduction or elimination of the following particular kinds of services:

<u>Particular Kinds of Services</u>	<u>Full Time Equivalent (FTE) Positions</u>
Counselor/Social Worker	1
Resource Teacher (Elementary)	2
TOSA II (Special Education)	1
TOSA II (G.A.T.E./Language Assessment & Development)	1
TOSA II (Program Support)	1
Chief Technology Officer	1
Coordinator II (ROP)	1
School Psychologist (Special Education)	4
 Total FTE positions to be reduced or eliminated:	 12

7. By no later than March 15, 2012, Mendoza provided the Board and 104 certificated employees of the District, including Respondents, with preliminary notices that those certificated employees' services would not be required for the following school year, due to the reduction of particular kinds of services. At the same time, Mendoza caused an Accusation and related documents to be served upon each affected certificated employee.

8. Respondents are 47 certificated employees who timely requested a hearing to determine if there is cause for terminating their services, which resulted in the instant hearing.

9. All prehearing jurisdictional requirements have been met.

10. The services set forth in factual finding numbers 4 and 6 are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 44955.¹

11. The District seeks to reduce or discontinue these services due to budget issues. The Board's decision to reduce or discontinue the services is not arbitrary or capricious but is rather a proper exercise of the District's discretion.

¹ All further references are to the Education Code.

12. The reduction or discontinuation of services set forth in factual finding numbers 4 and 6, in the context of a budget shortfall and the need to continue providing services to students, 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.

13. The District properly considered all known attrition in determining the actual number of necessary layoff notices to be delivered to its employees.

14. Taking into account the findings and conclusions below, no permanent certificated employee with less seniority will be retained to render a service that the Respondents are certificated and competent to render.

Skipping Challenges

15. Respondents Hill and Francia are senior employees affected by a “skipping” provision in Resolution No. 2236, whereby the Board has determined the District has a specific need to retain certificated employees who possess certain credentials, which more senior employees do not possess.² Resolution No. 2236, in part, authorizes the District to deviate from terminating certificated employees in order of seniority in instances where employees with seniority, such as Hill and Francia, do not possess Highly Qualified (HQ) status under the federal No Child Left Behind Act (NCLB).³ The District’s rationale for “skipping” junior employees that are NCLB compliant, and laying off Hill and Francia, is its belief that, since July 1, 2006, federal law and state Board of Education guidelines have required all teachers of NCLB core academic subjects, in addition to holding valid teaching credentials issued by the Commission on Teacher Credentialing (CTC), to demonstrate that they have achieved subject matter competence in the subject areas being taught. NCLB subject matter competence generally can be met by passing a CTC-approved examination.

² Districts are permitted to disregard seniority, and “skip” junior employees, in accordance with section 44955, subdivision (d), which provides, in pertinent part: “Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons: (1) The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the certificated employee has special training and experience necessary to teach that course of study or to provide those services, which others with more seniority do not possess. . . .”

³ Resolution 2236 provides, in part, that “in accordance with Education Code section 44955(d), the District may deviate from terminating certificated employees in order of seniority, based on a specific need for personnel who possess special training, experience, and/or competency to teach specific course or courses of study or to provide specific services, which others with more seniority do not possess including, but not limited to, as follows: [¶] . . . [¶] F. Possession of Highly Qualified (‘HQ’) status under the No Child Left Behind Act (‘NCLB’).” (Underline in the original.)

16a. Steven Miller (Miller), the District's Director of Human Resources, testified at the hearing. Miller's responsibilities include ensuring the District has met all state and federal requirements. In his testimony, Miller said the consequences of the District's failure to comply with the perceived mandate are: (1) The District must report the teachers who are not NCLB compliant to the California Department of Education; (2) The District must notify parents of children in those teachers' classrooms that their child's teacher was not "highly qualified;" and (3) Parents could demand a transfer of their child to a "highly qualified" teacher. Miller is not aware of any parent having requested a transfer for their child under the latter circumstances.

16b. Miller believes that the District has kept its certificated employees informed of their obligations under NCLB at least since 2009. The District will not hire teachers unless they are NCLB compliant. The District asserts that Respondents Hill and Francia are the only District teachers of NCLB core academic subjects that are not NCLB compliant. In January 2013, Miller sent a letter to Respondents Hill and Francia, in which he wrote that they had failed to demonstrate they were "highly qualified" or NCLB compliant and that, if they failed to come into compliance by March 1, 2013, they may be subject to reduction in force proceedings. The District, however, never served Respondents Hill and Francia with notice of the Board's determination to skip the junior teachers who were NCLB compliant until this hearing.

