

BEFORE THE  
BOARD OF DIRECTORS  
OF THE  
MEMORIAL ACADEMY OF LEARNING AND TECHNOLOGY  
COUNTY OF SAN DIEGO  
STATE OF CALIFORNIA

In the Matter of the Employment Status of  
the 38 Certificated Employees Receiving  
Notice of Recommendation that Services  
Would Not Be Required for the 2008-2009  
School Year,

OAH No. 2008040003

Respondents.

**PROPOSED DECISION**

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego, California, on April 30, 2008.

Jerry W. Simmons, Attorney at Law, represented the Memorial Academy of Learning and Technology.

Fern M. Steiner, Attorney at Law, represented respondents Jose Arellano, Cherilyn Avedian, Chantille Bortscheller, William Brooks, Brian Diamond, Dina Galvan, Tracey Makings, Susan Nguyen, Isabel Nunez, Karissa Ortega, Nani Lisa A. Schott, Charlette Snider, Amy Stough, Danny Timothy, Marilen Tran, and Claudia E. Valencia.

No appearance was made by or on behalf of the remaining respondent certificated employees who received notice of the recommendation that their services would not be required for the 2008-2009 school year.

The matter was submitted on April 30, 2008.

**FACTUAL FINDINGS**

*Charter Schools*

1. Charter schools are authorized to provide instruction from kindergarten through grade 12. A charter school is usually organized and created by a group of parents,

educators, and community leaders or community-based organizations. An existing local public school district usually sponsors a charter school. A charter school's specific goals are usually detailed in an agreement (or "charter") between the local school district and the charter school's organizers. A charter school provides choices for parents and students within the public school system for innovative, high-quality learning opportunities and stimulates competition in the educational market. To meet these objectives, charter schools are given increased autonomy in exchange for increased accountability for results.

A charter is typically granted for five years. During the term of a charter, a charter school must meet the student performance and operational goals listed in its charter, or the charter may be revoked immediately or not renewed at the conclusion of the charter term.

### *The Memorial Academy of Learning and Technology*

2. Memorial Academy of Learning and Technology (MALT) opened on September 18, 1922, and was one of the first junior high schools in the San Diego Unified School District. It was originally named Cleveland Junior High School, but its name was changed to Memorial Junior High to honor those who gave their lives in the First World War. The name was thereafter changed to Memorial Academy.

MALT converted from a traditionally-operated school to an "arm of the district" chartered school in 2000. From 2000 to the end of the 2005 school year, MALT's payroll was handled by the San Diego Unified School District and its operation was conducted by an internal management team made of students, parents and school employees.

MALT failed to meet benchmarks established by the No Child Left Behind Act at the conclusion of the 2004-2005 school year and was forced to restructure. The charter school changed its name from Memorial Academy to Memorial Academy of Learning and Technology at the beginning of the 2005-2006 school year.

An 11-member governing board was originally established through "serial procedure," a recognized method that elects trustees one at a time, allowing each new member to immediately vote on the next member. The by-laws were later amended to authorize a seven-member governing board (the Board). Following the resignation of two board members in 2008, the school has been operated by a five-member board.

MALT receives funding directly from the State of California based on the number of students attending the school. When MALT was an "arm of the district" charter school, MALT enjoyed the status of being a resident school for the area. However, due to problems MALT had meeting accountability standards, the San Diego Unified School District withdrew MALT's resident school status and assigned students living in the area to Roosevelt Junior High School as the resident school.

The San Diego Unified School District's withdrawal of MALT's resident school status had a huge impact on the number of students attending MALT which, in turn, had an impact on MALT's staffing and budget. Since it was restructured in 2005, MALT has faced



many additional challenges including widespread changes in the Board's composition, administrative changes, and problems meeting mandated accountability standards.

In 2005, MALT's Academic Performance Index (API)<sup>1</sup> declined and the school failed to meet the improvement goal established by the state. The following school year, the API declined even further, and MALT again failed to meet state improvement standards.

In November 2007, the San Diego Unified School District sent MALT's Board a letter warning that MALT was at risk of losing its charter at the next renewal. The letter mentioned the school's poor API rankings, as well as its failure to show progress necessary to meet Adequate Yearly Progress targets set under federal law. The letter stated:

"It is the district's belief that the academic performance issues described above demonstrate a failure to comply with the Charter, a failure to meet pupil outcomes identified in the Charter, failure to meet state and federal academic achievement requirements, and therefore amounts to a violation of the charter and the charter law."

3. In addition to losing its resident school status, the San Diego Unified School District authorized the opening of a new charter school – the King/Chavez Academy of Excellence Charter School (King/Chavez) – to conduct its operation on the campus MALT occupies. King/Chavez, which is in its first year of existence, provides services to students from kindergarten through grade eight. Next year, Memorial Preparatory will open, and it will be designated as the District's resident middle school for the area. It, too, will conduct its operation on the campus MALT occupies. The opening of these competitor schools will not assist MALT in growing its student population.

4. MALT is a year-round junior high school providing educational services and supports to students in grades six through eight. MALT is located at 2850 Logan Avenue, San Diego, CA 92113. MALT had a total enrollment of approximately 1,350 students a couple of years ago, but the student body has dwindled to 850 students for this school year. MALT's projected student body for the 2008-2009 school year is about 400 students.

MALT presently employs about 45 certificated employees, a few of whom are directly employed by the San Diego Unified School District and 38 of whom MALT employs directly. MALT's present student teacher ratio is 20:1, an extremely low ratio which is the result of overstaffing brought about by the loss of its resident school status. MALT's student teacher ratio for the 2008-2009 school year has been projected to be 28:1, which exceeds the ratio set forth in the charter.

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<sup>1</sup> The State of California assigns a single API ranking to schools on a scale from 200 to 1,000, based on students' performance on statewide tests. The state has a goal of 800 for all schools, and it calls for progress toward that target on an annual basis. MALT was consistently below 800.



## *The Fiscal Crisis – Economic Layoffs*

5. Proposition 13 limited the imposition of local property taxes and reduced a major source of assured revenue for funding public education in California. Since the passage of Proposition 13, public school districts have looked primarily to the State of California and to other governmental entities for funding. Charter schools, like public school districts, look to the State of California and other governmental entities for their funding.

School districts and charter schools cannot determine the level of state funding that will be received until the state budget is chaptered, an event usually occurring in late June. Before then, governing boards must take steps to make certain that ends meet if the worst-case financial scenario develops. California's current economic crisis has made the budgeting problems far more complicated than they were before.

A board's obligation to balance its budget often requires that some teachers, administrators and/or other certificated employees be given preliminary layoff notices, warning them that their services will not be required for the next school year. Under Education Code section 44949, these preliminary layoff notices must be given to certificated employees no later than March 15. Many charter schools operate under the same basic framework as school districts with regard to reductions in particular kinds of services and the need to retain senior employees over more junior employees. In this matter, it was stipulated that MALT generally followed the standards set forth in the Education Code.

The economic layoff statutes found in the Education Code generally require the retention of senior employees over more junior employees and the retention of permanent employees over probationary employees and other employees with less seniority.

### *MALT's Response to the Budget Crisis*

6. In early 2008, MALT's Board became aware of the many financial challenges facing the school including a decrease in the state funding to be provided for each student and the declining enrollment figures. As a result of the financial crisis, the Governor's proposed budget, and the decline in enrollment, MALT's business manager projected a \$5.5 million dollar shortfall for the 2008-2009 school year unless the budget was reduced.

Under the direction of Principal Sheila Solorzano-Ybarra (Principal Solorzano-Ybarra), who in early March 2008 replaced MALT's administrator/superintendent who had just resigned, and Ashenefi Hailu (Hailu), MALT's Business Manager, budgetary cuts were considered including the elimination and reduction of particular kinds of services being provided by certificated employees.

On March 13, 2008, Principal Solorzano-Ybarra recommended to the Board a reduction and elimination of particular kinds of services totaling 38 full time equivalent (FTE) positions. Hailu was also present at the Board meeting to discuss MALT's financial situation.

7. On March 13, 2008, following Principal Solorzano-Ybarra's recommendation, MALT's Board passed Resolution No. 2008-01, which directed that certain certificated employee services would be reduced or eliminated for the 2008-2009 school year and directed the Interim Principal to provide notice to affected certificated employees. The resolution provided:

Resolution 2008-01  
Memorial Academy of Learning and Technology Charter School

**RESOLUTION**

**REDUCTION OR ELIMINATION OF CERTAIN CERTIFICATED SERVICES**  
(Education Code Sections 44949 and 44955)

**WHEREAS**, Sections 44949 and 44955 of the Education Code require action by the Charter Governing Board in order to reduce or eliminate services and permit the layoff of certificated employees and;

**WHEREAS**, the Interim Principal of the Memorial Academy of Learning and Technology Charter School has recommended to the Memorial Governing Board that particular kinds of services be reduced or eliminated no later than the beginning of the 2008/2009 school year; and

**WHEREAS**, the Charter Governing Board has determined that a reduction or elimination of particular kinds of services is needed no later than the beginning of the 2008/2009 school year; and

**NOW, THEREFORE, BE IT RESOLVED** by the Charter Governing Board of the Memorial Academy of Learning and Technology Charter School:

1. That all of the foregoing recitals are true and correct.
2. 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 Charter Governing Board hereby determines to reduce or eliminate those positions set forth in Exhibit A, attached hereto and incorporated by reference herein, listed by field or classification and full-time equivalent, those positions which shall be reduced or eliminated no later than the beginning of the 2008/2009 school year.
3. That because of the elimination and reduction of particular kinds of services listed in **Exhibit A** it is necessary to terminate at the end of the 2007/2008 school year certificated employees equal in number to the positions affected in the reduction or elimination of the above-described service.
4. That the seniority and qualifications of some of the employees in the services being reduced or eliminated are such that they have displacement rights by virtue of seniority, and that no employee will be terminated while a less senior employee is retained to render a service which the more senior employee is both certificated and competent to render.



5. That in selecting those probationary and permanent certificated employees who shall receive notice of termination pursuant to this Resolution, Education Code section 44955 requires the Charter Governing Board to state specific criteria to be used in determining the order of termination of certificated employees who first rendered paid service to the Charter Governing Board in a probationary position on the same date.
6. That the criteria to be used in determining the order of termination of certificated employees who first rendered paid service to Memorial Academy of Learning and Technology Charter School in a probationary position on the same dates are listed and described in **Exhibit B**, which is attached hereto and incorporated by reference herein.
7. That the criteria to be used in determining the order of termination of certificated employees who first rendered paid service to Memorial Academy of Learning and Technology Charter School in a probationary position on the same date, listed and described in **Exhibit B**, are based solely on the needs of Memorial Academy of Learning and Technology Charter School and the students thereof.
8. That in selecting those probationary and permanent certificated employees who shall receive notice of termination pursuant to this Resolution, Education Code § 44955 allows the Charter Governing Board to deviate from terminating a certificated employee in order of seniority by virtue of their competence, credential(s), assignment, and the specific needs of Memorial Academy of Learning and Technology Charter School and its students.
9. That the criteria that will be applied to deviate from terminating certificated employees who may otherwise be terminated by order of seniority will be based on the needs of the students of Memorial Academy of Learning and Technology Charter School, and will ensure that no employee will be terminated while a less senior employee is retained to render service which the more senior employee is both certificated and competent to render.
10. That the Interim Principal or his designated representative is authorized and directed to determine which employees' services may not be required for the 2008-09 school year as a result of this reduction in services, and the Interim Principal shall send appropriate notices to all employees possibly affected by virtue of the reduction and elimination of particular kinds of service prior to March 15, 2008 by certified mail, return receipt requested.
11. That the action of this Charter Governing Board will not, in any way, be considered to prejudice the rights of certificated employees to whom notice will be given as to the Charter Governing Board's consideration of any proposed decision by an administrative law judge in the event a hearing is requested by any employee.

**PASSED AND ADOPTED** by the Charter Governing Board of Memorial Academy of Learning and Technology Charter School this 13<sup>th</sup> day of March 2008,

8. Exhibit A to the resolution described the particular kinds of services that were being eliminated or reduced. It provided:

**Exhibit A**

Particular Kind of Service or Program	Number of Full Time Equivalent Positions Including Prep and Travel Periods Where Applicable
Middle School Teaching (6-8)	35
Counselor	3

9. Exhibit B to the resolution contained the Board's tie-breaking criteria for employees having the same seniority date. It provided:

**Exhibit B**

Criteria to be Applied to Determine Order of Layoff for those Certificated Employees with the Same Date of First Paid Probationary Service

The following criteria will be applied in the priority order indicated to determine which certificated employees meet the particular needs of Memorial Academy of Learning and Technology Charter School in the event that all certificated employees with the same date of hire are not terminated. These criteria meet the particular needs of Memorial Academy of Learning and Technology Charter School at the present time:

1. Persons with advanced degrees in the following order:
  - a. Doctoral Degree
  - b. Masters Degree in Core Subject Area
  - c. Master Degree
2. Persons with majors in an academic teaching subject possessing two teaching credentials.
3. A lottery among individuals who remain tied with the San Diego Teachers Association (SDEA) President or his designee invited to attend with the first name drawn being most senior down to the last name drawn being least senior.

