

BEFORE THE  
BOARD OF DIRECTORS  
OF  
PALISADES CHARTER HIGH SCHOOL

In the Matter of the Accusation Against:  ANTHONY DiPOALO, RICHARD MAXWELL, and MARTA ORYSHCHYN,  Respondents.	OAH No. 2011030980
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**PROPOSED DECISION**

Howard W. Cohen, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 26, 2011, in Pacific Palisades.

James E. Young, Attorney at Law, Law Offices of Middleton, Young & Minney, LLP, represented Palisades Charter High School (PCHS).

Roger Scott, Area Representative–West Area, United Teachers Los Angeles, represented Anthony DiPoalo, Richard Maxwell, and Marta Oryshchyn (respondents), all of whom were present at the hearing.

PCHS has decided to reduce or discontinue certain services and has given respondents notice of its intent not to reemploy them for the 2011-2012 school year. Respondents requested a hearing for a determination of whether cause exists for not reemploying them for the 2011-2012 school year.

Oral and documentary evidence was received at the hearing. The record was closed and the matter was submitted for decision on April 26, 2010.

**FACTUAL FINDINGS**

1. Michael A. Smith, Interim Executive Director, took all relevant actions on behalf of PCHS in his official capacity.
2. Respondents are certificated employees of PCHS.
3. PCHS is a charter school. Charter schools are, with certain exceptions not relevant here, exempt from the laws governing school districts, under Education

Code section 47610.<sup>1</sup> Nevertheless, PCHS has agreed to comply with the requirements of Education Code sections 44949 and 44955.

4. On March 1, 2011, the Governing Board (Board) of PCHS adopted Resolution No. 2010-2011-01 (Ex. 1). That resolution recites that, “because of the financial constraints resulting from revenue being insufficient to maintain the current levels of programs and necessary program changes resulting therefrom,” the Board determines to reduce or eliminate the following particular kinds of services (PKS) for the 2011-2012 school year:

<u>Services</u>	<u>FTE<sup>2</sup></u>
Counseling	1.0
English	2.0
Foreign Language	1.0
Math	1.0
Physical Education	1.0
Science	1.0
Social Studies	1.0
<b>Total</b>	<b>8.0</b>

5. The resolution reflects that the Board further determined that due to the reduction or discontinuance of particular kinds of services, the corresponding number of certificated employees of PCHS would be terminated at the end of the 2010-2011 school year. The Board directed the Executive Director or his designated representative to determine which employees’ services would not be required for the 2011-2012 school year as a result of this reduction in services, and directed the Executive Director to send appropriate notices to all employees affected by virtue of the reduction and elimination of particular kinds of service.

6. On or before March 15, 2011, PCHS provided written notice to the affected certificated employees, under sections 44949 and 44955, that their services would not be required for the 2011-2012 school year. Each written notice stated that the Board had adopted a resolution reducing or eliminating certain certificated services for the 2011-2012 school year, and attached a copy of Resolution No. 2010-

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<sup>1</sup> All statutory citations are to the Education Code, unless indicated otherwise.

<sup>2</sup> Full-time equivalent position.

2011-001, thereby identifying the Board's reasons and the particular kinds of services being reduced or eliminated. Respondents thereafter timely filed requests for hearing, seeking a determination of whether cause exists for not reemploying them for the 2011-2012 school year.<sup>3</sup>

7. On March 31, 2011, PCHS filed and served the Accusation and related documents on respondents. On April 7, 2011, PCHS served Exhibit B to the Accusation, i.e., Resolution No. 2010-2011-001, on respondents.<sup>4</sup>

8. All prehearing jurisdictional requirements have been met.

9. The services set forth in factual finding 4 are particular kinds of services that may be reduced or discontinued within the meaning of section 44955.

10. The Board took action to reduce the services set forth in factual finding 4 because of uncertainty surrounding future state funding. The decision to reduce services was not related to the capabilities and dedication of the individuals whose services are proposed to be reduced or eliminated. The decision to reduce the particular kinds of services is related solely to the welfare of PCHS and its pupils, and is neither arbitrary nor capricious but is rather a proper exercise of PCHS's discretion.

