

**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. 2011030848

PROPOSED DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, on April 28, 2011, in Pasadena. The record was closed and the matter was submitted for decision at the conclusion of the hearing.

Jeff C. Marderosian, Esq., Law Offices of Jeff C. Marderosian, represented the Pasadena Unified School District (District).

Respondents are the 44 individuals identified in exhibit 4B. Jean Shin, Staff Attorney, California Teachers Association, and Maria Keegan Myers, Esq., Rothner, Segall & Greenstone, represented the 36 Respondents identified in exhibit A.

The hearing of this matter was previously continued for two days at the request of counsel, as described in more detail in a written order. Pursuant to Education Code sections 44949, subdivision (c), and 44955, subdivision (c), the continuance extends the deadline for submission of the proposed decision to May 9, 2011.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Edwin Diaz made and filed the Accusations in his official capacity as the District's Superintendent.
2. Respondents were at all times mentioned certificated District employees.
3. On March 8, 2011, the Governing Board of the District (Board) adopted Resolution No. 2140, which proposed to reduce or discontinue the particular kinds of services encompassing 66 full-time equivalent (FTE) positions by the close of the 2010-2011 school year.

4. By no later than March 15, 2011, the Board and certificated employees of the District, including Respondents, were given preliminary notice that those certificated employees' services would not be required for the following school year, pursuant to Education Code sections 44949 and 44955.

5. Respondents timely requested a hearing to determine if there is cause for terminating their services, or the parties stipulated that they may appear in this matter. Each Respondent was thereafter served with an Accusation. Respondents timely filed Notices of Defense, or the parties stipulated that they did, which resulted in the instant hearing.

6. During the hearing, the District withdrew the Accusation against Respondent Diana Nestico-Arnold.

The Board's Resolution

7. Resolution No. 2140 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)	21.5
High School English	3.5
High School Literacy Coach	.5
Secondary Librarians	7.0
High School Mathematics	.5
High School Math Coach	.5
Resource Teacher (Elementary)	2.0
Special Education (Mild/Moderate)	4.5
Special Education (Pre-K) (mild/moderate)	4.0
Child Development Coordinator	1.0
TOSA II, Instructional Services	1.0
TOSA II, Technology, Assessment & Accountability	1.0
High School Assistant Principal	2.0
Elementary Principal	3.0
High School Principal	1.0
Executive Director, High School, College & Careers Pathways	1.0
Elementary Teacher Coordinator	1.0
High School Teacher Coordinator	1.0
Coordinator, Center for Independent Studies	1.0
High School Business	5.0
High School Spanish	1.0
High School Social Science	3.0
Total FTE positions to be reduced or eliminated:	66

8. The decision to reduce or eliminate 66 FTEs was the result of financial difficulties experienced by the District, including an anticipated \$11.2 million deficit.

9. Prior to sending out the preliminary notices mentioned above, the Board considered all known assured attrition.¹

10. Pursuant to Resolution No. 2140, the Board determined that it was necessary to retain certificated employees for the following school year regardless of seniority (skipping) to teach a specific course or courses of study who possess the following types of special training and experience which others more senior do not possess:

A. Possess an EL authorization and whose current assignment requires such authorization.

B. Currently assigned to a teaching position in the District, and in the last three years participated in a minimum of 25 hours of training in the Pathway program, as well as knowledge of the strategies and lesson development of the Pathway program, who are also NCLB compliant and support the District's Graduation Initiative.

C. Current, valid multiple subject credential and possess a current, valid BCLAD in Mandarin and/or Spanish, with experience in the District in the last five years in a dual immersion program.

11. None of the skipping categories is subject to dispute. Therefore, the District stipulated that Respondent William Jenkins should be subject to the Pathway program skip and therefore he should not be laid off.

12. Exhibit A to Resolution No. 2140 established tie-breaking criteria to determine the relative seniority of certificated employees who first rendered paid probationary service on the same date. The tie-breaking criteria was used in this matter to resolve ties in seniority amongst certificated personnel. The validity of the tie-breaking process is not in dispute.