17. Respondent Hill has a seniority date of September 7, 1999. She holds a multiple subject teaching credential and an administrative services credential, as well as Crosscultural Language and Academic Development (CLAD) and GATE certificates. She has completed two Master's degrees and is working toward her Doctoral degree. She has been a District trainer and facilitator to other teachers. She is employed in a permanent 1.0 FTE position to teach middle school students at McKinley Elementary/Middle School (McKinley). Hill never became NCLB compliant because she did not think it would affect her employment by the District. She is scheduled to take the appropriate subtests of the CTC-approved California Subject Examinations for Teachers (CSET) on May 27, 2013. If she passes, she will be in compliance with NCLB.

18. Respondent Francia has a seniority date of September 27, 2004. She holds a multiple subject teaching credential and a CLAD certificate. Francia is employed in a permanent 0.5 FTE position at McKinley. Francia took the CSET and passed all but one of the subtests. She is scheduled to take the CSET again in May 2013. Francia offered her nine years of experience as a classroom teacher to demonstrate her competence to retain her position as an elementary school teacher. Her reviews on all her evaluations have been good and she never has received a complaint from any parent or any principal. She did not learn that NCLB compliance was going to be a skipping criterion until this hearing. She said she would have taken and passed the CSET earlier, had she known that noncompliance with NCLB would subject her to layoff in this proceeding.

19. Respondent Monique Garza (Garza) has a seniority date of September 5, 2006, and holds a multiple subject teaching credential. She teaches at Webster Elementary. She held her teaching credential and a Master's degree when she was hired by the District. She

has been subject to reduction in force proceedings for four years in a row. She received a precautionary notice for this proceeding, based on the District's intention to skip Garza and another junior employee, who both have demonstrated compliance with NCLB. If both Respondents Hill and Francia, who are not NCLB compliant, are retained by the District, then Garza will be subject to layoff.

20. Respondent Martha Tovar (Tovar) is a first-grade elementary teacher at McKinley, with a seniority date of October 1, 2006. She holds a multiple subject credential. At this point, the District intends to skip Tovar and retain her, but if either Respondent Hill or Respondent Francia is retained, then Tovar will be subject to layoff.

21. The District maintains that Respondents Deborha Marie Curtin, Brooke Elizabeth Kent, and Donnetha Alexander Wallace are performing services pursuant to temporary contracts. The District pays for these Respondents' services with funding the District receives pursuant to an agreement between the District and the Los Angeles County Office of Education for participating in the Los Angeles County Regional Occupational Program (ROP). This categorical funding is temporary and will expire in June 2013. The District has released these Respondents from their employment effective at the conclusion of the 2012-2013 school year. The District served "precautionary" preliminary notices, out of an abundance of caution, to allow those Respondents to participate and to exercise arguable rights in the hearing process. The District nevertheless maintains these employees do not possess rights to participate in this layoff proceeding. None of these Respondents has contested the District's classification of them as temporary certificated employees. The District's classification of these Respondents is presumed to be proper.

LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists pursuant to sections 44949 and 44955, by reason of factual finding numbers 1 through 9.

2. The services listed in factual finding numbers 4 and 6 are determined to be particular kinds of services within the meaning of section 44955, by reason of factual finding numbers 4 and 8.

3. Cause exists under sections 44949 and 44955 for the District to reduce or discontinue the particular kinds of services set forth in factual finding numbers 4 and 6, which cause relates solely to the welfare of the District's schools and pupils, by reason of factual finding numbers 1 through 12.

4. The only issues in this case is whether the District may, pursuant to section 44955, subdivision (d), skip junior employees who are NCLB compliant and layoff two more senior employees who have not achieved HQ status. The District has the burden of demonstrating "a specific need for personnel to teach a specific course or course of study." (See *Bledsoe v. Biggs Unified School Dist.* (2009) 170 Cal.App.4th 127.) The District also must

demonstrate that the junior certificated employees, by virtue of their HQ status, have special training and experience necessary to teach a specific course or course of study, which Respondents Hill and Francia did not possess. The District has not established any of these elements in this matter. To the contrary, Respondents Hill and Francia have demonstrated that they have met, and can continue to meet, the needs of the District's educational program.