### *Skipping*

11. Respondent Maxwell teaches social sciences. His seniority date is September 8, 2010; at hearing he admitted that he is the least senior social studies teacher at PCHS. Mr. Maxwell testified that he has unique teaching skills that should warrant his retention. He teaches at the Temescal Academy, a school operated by PCHS since September 2009 for students who have been unsuccessful at PCHS and have fallen behind in their studies. Mr. Maxwell testified that he and the other teachers at the Temescal Academy have developed individualized study packets to assist their students, that he often teaches multiple levels of multiple courses simultaneously, and that his students have had great success meeting state standards.

12. Respondent DiPoalo teaches physical education. His seniority date is September 8, 2010; at hearing he admitted that he is the least senior physical education teacher at PCHS. Mr. DiPoalo testified that he has unique teaching skills that should warrant his retention. He testified that, in addition to a physical education credential, he has an adapted physical education (A.P.E.) credential as well as a health

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<sup>3</sup> Of the affected employees, only the three respondents filed a hearing request.

<sup>4</sup> There was no prejudice shown from service of the resolution after service of the Accusation, a nonsubstantive procedural error. (See § 44949, subd. (c)(3).) Moreover, PCHS had earlier served the resolution on respondents with the notice of non-reemployment. This issue was not raised at hearing.

science credential and CLAD. He testified to his belief that some students at PCHS require A.P.E. and no other teachers at PCHS are qualified to teach A.P.E. He admitted that he was not hired to teach A.P.E., but rather to teach aquatics.

13. A school district may deviate from terminating certificated employees in order of seniority where it demonstrates a specific need for personnel to teach a specific course or course of study that others with more seniority do not possess and that the certificated employee has special training and experience necessary to teach that course or course of study.<sup>5</sup> At hearing, PCHS did not question that Mr. Maxwell and Mr. DiPoalo provide valuable services to PCHS. Skipping decisions are, however, within the sole purview of a governing board under section 44955, subdivision (d). While certificated staff may contest the subject matter of skipping criteria or how it is applied, they do not have standing to request or demand that particular categories be subject to skipping. PCHS does not seek to deviate from terminating employees in order of seniority, nor did PCHS cite a specific need to retain a less senior teacher with special training and experience. Moreover, there was insufficient evidence presented to support a conclusion that PCHS will fail to provide any mandated services should Mr. Maxwell not be retained.

#### *Other Findings*

14. Respondent Oryshchyn teaches math. Her seniority date is September 30, 2010; at hearing she admitted that she is the least senior math teacher at PCHS. Ms. Oryshchyn testified that she had been told by PCHS last year that she was being hired to replace a retiring teacher, that PCHS has continued to employ that teacher on a part-time basis, and that she should be retained in place of the more senior part-time teacher. Whether PCHS is retaining the more senior employee on a part-time basis was not established. That employee's possible part-time status is not relevant to this determination, however. The services of no permanent employee may be terminated while any probationary employee, or any other employee with less seniority, is retained to render a service that the permanent employee is certificated and competent to render.<sup>6</sup>

15. The reduction or discontinuation of particular kinds of services related to the welfare of PCHS and its pupils. The reduction or discontinuation of particular kinds of services was necessary to decrease the number of certificated employees of PCHS as determined by the Board.

16. There was no challenge to the order of seniority on the seniority list.

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<sup>5</sup> Section 44955, subdivision (d)(1).

<sup>6</sup> Section 44955, subdivision (b).

17. PCHS properly considered all known attrition, resignations, retirements, and requests for transfer in determining the number of layoff notices to be delivered to employees by March 15, 2011.

18. PCHS did not retain any certificated employee junior to respondents to render a service that respondents are certificated and competent to render.

#### LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists under sections 44949 and 44955, by reason of factual findings 1 through 8.

2. The services identified in factual finding 4 are particular kinds of services that may be reduced or discontinued under section 44955, by reason of factual findings 4 and 9.

3. Cause exists under sections 44949 and 44955 for the reduction of the particular kinds of services set forth in factual finding 4, which cause relates solely to the welfare of PCHS's schools and pupils, by reason of factual findings 1 through 18.

4. Cause exists to terminate the services of respondents Anthony DiPoalo, Richard Maxwell, and Marta Oryshchyn, by reason of factual findings 1 through 18 and legal conclusions 1 through 3.

#### ORDER

The Accusation is sustained as to respondents Anthony DiPoalo, Richard Maxwell, and Marta Oryshchyn, and PCHS may notify them that their services will not be required for the 2011-2012 school year due to the reduction of particular kinds of services.

Dated: May 3, 2011

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HOWARD W. COHEN  
Administrative Law Judge  
Office of Administrative Hearings