13. Exhibit B to Resolution No. 2140 provides a definition of competency to be used for bumping purposes, by which a certificated employee is considered competent to perform a service only if that employee has, under the appropriate credential, performed the service for the District for one complete school year within the past ten years, and possesses a BCLAD, CLAD or other appropriate EL authorization. The validity of the competency definition is not in dispute.

¹ School districts are not required to account for circumstances that occur after March 15th when implementing layoff decisions. (*Lewin v. Board of Trustees* (1976) 62 Cal.App.3d 977, 982.)

Overall Findings

14. The reduction or elimination of the FTE positions in question will not reduce services below mandated levels.

15. The District maintains a seniority list containing employees' seniority dates, current assignments and locations, credentials and authorizations. Steven Miller, the District's Director of Human Resources, testified to the accuracy of the seniority list, and how it was compiled. In November of 2010, certificated employees were notified in writing of the District's records regarding their employment history with the District, and allowed to confirm or challenge the accuracy of that information. The seniority list was updated based on new information obtained from certificated employees that was verified. It was established that the information on the seniority list is accurate, except for the following, and the changes noted in the Factual Findings 23 and 25 below:

A. Although the seniority list does not incorporate the results after applying the tie-breaking criteria to certificated employees with the same seniority dates, the District created another document (ex. 7) which does so.

B. Respondent Rhyna Vasquez is a "Prob II" this year, not a "Prob I."

16. The District used the seniority list to implement and determine the proposed layoffs. The District then determined whether the least senior employees held other credentials entitling them to "bump" other employees. In determining who would be subject to layoff for each kind of particular service reduced, the District counted the number of reductions not covered by the known vacancies, and determined the impact on incumbent staff in inverse order of seniority.

17. The Board's decision to reduce or discontinue the above-described particular kinds of services was neither arbitrary nor capricious, and was a proper exercise of its discretion.

18. The cause for reducing and/or eliminating the above-described particular kinds of services relates solely to the welfare of the schools in the District and its pupils.

19. 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.

Seniority Disputes

20. Respondent Ella Farinas challenged her seniority date of February 5, 2007, arguing that it should be changed to September 5, 2006. She made the same argument in last year's layoff hearing, based on the same evidence, which was rejected by the ALJ who heard the matter. She is therefore collaterally estopped from raising the same issue in this case,

based on the same facts, as the issue has been previously litigated between her and the District.² There is no basis to change her seniority date.

21. Respondent Marjorie Lott seeks to change her seniority date from October 23, 2006, to October 25, 2000. Respondent Lisa Newton seeks to change her seniority date from September 5, 1997, to October of 1996. The District argues these Respondents should not be allowed to contest their seniority dates because the District detrimentally relied on the fact that neither Respondent answered the District's attempt in November of 2010 to confirm their seniority date and credential information "in case the District implements a layoff."³ The District points out that this is especially so given that the Respondents are seeking changes based on events that occurred more than 10 years ago.

22. The District did not establish that Respondents Lott and Newton should be estopped from asserting a different seniority date for the following reasons:⁴

A. It was not established that either Respondent intended their lack of response to the November 2010 verification letter to be relied upon by the District as an agreement that the stated information was correct.

² An administrative decision can have preclusive effect in subsequent litigation. (*People v. Sims* (1982) 32 Cal.3d 468, 479.) The following elements must exist for collateral estoppel to apply. A claim or issue raised in the present action must be identical to a claim or issue litigated in a prior proceeding; the prior proceeding must have resulted in a final judgment on the merits; and the party against whom the doctrine is being asserted must have been a party or in privity with a party to the prior proceeding. (*People v. Barragan* (2004) 32 Cal.4th 236, 252-253.) In this case, there is no dispute that these three elements exist.

