

**BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

OAH No. 2010071069

PATRICIA MYERS,

Respondent.

DECISION

This matter was heard on January 25, 2011, before the Commission on Professional Competence (Commission), which consisted of Kisha Williams, Sean Monroe, and Administrative Law Judge (ALJ) Mark Harman, Office of Administrative Hearings, State of California, who presided. Eric Bathen, Attorney at Law, represented the Whittier Union High School District (District). Richard J. Schwab, Attorney at Law, represented Patricia Myers (Respondent).

In June 2010, the District filed a Statement of Charges to initiate a proceeding to terminate Respondent's employment under Education Code¹ section 44939. The District charged that Respondent willfully had refused to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing school district, because she failed to maintain the appropriate credentials needed to properly discharge her position. In July 2010, the District filed the Accusation, which incorporated the Statement of Charges. At the hearing, the District orally moved to amend the Accusation and Statement of Charges and to add a second cause for termination, charging Respondent with evident unfitness for service under section 44932, subdivision (a)(5). Respondent orally objected, arguing that the proposed new basis or "cause" could not have been included in the original Accusation and Statement of Charges when they were filed, due to the "moratorium" under section 44936, and that amendment at this late time was prejudicial to Respondent.

The District's motion is granted for the reasons stated on the record and herein. Amendments are favored under Government Code section 11507 as long as a respondent is afforded an opportunity to prepare his or her defense. At hearing, Respondent did not move to continue the matter or otherwise seek more time to prepare her defense. Respondent has failed to establish that she would be prejudiced by granting the motion.

Evidence was received by stipulation, documents and testimony. The record was closed and the matter was deemed submitted for decision on January 25, 2011.

¹ All further statutory references are to the Education Code, unless specified otherwise.

FACTUAL FINDINGS

1. The Accusation was filed by Sandra Thorstenson, the Superintendent of the District, acting in her official capacity.

2. Respondent is a certificated permanent employee of the District. She holds a Clear Specialist Instruction Credential in Special Education. She taught special education students for 10 years in the District, beginning in 2000 and ending in July 2010, when the District initiated this matter and suspended her employment.

3. Respondent speaks Spanish fluently, and holds a credential to teach Spanish, but she has never obtained an English learner (EL) certification² and, thus, is unqualified to teach EL students in the State.

4. Although Respondent has never refused to teach a class assignment, the District has made numerous attempts to gain Respondent's commitment to obtain EL certification, as demonstrated by the following:

A. On June 14, 2005, the District distributed a memorandum to all certificated staff stating that, under federal and state law, all teachers working with EL students in the District were required to obtain a Cross-Cultural Language and Academic Development (CLAD) Certificate.³ This memorandum sets forth, in part, the District's training plan for teachers to satisfy the requirement, and suggests three educational options for the teachers to complete the necessary training.

B. On or about September 1, 2006, the District distributed a memorandum to all certificated staff who had not obtained a CLAD or related certifications that the District was offering a one-time stipend of \$1,200 to all teachers who received these certifications during the 2006-2007 school year.

C. On April 27, 2007, the District by memorandum notified its staff that the District was creating an independent study opportunity for teachers to "complete your CLAD program and fulfill the state-mandated requirements."

² "Public school teachers are required to be specially certified to teach EL students [who are not proficient in English]. (Ed. Code, §§ 44253.3, 44253.4, 44253.10.) The State Department of Education monitors and sanctions school districts who assign an EL student to a teacher who is not certified to teach EL students. (Ed. Code, §§ 44258.9, 45037.)" (*Governing Board of Ripon Unified School District v. Commission on Professional Conduct* (2009) 177 Cal.App.4th 1379.)

³ Respondent does not need EL certification to teach special education to non-EL students or to teach Spanish, but state law requires EL certification to teach EL students in every other situation except for foreign language instruction. There are several different ways to get EL certified, such as completing a CLAD training and certification program.

D. In April 2008, the District requested information from Respondent on her plan to complete CLAD certification. On May 5, 2008, Respondent wrote on the form supplied to her, "CTEL/CLAD are not in my current educational plans."

E. On November 5, 2009, Martin Plourde, the Assistant Superintendent for Personnel Services, informed Respondent that the District was directing her to apply for an emergency CLAD permit by December 1, 2009, and to enroll by February 1, 2010, in a state approved program to earn the appropriate authorization to teach EL students. If she failed to comply, she would be suspended without pay and recommended for termination.

5. Respondent did not comply with the District's directive, or any of the other attempts made by the District to obtain her compliance with the EL certification requirement.

6. At hearing, Respondent has suggested various options the District could employ that do not require her to obtain EL certification. The District may fill her class assignments with only students who are proficient in the English language. They may assign her to teach only foreign language classes, which are an exception to the EL certification requirement. The District could create a collaborative teaching assignment with other special education teachers, so that Respondent would not be educating EL students.

7. More than one-third of the students served by the District are EL students. In Respondent's most recent assignment, she had 18 EL students. The District has required all of its teachers to become EL certified, because it is a violation of state law to assign a teacher without EL certification to a classroom with EL students. In 2005, 250 District teachers had not completed the requirements for their CLAD certifications. In 2011, only one such teacher, Respondent, had failed to meet this requirement. The District argues that it cannot meet the needs of its students unless every teacher possesses an EL certification. Teachers cannot choose their assignments on the basis that they refuse to become certified to teach EL students. The District has sole authority to determine a teacher's assignment.

8. Respondent has offered varying reasons for her refusal to obtain EL certification. She has stated that her decision "was neither uninformed nor impulsive, but is based on the deep conviction that CLAD is expensive and more importantly, harmful to our EL population." (Exhibit 2.) She believes the state requirement is a misuse of taxpayers' monies. She believes there are more effective programs, and that she is qualified to help EL students obtain proficiency in the English language. In June 2010, she wrote "my career and passion in life are being thrown away based on convictions I cannot compromise." (*Id.*)

LEGAL CONCLUSIONS

1. The District has the burden of proof. The standard of proof is preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1038-1039.)

2. “Evident unfitness for service,” within the meaning of section 44932, subdivision (a)(5), requires that the unfitness for service be attributable to a defect or inadequacy in temperament, presumably not remediable merely on receipt of notice that the teacher’s conduct fails to meet the expectations of the employing school district. (*Woodland Joint Unified School District v. Commission on Professional Competence (Zuber)* (1992) 2 Cal.App.4th 1429, 1444-1445.)

3. Cause for dismissal exists under Education Code section 44932, subdivision (a)(5), for evident unfitness for service, by reason of factual finding numbers 1 through 8 and legal conclusion number 2. Respondent was given notice and ample opportunity to comply with its policy and its directive to enroll in an EL certification program, a requirement that every other District teacher has met. Respondent’s refusal to do so, even when threatened with termination, demonstrates she suffers from a defect in temperament.

The District’s EL policy is a reasonable exercise of its authority under state law. Respondent’s actions demonstrate a disregard for District administrators, students, parents, and the law. Respondent has yet to accept responsibility for the consequences of her refusal to follow the District’s directive. Her conduct meets the criteria demonstrating “unfitness to teach,” as promulgated by the California Supreme Court in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214 (hereafter *Morrison*), as discussed in detail, *ante*.

4. Cause for dismissal exists under Education code section 44939, for willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing school district, as set forth in factual finding numbers 1 through 8.

5. In *Morrison, supra*, 1 Cal.3d 213, the California Supreme Court held that for purposes of teacher dismissal, conduct characterized as "immoral," "unprofessional" or "involving moral turpitude" must be limited to conduct indicating that a teacher is "unfit to teach." (*Id.* at p. 229.) Otherwise, these terms would be unconstitutionally vague and overbroad. The court then listed factors relevant to determining whether a teacher's conduct indicates unfitness to teach, which were:

[T]he likelihood that the conduct may have adversely affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness or blameworthiness of the motives resulting in the conduct, the likelihood of the recurrence of the questioned conduct, and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers.

(*Id.* at pp. 229-230.)

6. In analyzing Respondent's conduct in light of the relevant *Morrison* factors, the District has established that Respondent is unfit to teach, by reason of factual finding numbers 1 through 8.

A. Adverse Affect on Students and Teachers -- Respondent's conduct makes her unavailable to teach one third of the students of the District. This has direct and negative consequences on the District's ability to make teachers' assignments and students' schedules. If Respondent cannot teach a class she would normally teach, because she lacks a necessary credential, then other teachers would have to assume that responsibility. Respondent has substantial qualifications to teach her students and provide them with many benefits, but her steadfast refusal to obtain EL certification and thus, to adapt to the system that she is a part of, has the consequence of making her unavailable to help those that she seems to care about, the students in her classroom.

B. Degree of Adverse Affect -- Respondent's conduct likely will not result in notoriety, but her students and the District are affected by Respondent's failure to comply.

C. Proximity in Time of Conduct -- Respondent's conduct is ongoing and recent.

D. Type of Credential -- Respondent's conduct is directly related to her position and the credentials that she holds.

E. Extenuating and Aggravating Circumstances -- In aggravation, Respondent persisted in her refusal despite many opportunities to comply. There are no extenuating circumstances. Her refusal to become certified, while teaching EL students, exposed the District to sanctions by the State. Also, the District has incurred additional costs to bring Respondent into compliance, without success, because she refuses to comply.

F. Praiseworthiness or Blameworthiness of Respondent's Motives -- Despite her convictions and her broad qualifications as a teacher, there is little if anything praiseworthy about Respondent's conduct.

G. Likelihood of Recurrence -- Respondent has not acknowledged that she is obligated to follow the District's directive. She has minimized her responsibility for the current situation. Therefore, it is more likely that she will continue to refuse to comply with a lawful directive.

H. No Constitutional issues are involved this matter.

7. Measured against the *Morrison* criteria, Respondent's conduct warrants her dismissal as a special education teacher with the District.

ORDER

The Accusation and Statement of Charges are sustained. Patricia Myers is dismissed from her position as a permanent certificated employee of the Whittier Union High School District.

Dated: May ____, 2011

Kisha Williams, Commission Member

Dated: May ____, 2011

Sean Monroe, Commission Member

Dated: May ____, 2011

Mark Harman, Commission Member