10. In preparation for the recommended layoffs, MALT's administrative staff reviewed MALT's credentialed employee seniority list. That list contained the names of all persons directly employed by MALT in a position requiring a credential, but not the names of persons employed by the San Diego Unified School District who were providing credentialed services at MALT.

The San Diego Unified School District employees taught at the MALT site before it became a chartered school. When MALT became a chartered school, they were given the option of remaining employed at MALT but maintaining employment with the San Diego Unified School District.



For certificated employees hired directly by the chartered school after it commenced operation, these persons received compensation and benefits at the same level and in the same manner as did San Diego Unified School District employees (including cost of living increases, retirement, etc.), but they were not employed by the District. For reasons far too technical to require explanation here, one MALT certificated employee – Hugo Roji – had a seniority date (i.e., first date of paid probationary service) greater than several of the most junior San Diego Unified School District Employees providing services at MALT. However, the remainder of the MALT employees had seniority dates that made them junior to all San Diego Unified School District employees providing contracted services at MALT.

11. MALT's seniority list included the employee's last name, the employee's start date (i.e., first date of paid service in a probationary position), the employee's assignment, the credential(s) the employee held, whether the employee held BCLAD or CLAD certification, whether the employee was NCLB compliant, and the employee's tenured status (i.e., permanent, probationary I, probationary II).

12. On March 14, 2008, each certificated employee who is party to this proceeding was given notice that Principal Solorzano-Ybarra had recommended that his or her services with MALT would be terminated at the conclusion of the current school year and that his or her services would not be needed by MALT for the 2008-2009 school year. Each employee was notified of the right to a hearing. The preliminary layoff notices were duly served on all the certificated employees whom MALT employed directly, including Hugo Roji. Many of those served with the layoff notice and Board resolution requested a hearing. An accusation and other required jurisdictional documents were served on those respondents. All jurisdictional requirements were met.

#### *The Administrative Hearing*

13. On April 30, 2008, the record in the administrative hearing was opened. The District gave an opening statement. An opening statement was given on behalf of the represented respondents. Jurisdictional documents were presented, a written stipulation to jurisdictional facts was received, sworn testimony and documentary evidence was received, closing arguments were given, the record was closed and the matter was submitted.

#### *The Particular Kinds of Services*

14. The particular services identified by Memorial's Board for reduction or elimination in Exhibit A (Factual Finding 7) included "Middle School Teaching" and "Counselor," each a particular kind of service that the Board could properly reduce and discontinue. The reduction and elimination of those services was neither arbitrary nor capricious, and the reduction or elimination of those services constituted a matter well within the proper exercise of the Board's discretion. The layoff related to the welfare of the school and the students. No services were reduced below levels required by federal and state laws.

15. There was a claim that Physical Education teachers required a special credential and could not be included in the broad classification of "Middle School Teaching."



The fact that MALT is a charter school was relevant to that issue because Education Code section 47605, subdivision (1) provides:

"Teachers in charter schools shall hold a Commission on Teacher Credentialing certificate, permit, or other document equivalent to that which a teacher in other public schools would be required to hold. These documents shall be maintained on file at the charter school and are subject to periodic inspection by the chartering authority. It is the intent of the Legislature that charter schools be given flexibility with regard to noncore, noncollege preparatory courses."

Physical Education is a noncore, noncollege preparatory course, and thus did not was properly included within the broad classification of "Middle School Teaching."

16. There was a claim that the notice was not sufficiently specific because it identified "Middle School Teaching" and did not specify what courses were being taught by these teachers. In fact, at MALT a team-teaching approach is used outside of Music, Art, and Physical Education, with one member of the team teaching Language Arts and Social Studies and the other member teaching Math and Science. Since this charter school teachers were credentialed to teach multiple subjects, the notice was sufficiently broad.

17. The fact that the Board planned to retain the services of the San Diego Unified School District certificated employees did not render the notice legally insufficient. All mandated services will be met. All MALT employees, other than Hugo Roji, were junior to the District employees who provide services at MALT. Had the Board's notice and resolution included the names of these District employees, the outcome would have been the same except for Hugo Roji.