³ Even if they responded, it is doubtful that Respondents would have been bound by their responses. Statutory provisions regarding employment classifications for certificated personnel may not be waived, and any agreement, express or implied, made by an employee to waive them is null and void. (Ed. Code, § 44924; *Fine v. Los Angeles Unified School District* (2004) 116 Cal.App.4th 1070.)

⁴ Although the District did not specifically label its legal argument, it is assumed it relies on the doctrines of laches and equitable estoppel. The concept of laches prevents an unreasonable delay in raising a matter which results in prejudice to another party in preparing a defense. (*Gates v. DMV* (1979) 94 Cal.App.3d 921.) The elements of equitable estoppel are (1) the party to be estopped is apprised of the facts; (2) he or she must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel has the right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) the party invoking estoppel must rely on the conduct to its injury. (*Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567, 581.)

B. It was not established that the District was ignorant of the true facts, in that it always had at its disposal the same information as testified to by the Respondents. In fact, Respondent Lott testified that she has frequently discussed her seniority date with District staff and has consistently maintained the 2000 date is correct. Moreover, Respondents cannot be expected to know all the nuances of the complex legal and factual issues intertwined with the issues of seniority, status as temporary employees, and the legal significance of the dates in which their credentials were issued, registered and presented, the same way that the District appreciates those events.⁵

C. It was not established that the District was prejudiced or harmed in presenting its case, or in responding to the testimony of either Respondent, simply because they failed to respond to the November 2010 verification letter, or failed to assert a different seniority date before the hearing.

D. Without a showing of prejudice, laches does not apply. In any event, it was not established that Respondents unreasonably delayed in presenting their seniority dates in relationship to this layoff hearing. The November 2010 letter did not indicate layoffs were a certainty. There is nothing contained in that letter mandating a response. Nor were Respondents requested for this information after they received their preliminary layoff notices and before the hearing.

⁵ The District's reliance on *American Federation of Teachers v. Board of Education* (1977) 77 Cal.App.3d 100 is unavailing. That case involved a teacher hired to replace a more experienced one who had been assigned to a categorically funded reading program. The district later gave the teacher a release notice at the end of the school year, subject to the renewal of the funding for the reading program. She then sought a writ of mandate to compel the district to rehire her as a probationary teacher. The trial court held the teacher had waited too long to bring up her classification (i.e., until after March 15), and therefore was estopped to claim probationary status. It found the district had explained to her when she signed the contract that she was a temporary employee, along with the implications of that status on her reemployment for the following year, and the district had relied in good faith on her apparent acceptance of those conditions. The appellate court affirmed the judgment as to both the teacher's classification and the finding of estoppel through laches. However the court in *Bakersfield Elementary Teachers Ass'n v. Bakersfield City School Dist.* (2006) 145 Cal.App.4th 1260, 1276, questioned whether the discussion of laches and estoppel in *American Federation of Teachers* was dictum, in as much as the matter had already been decided when the appellate court affirmed the district's initial classification of the teacher without having to decide the laches issue. More importantly, the *American Federation of Teachers* case is distinguishable from this layoff case. There is no evidence that the District here directly interacted with either Respondent regarding their seniority dates, vis-à-vis the layoff, or relied on these Respondents' failure to respond to the November 2010 verification inquiry, as the district in *American Federation of Teachers* had with the teacher in that case. Nor was there any prejudice shown in this case, unlike in *American Federation of Teachers*.