5. The provisions authorizing a reduction in force proceeding make clear the Legislative intent -- that Districts may not lay off senior teachers while retaining junior teachers absent specific and compelling circumstances. Section 44955, subdivision (b), provides, in pertinent part: "[t]he services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is *certificated and competent* to render." (Emphasis added.) Respondents Hill and Francia hold the necessary credentials to teach in their current positions. They have many years of experience teaching in these jobs. Both have the skills, knowledge, and experience necessary to meet the needs of the students they teach, and thus, are competent to teach their current assignments at McKinley.

6. The District, thus, would depart from seniority-based economic layoff by skipping junior employees who are NCLB compliant. The District asserts, without proving, that the junior employees who are NCLB compliant have special training and experience that Respondents Hill and Francia do not possess. The District's contention is based, in large measure, on the premise that only teachers who are NCLB compliant may provide instruction in NCLB core academic subjects. This has not been shown. In fact, the District has failed to identify a specific course or course of study that requires special skills or experience to teach. The District has designated its entire elementary and middle school educational instruction program as a "course or course of study," which does not comport with the more narrow definitions of these words and phrases. The District has failed to identify any special training or experience needed to teach McKinley students that Hill and Francia do not possess.

7. The District further suggests that, if a teacher has been afforded adequate notice and a reasonable opportunity to achieve HQ status and simply did not do so in a timely manner, a school district should be able to lay him or her off, even if the teacher is in the process of obtaining HQ status. These factors, however, would be relevant only in disciplinary proceedings against Respondents Hill or Francia. (See *Ripon Unified School District v. Commission on Professional Competence* (2009) 177 Cal.App.4th 1379.) The District cannot otherwise make NCLB compliance a skipping criterion absent a showing that such is also necessary to teach a course or course of study. The District clearly wishes to address an administrative issue of teachers who have not become NCLB compliant through this proceeding, which is not the proper venue.

8. The Districts' decision, to skip junior certificated employees who are NCLB compliant and layoff certificated and competent senior teachers who are not, is improper. Cause does not exist under sections 44949 and 44955 to provide notice to Respondent's Hill and Francia that their services will not be required in the ensuing school year.

9. With the exceptions noted in legal conclusion number 8, cause exists to terminate the services of 41 of the Respondents in this proceeding, by reason of factual finding numbers 1 through 21, and legal conclusion numbers 1 through 8. Because Respondent Franzia is being retained in her 0.5 FTE position, Respondent Garza, as the next most senior elementary teacher noticed for layoff, is entitled to retain 0.5 FTE of her position.

ORDERS

1. The Accusation is sustained in part and the District may notify 41 Respondents, Datevik Debbie Afsharian, Nallely Arteaga, Charel Bailey, Courtney Leanne Barrett, Alyson B. Beecher, Maruzèlla Bognoli, Michelle Pauline Bradshaw, Lisa Collins, Brian James Covey, Yvette C. Cuara, Deborha Marie Curtin, Al Davidian, Sara J. Dickerson, Jonathan D. Durfee, Ella Farinas, Luisa Geiger, Kristine K. Gonzales, Michael M. Harrison, Vivian Wen Huang, Brooke Elizabeth Kent, Denine L. Kohl, Bryan Jonathan Lantz, Maura M. Large, Hanh Thuan Le, Erica Civitate Linares, Sean Eric Magallanes, Chaneika T. Martin, Julie Aurelia Martinez, Anne Montiglio, Jamie B. Munro, Erin D. Musick, Sheryl Orange, Jeffrey Michael Salmon, Linda C. Saucedo, Veronica Serrano, Lisa Tamiko Takemura, Martha L. Gonzalez Tovar, Rosa Marie C. Valdez, Donnetha Alexander Wallace, Keisha Denise Wallace, and Kimberly D. Winckler, that their services will not be needed during the 2013-2014 school year due to the reduction of particular kinds of services.

2. The Accusation is sustained in part with respect to Respondent Monique K. Garza, who shall be retained for 0.5 FTE of her position for the 2013-2014 school year.

3. The Accusation is dismissed with respect to Respondents Dana Lynette Hill and Jacqueline Francia, who shall be retained for the 2013-2014 school year.

Dated: May 2, 2013

MARK HARMAN
Administrative Law Judge
Office of Administrative Hearings