18. No employee suffered any prejudice by reason of the wording of the notice and resolution. Each certificated employee to this action was on constructive notice, if not on actual notice, that his or her employment was at risk and that he or she should commence looking for other employment elsewhere.

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#### *The District's Layoff Procedure*

19. According to Principal Solorzano-Ybarra and Hailu, the enrollment at MALT is in precipitous decline. The Board determined that the student teacher ratio for the 2008-2009 school year should be 28:1. Using a projected student population of 400 (which may be too high), MALT had a need to retain the services of 14 teachers. Thus, the reduction of 38 FTEs was reasonable. It turned out that MALT employed 38 certificated employees, 35 teachers and three counselors, in addition to the teachers employed through the San Diego Unified School District. By the time of the hearing, eight teachers employed by the San Diego Unified School District had announced their intention to remain at MALT for the 2008-2009 school year, which means that the six most senior MALT teachers (one of whom is Hugo Roji) will be retained. No junior employee has been retained to provide services a more senior employee is competent and certificated to render.



## LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied as to those certificated employees identified herein.

2. The purpose of the initial termination notice provision is to notify an employee of the probability that his or her services will not be required for the ensuing year so that he or she may consider looking elsewhere for employment. Nothing in the statute relating to the termination of teachers due to a reduction in daily average attendance or, in the alternative, a reduction of services (Ed. Code, § 44955) prohibits the statement of more than one ground in putting employees on notice that their jobs are in jeopardy. (*Moreland Teachers Association v. Kurze* (1980) 109 Cal.App.3d 648, 653.) However, where just one statutory ground is raised, a school district cannot introduce evidence at a hearing to support termination on another statutory ground that was not originally raised. (*Karbach v. Board of Education* (1974) 39 Cal.App.3d 355, 363.)

3. A school board's decision to reduce or discontinue particular kinds of services (PKS) need not be tied to any statistical computation, such as a reduction in the number of students. The number of terminations through PKS reductions depends totally upon the decision about how many services to reduce. It is within a board's discretion to determine the extent to which it will reduce a particular service. At the elementary school level, reduction of classroom teaching can be a reduction of a particular kind of service. A school district may consider its financial circumstances in deciding whether to reduce or discontinue a particular kind of service. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627.)

A school board may "reduce services" by eliminating certain types of services or by reducing the number of district employees providing such services. The decision to reduce or discontinue a particular kind of service is not unfair or improper simply because the board made a decision it was empowered to make. (*Rutherford v. Board of Trustees of Bellflower Unified School District* (1976) 64 Cal.App.3d 167.)

4. Education Code section 44955, subdivisions (b) and (c), sets forth a general rule requiring school districts to retain senior employees over more junior employees and to retain permanent employees over temporary employees. Any exception to this general rule must be based on statute. For employees hired on the same date, Education Code section 44955, subdivision (b) provides:

"As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof."

5. As a result of the District's lawful reduction of particular kinds of services, cause exists under Education Code section 44955 for the District to give notice to all respondents who were served with preliminary layoff notices that their employment will be



terminated at the close of the current school year and that their services will not be needed for the 2008-2009 school year, except for Hugo Roji.

The Accusation against Hugo Roji shall be dismissed.

This conclusion is based on all Factual Findings and on all Legal Conclusions.

#### RECOMMENDATION

It is recommended that the Board give notice to all respondents previously served with a preliminary layoff notice that their employment will be terminated at the close of the current school year and that their services will not be needed for the 2008-2009 school year except for Hugo Roji.

These employees include Gina M. Alves, Jose Arellano, Cherilyn Avedian, Chantille Bortscheller, William Brooks, Laurie Cartlidge, Lauren Castillo, Gloria de Hoyos, Brian Diamond, Donald Trey Dugan, Julie Espinosa, Dina Galvan, Joselyn Gunderson, Cristal Herrera, Joy Josker, Aremi Lopez, Tracey Makings, Chantille McDonald, Katherine Mickelson, Susan Nguyen, Isabel Nunez, Karissa Ortega, Marian Ramirez, Roman Robio, Nani Lisa A. Schott, Elizabeth Smith Calvin, Charlette Snider, Amy Stough, Danny Timothy, Marilen Tran, Claudia Valencia, and Miroslava Zavala.

DATED: \_\_\_\_\_

5/1/08



JAMES AHLER

Administrative Law Judge

Office of Administrative Hearings