23. Respondent Lott has a multiple subject teaching credential and now teaches seventh grade math and science classes. She started working for the District on October 25, 2000. She worked full-time, but was classified as a temporary employee because she only had an emergency credential at the time. By default, she should have been classified as probationary.⁶ Respondent Lott thereafter was granted unpaid leaves of absences from the District, which do not constitute a break in service. Upon her return on March 15, 2005, she was classified as a “prob 0.” She was then terminated from District service on September 5, 2006, and rehired as a substitute teacher, because the District believed she had lost her emergency credential. In fact, Respondent Lott had obtained a clear multiple subject teaching credential as of September 4, 2006, which was not communicated to the District until November 9, 2006. District staff attributed that delay to the fact that the California Commission on Teacher Credentialing (CTC) had a three-month backlog. Thus, the basis for terminating Respondent Lott was factually unjustified. Moreover, in light of the fact that she should have been classified as a probationary employee at the time, the District’s termination of her employment in 2006 was improper, and therefore did not constitute a break in her service. Once the District was satisfied that Respondent Lott had obtained her clear credential, she was classified as a probationary employee on October 23, 2006, which is the District’s given seniority date for her. However, under these circumstances, Respondent Lott established that she was entitled to the probationary default classification as of October 25, 2000, and did nothing after to justify reclassification. She continued to work full-time under a credential during the entire period in question, and therefore established a new seniority date of October 25, 2000.

24. A review of the District’s seniority list reveals a number of middle school teachers with a multiple subject credential less senior to Respondent Lott who have not received preliminary layoff notices. Under these circumstances, Respondent Lott may not be laid off.

25. The District gave Respondent Newton a seniority date of September 5, 1997. However, Respondent Newton began service with the District on a date not specified in October of 1996, as a long term substitute for a teacher on a work-related injury leave. At the time, she was classified as a temporary employee. She worked full-time the rest of the school year in that position, and at least 75 percent of the school days of that school year. She was made a probationary employee as of the first day of the following school year. By operation of Education Code section 44918, Respondent Newton should be able to “tack on” to her

⁶ See *Kavanaugh v. West Sonoma County Union High School District* (2003) 29 Cal.4th 911, 916-917, in which it was held that “probationary” is the default classification; i.e., school districts are to classify all teachers as probationary who are not otherwise required by the Education Code to be classified as permanent, temporary, or substitute. In *Bakersfield Elementary Teachers Assn. v. Bakersfield City School District* (2006) 145 Cal.App.4th 1260, 1282-1283, the court held that it is improper for a school district to classify a teacher as temporary simply because she had less than a full credential. By default, teachers in such a situation, who were not properly qualified to be assigned permanent or substitute status, should be classified as probationary employees.

current seniority date, since she worked at least 75 percent of the 1996-1997 school year and was thereafter reemployed in a probationary capacity. The District's contention that she is not entitled to earlier seniority based on her work in 1996 because she had a different credential then was not persuasive. The District's evidence on that point was vague, and the District presented no legal authority supporting that argument. The only employees in the District's seniority list with a seniority date in October of 1996 have October 1st as their seniority date. Since Respondent Newton was unable to specify the particular date she started her service, she will be given the same date in October of 1996 as those other certificated employees, i.e., October 1, 1996. However, the change in her seniority date does not change her layoff status.

Bumping & Skipping Challenges

26. Respondents Newton, Anthony Brooks, and Jason Taylor have business credentials which would allow them to teach the District's high school economics course. High school students are required to take economics to graduate. Superintendent Diaz testified that there are at least 500 students, and perhaps 1000, in the District's five high schools who need to take economics. However, the District currently uses teachers with social studies credentials to teach economics bundled with a civics course. The students take one semester of economics and one semester of civics, both taught by a teacher with a social studies credential. The District intends to maintain that scheduling next school year. The District touts the flexibility of that schedule, in that it can utilize one credentialed teacher for different courses. A business credential does not allow a teacher to teach a civics course. Thus, although these three Respondents are credentialed and competent to teach the economics course, they are not so with regard to the civics course. Many of the social studies teachers who will be retained to teach the economics course (bundled with civics) next year are junior to these three Respondents.

