

BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
OF THE STOCKTON UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Amended Accusation
Against:

OAH No. 2009091226

DAVID BOLIOU,

Respondent.

DISMISSAL ORDER

On January 21 and July 19, 2010, this matter convened before a Commission on Professional Competence (CPC) of the Stockton Unified School District in, respectively, Stockton and Sacramento, California. CPC members are Pat Chabot, Maria Jackson, and Marilyn Woollard, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH) and CPC Chairperson.

Kristianne T. Seargeant and Ryan Davis, Kronick, Moskovitz, Tiedemann & Girard, represented the Stockton Unified School District (district). Also present on the district's behalf were Interim Assistant Superintendent Robert Thomas (January 21, 2010) and Julie Penn, Assistant Superintendent for Student Services (July 19, 2010).

Thomas J. Driscoll, Jr., Driscoll & Associates, represented David Boliou (respondent), who was present.

* * *

This action commenced on February 12, 2009, when the district filed its Notice of Intent to Dismiss respondent. On May 12, 2009, the district filed its original Accusation against respondent, based upon his alleged unprofessional and immoral conduct, evident unfitness for service, and persistent violation of or refusal to obey school laws and reasonable district regulations pursuant to Education Code section 44932, subdivisions (a)(1), (a)(5), and (a)(7).¹ On December 10, 2009, the Amended Accusation was filed with an Amended Statement of Charges.

¹ Unless otherwise indicated, all statutory references are to the California Education Code.

On January 21, 2010, this matter convened before the CPC for hearing. Before opening argument or presentation of evidence, the ALJ heard legal arguments outside the presence of CPC members Mr. Chabot and Ms. Jackson.

On January 23, 2010, the ALJ issued an Order Dismissing Unprofessional Conduct Charge in the district's Amended Statement of Charges. The district was ordered to proceed on its four remaining charges.

On January 25, 2010, at the district's request, the hearing was continued. On January 28, 2010, the parties agreed to set the case for six days of hearing, from July 19 through 23, 2010 and July 26, 2010.

On March 9, 2010, the district filed a Petition for Writ of Administrative Mandamus with the San Joaquin County Superior Court seeking to overturn the January 23, 2010 Order.

On July 2, 2010, Superior Court Judge Elizabeth Humphreys ruled that there was no "final" ruling subject to judicial review and that the district had failed to exhaust its administrative remedies. The petition was denied without prejudice. On July 6, 2010, the Judgment Denying Petition for Writ of Administrative Mandamus was entered.

On July 7, 2010, the district issued an Amended Notice of Hearing for the dates set forth above.

On July 14, 2010, the district advised OAH and respondent's counsel that its governing board (board) voted at its July 13, 2010 meeting to rescind all dismissal charges against respondent. Respondent would be reassigned to the classroom for the 2010-2011 school year. The district asked that the matter be removed from the hearing calendar.

Respondent objected. He argued that the district did not have the unilateral right to take the matter off calendar, that the CPC must rule on the district's motion to dismiss the case, and that the CPC should issue a decision that he is not to be dismissed.

In response, the district argued that, once the board rescinded its charges, the CPC had no jurisdiction to proceed.

On July 16, 2010, the ALJ issued a Case Status Order setting the case for oral argument before the CPC. The district's July 14, 2010 letter to OAH was treated as its motion to dismiss the proceeding.

On July 19, 2010, the CPC convened to hear oral arguments regarding the proper disposition of the case in light of the board's action rescinding its charges against respondent. The CPC also reviewed the district's written motion for dismissal requesting that the motion to dismiss be granted without prejudice and that the CPC enter an order of dismissal rather than a decision on the merits of the charges.

Following argument, the pending hearing dates were vacated and the matter was submitted.

Discussion

A proceeding to dismiss a certificated employee is initiated "upon the filing of written charges" with or "upon a written statement of charges formulated by the governing board, charging that there exists cause" to dismiss under section 44932 or 44933. (§ 44934.) The board serves a notice of intention to dismiss upon the employee. If the employee demands a hearing, a hearing must be set before a duly constituted CPC, which "shall have all of the powers granted to an agency..." (§ 44944, subd. (a)(1).) Section 44944 outlines hearing procedures to be followed. The hearing "shall be initiated, conducted, and a decision made in accordance with Chapter 5 (commencing with Section 11500)...of the Government Code. . ." (Administrative Procedure Act [APA].) (*Id.*) Pursuant to section 44944, subdivision (c)(1), after the hearing, the CPC "shall prepare a written decision containing findings of fact, determinations of issues, and a disposition that shall be, solely, one of the following: (A) That the employee should be dismissed. (B) That the employee should be suspended for a specific period of time without pay. (C) That the employee should not be dismissed or suspended." The CPC's decision "shall be deemed to be the final decision of the governing board." (§ 44944, subd. (c)(4).)

Once the employee demands a hearing, the district has "the option either (a) to rescind its action, or (b) schedule a hearing on the matter." (§ 44943.) After a case is set for hearing, it is possible that either party may decide not to go forward with a trial. The parties may enter into a settlement agreement, a teacher may decide to withdraw his or her request for a hearing or, as in this case, the district may decide to withdraw the charges. Pursuant to section 44944, once the CPC has convened, the district may not unilaterally rescind its charges. The CPC retains jurisdiction to rule on the district's request to dismiss the action in order to protect the legal rights of the employee who has been the subject of the charges the district now seeks to dismiss. Specifically, the employee may have the right to receive a final decision from the CPC that he "should not be dismissed," rather than an order dismissing the case. If such a decision is issued, the employee has the additional right to reasonable attorney's fees that is automatically triggered by the decision in his favor. (§ 44944, subds. (c)(1)(C), and (e).)²

² Section 44944, subdivision (e)(1), provides in pertinent part that, where the CPC "determines that the employee should be dismissed or suspended, the governing board and the employee shall share

A decision by the CPC after the commencement of evidentiary presentation ensures that a prevailing employee will be able to recover attorney's fees, as required by section 44944, subdivision (e). If the governing board rescinds its charges and seeks dismissal after the evidentiary hearing commences, the CPC has jurisdiction to and should issue a decision under section 44944 to protect the employee's rights as discussed above.

In this matter, respondent has had to defend himself against the district's dismissal action for approximately 18 months. Is respondent entitled to the issuance of a final decision, and to the attorney's fees attendant to such a decision, where the evidentiary hearing never commenced?

Section 44944 plainly contemplates that an evidentiary hearing will be held that will enable the CPC to make findings of fact and a decision on the ultimate issue regarding employment status; i.e., whether the employee should be dismissed or should not be dismissed. Under the APA, the written decision "shall include a statement of the factual and legal basis for the decision. (Gov. Code, § 11425.50, subd. (a).) "The statement of the factual basis for the decision shall be based exclusively on the evidence of record in the proceeding and on matters officially noticed in the proceeding..." (Gov. Code, § 11425.50, subd. (c).)³

Section 44944 does not authorize the issuance of a decision by the CPC when a governing board rescinds its charges and requests dismissal of the case against the employee prior to the commencement of trial. In this matter, no opening arguments were presented and no witnesses had been sworn. The evidentiary hearing had not commenced. (See, e.g., C.C.P. § 581.)⁴

While issuance of a decision is not appropriate, the respondent must not be subjected to attempts to litigate this matter in the future. The board decided to rescind charges against respondent following the denial of its writ petition in July 2010;

equally the expenses of the hearing, including the cost of the administrative law judge. . . The employee and the governing board shall pay their own attorney's fees." Under Section 44944, subdivision (e)(2), if the CPC "determines that the employee should not be dismissed or suspended, the governing board shall pay the expenses of the hearing, including the cost of the administrative law judge . . . , and reasonable attorney's fees incurred by the employee."

³ Chapter 4.5 of the APA "applies to an adjudicative proceeding required to be conducted under Chapter 5 (commencing with Section 11500) unless the statutes relating to the proceeding provide otherwise." (Gov. Code, § 11410.50.) An "'adjudicative proceeding' means an evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a decision." (Gov. Code, § 11405.20.)

⁴ In the analogous civil context, trial is "deemed to actually commence at the beginning of the opening statement or argument of any party or his or her counsel, or if there is no opening statement, then at the time of the administering of the oath or affirmation to the first witness, or the introduction of any evidence." (C.C.P., § 581, subd. (a)(6).)

however, the district was on notice to proceed with its remaining charges in January 2010. The district had ample opportunity to assess and weigh the viability of these charges. Instead, it waited to rescind all charges until two business days before the start of a six-day hearing. The case is dismissed with prejudice.

ORDER

The district's motion to dismiss the Amended Accusation and Amended Statement of Charges against respondent is granted. The case is dismissed with prejudice.

DATED: July 26, 2010

PAT CHABOT
Commission Member

MARIA JACKSON
Commission Member

MARILYN A. WOOLLARD
Administrative Law Judge
Office of Administrative Hearings
Commission Chairperson