27. The District's argument is convincing that these three Respondents cannot bump into the social studies teachers' positions relative to the economics course next school year. The District has made a reasonable and good faith decision to bundle together the economics course with civics course so one teacher can do both.⁷ Since the District is reducing and eliminating positions to save money, it is reasonable for the District to bundle courses together like this. The fact that the District could theoretically assign the three Respondents to teach only the economics classes does not mean the District's decision to the contrary is unreasonable or not in good faith. The District is allowed this type of flexibility in

⁷ In *Hildebrandt v. St. Helena Unified School District* (2009) 172 Cal.App.4th 334, the court held that school districts have discretion to define positions and the manner in which they will be taught as long as it is done in good faith. In determining whether the decision of a school board is reasonable or in good faith, 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. (*Campbell v. Abbott* (1978) 76 Cal.App.3d 796, 808.)

making assignments and reassignments. Since these three Respondents are not credentialed and competent to teach the civics course bundled with the economics course, they did not establish a basis to bump into positions held by junior employees.

28. Respondent Newton also argues that she should be skipped because she meets the Pathway program criteria. She teaches in the Pasadena High School's Creative Arts, Media and Design Pathway, which includes the Graphic Communications, and Visual Arts and Design academies. This semester she is teaching Graphic Arts. She has a business credential, but not an arts credential. The District has chosen not to skip Respondent Newton because it believes the courses she has taught this year, including Graphic Arts, must be taught by a teacher with an arts credential, and that Respondent Newton was mis-assigned to teach those courses because she only has a business credential. The District established by a preponderance of the evidence (see Legal Conclusion 1) that Respondent Newton was mis-assigned. The Graphic Arts course is an art course which uses computers as a medium to make artistic expression. The computer work is not similar to the types of computer work that generally fall under the business credential, e.g. business computing, word processing, etc. Respondent Newton's course introduction (exhibit 17) for her Graphics Arts class depicts the course as one focusing on art, art history, design, and how to use media to express oneself artistically. Since Respondent Newton does not have an art credential which would allow her to teach a position at a Pathway program next year, the District correctly declined to skip her.

LEGAL CONCLUSIONS

1. The party asserting a claim or making charges in an administrative hearing generally has the burden of proof. (*Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155.) For example, in administrative hearings dealing with personnel matters, the burden of proof is ordinarily on the agency prosecuting the charges (*Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 113); in personnel matters concerning the dismissal of a teacher for cause, the burden of proof is similarly on the discharging school district (*Gardner v. Commission on Prof. Competence* (1985) 164 Cal.App.3d 1035). As no other law or statute requires otherwise, the standard of proof in this case requires proof to a preponderance of the evidence. (Evid. Code, § 115.)

2. All notice and jurisdictional requirements of Education Code sections 44949 and 44955 were met. (Factual Findings 1-6.)

3. The services identified in Resolution No. 2140 are particular kinds of services that can be reduced or discontinued pursuant to Education Code section 44955. The Board's decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion. Services will not be reduced below mandated levels. Cause for the reduction or discontinuation of those particular services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949. (Factual Findings 1-19.)

4. Cause exists to reduce the number of certificated employees of the District due to the reduction and discontinuation of particular kinds of services. (Factual Findings 1-19.)

5. Pursuant to stipulations between the parties, the District will not layoff Respondents Diana Nestico-Arnold and William Jenkins. Since Respondent Lott established an earlier seniority date, which makes her senior to other certificated employees the District is retaining to teach positions that Respondent Lott is certificated and competent to teach, the District may not layoff Respondent Lott. Taking these changes into account, no junior certificated employee is otherwise scheduled to be retained to perform services that a more senior employee is certificated and competent to render. (Factual Findings 1-28.)

ORDER

1. The Accusations against Respondents Diana Nestico-Arnold, William Jenkins, and Marjorie Lott are dismissed. The District shall not give them final layoff notices for the next school year.

2. The Accusations are sustained as against the remaining Respondents. The Board may give a final notice of layoff to those Respondents. Notice shall be given to those Respondents that their services will not be required for the 2011-2012 school year, and such notice shall be given in inverse order of seniority.

Dated: May 6, 2011

ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings