BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
FOR THE LOS ANGELES UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against: FRANCISCO PARODI, Respondent.	OAH No. 2012031244

DECISION

The Commission on Professional Competence (Commission) heard this matter in Los Angeles, California, on December 3 and 4, 2012. The Commission consisted of Philip Ramos, Temisha Brame, and Administrative Law Judge Ralph B. Dash, Office of Administrative Hearings, State of California, who presided.

Anahid Hoonaian, Attorney at Law, represented the Los Angeles Unified School District (District).

Richard J. Schwab, Attorney at Law, represented Francisco Parodi (Respondent).

The parties submitted the matter for decision on December 4, 2012.

Respondent is a permanent certificated employee of the District, employed as a Soccer Coach and Dean at Van Nuys High School (VNHS) during the 2008-2009 school year. District alleged that Respondent demonstrated unprofessional conduct (Education Code[1] section 44932, subdivision (a)(1)), immoral conduct (sections 44932, subdivision (a)(1) and 44939), evident unfitness for service (section 44932, subdivision (a)(5)), willful refusal to obey reasonable regulations (section 44932, subdivision (a) (7)), and willful refusal to perform regular assignments without reasonable cause (section 44939), all arising out of a single incident involving the alleged search of two students on February 9, 2009.

As more fully set forth below, District failed to present any direct evidence that the incident occurred as described in the Accusation and Statement of Charges. Accordingly, District's Accusation and Statement of Charges is dismissed.[2]

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[1] All statutory references are to the Education Code unless otherwise noted.

FACTUAL FINDINGS

1. In making the below Findings, the Commission weighed the testimony of all witnesses and documents. The Commission followed the guidance of the California Supreme Court in arriving at these Findings. In *Stevens v. Parke Davis & Co.* (1973) 9 Cal.3d 51, the court noted that the trier of fact may "accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted." (Id. at 67.) The trier of fact may also "reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected available material." (Id. at 67-68.)[3]

2. The parties entered into a Stipulation Regarding Evidentiary Issues and Facts (Exhibit 32) which established the following:

a. Respondent is a permanent certificated employee of the District.

b. Respondent was a Soccer Coach and Dean at VNHS during the 2008-2009 school year.

c. On or about March 19, 2012, the District issued a Notice of Intent to Dismiss placing Respondent on immediate unpaid suspension.

d. On or about March 19, 2012, the District received Respondent's demand for hearing dated March 27, 2012.

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[2] Because this matter is being dismissed based on a failure of proof regarding the alleged misconduct, Respondent's Motion to Dismiss under section 44938, reserved for determination in this Decision, is moot.

[3] In this matter, the Commission evaluated the credibility of the witnesses pursuant to the factors set forth in Evidence Code section 780: the demeanor and manner of the witness while testifying, the character of the testimony, the capacity to perceive at the time the events occurred, the character of the witness for honesty, the existence of bias or other motive, other statements of the witness which are consistent or inconsistent with the testimony, the existence or absence of any fact to which the witness testified, and the attitude of the witness toward the proceeding in which the testimony has been given. The manner and demeanor of a witness while testifying are the two most important factors a trier of fact considers when judging credibility. The mannerisms, tone of voice, eye contact, facial expressions and body language are all considered, but are difficult to describe in such a way that the reader truly understands what causes the trier of fact to believe or disbelieve a witness.

e. On or about April 3, 2012, counsel for Respondent was served with the Accusation and Statement of Charges alleging cause to dismiss Respondent for immoral and unprofessional conduct, evident unfitness for service, persistent violation of and refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education by the governing board of the school district employing him, and willful refusal to perform regular assignments.

f. On or about April 5, 2012, Respondent served his Notice of Defense.

3. As gathered from all admissible evidence, the incident complained of is as follows. VNHS is in an area of known gang activity. The Deans and other administrators regularly patrol the grounds of the school to make sure holes have not been cut in the fence to allow illegal ingress. One particular area of the campus, the handball courts, was under regular scrutiny because it was an area where students would congregate to smoke marijuana, deal drugs and get in fights. The high walls of the courts would screen the view of these activities.[4] The principal required the Deans to "circulate in the area" of the handball courts. The Deans and other administrators (principal and four assistant principals) and the campus police were authorized to conduct searches of a student if they had reason to believe a student might have contraband. The searches could include having the student lift the legs of his pants and/or raise his shirt to expose the belt line. The Deans also had the authority to do an "exterior pat down" of a student or have him empty his pockets if they reasonably believed the student had contraband.

4. In the early afternoon of February 9, 2009, Respondent was on patrol near the handball courts. He was accompanied by a "campus security aid." According to the principal, at the time of the incident there were also "five P.E. teachers and a hundred students" in adjacent areas. For reasons not disclosed by the evidence,[5] Respondent became aware of a student named M[redacted] O. (M[redacted]). Respondent approached M[redacted] and conducted a search of some sort. M[redacted] apparently complained about the search to his stepfather who then filed a complaint with the school.

5. On February 11, 2009, M[redacted] made a written statement in Spanish (Exhibit 12). The exhibit contains an English translation (page 21 of Exhibit 12), however the District could not authenticate the translation and while M[redacted]'s statement was admitted in evidence, the translation was not. The District did not call M[redacted] to testify.[6] The statement was admitted as "administrative hearsay."[7]

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[4] On a date not disclosed by the evidence, but after February 9, 2009, VNHS had the handball courts taken down.

[5] Neither Respondent nor any of the alleged eyewitnesses to the event testified at the hearing.

[6] According to the District's counsel, M[redacted] was not in the country at the time of the hearing.

6. M[redacted] gave the written statement to Jack Molina, a former Dean and Assistant Vice Principal at VNHS, who also spoke with M[redacted] about the incident. According to Mr. Molina, M[redacted] described the incident as follows: Respondent searched M[redacted] by having him take off his jacket, lift up his shirt, and give himself a "wedgie."[8] [9] Respondent grabbed M[redacted]'s boxer shorts to show how he wanted the boxers to be pulled. According to Mr. Molina, M[redacted] felt that Respondent "was trying to view his privates." Based on M[redacted]'s statement, Mr. Molina filed a report with the "child abuse hotline."[10]

7. Mr. Molina's recitation of M[redacted]'s oral statements differed, in a critical respect, with the Incident Report Form Mr. Molina completed the day he spoke with M[redacted] (Exhibit 13). In that report, Mr. Molina wrote, "Mr. Parodi grabbed [M[redacted]'s] sweat pants and told M[redacted] to pull his boxers away from his body. M[redacted] did not do this as it would expose his genitals (emphasis added)." Thus, according to Mr. Molina's report but contrary to his testimony, Respondent did not touch M[redacted]'s underwear.

8. After Mr. Molina filed a report with Children's Protective Services, the police were notified, conducted an investigation, and closed their file taking no action. The Commission on Teacher Credentialing also investigated the matter and declined to commence disciplinary proceedings against Respondent's credentials. According to Mr. Molina, during the summer of 2009, the District conducted its own investigation of the alleged incident. Mr. Molina was directed "by the District" to conduct interviews of everyone in the vicinity of the alleged incident, which he did with the assistance of other administrators. According to Mr. Molina, two campus aids were present at the time of Respondent's alleged search of M[redacted], neither of whom "claimed any knowledge" of any untoward conduct by Respondent. Of the "90 to 100 students" who were interviewed during the summer of 2009, only two made any statements about Respondent. Both students "thought that [Respondent] was overzealous but nothing sexual."

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[7] The evidentiary value of administrative hearsay is fully discussed below.

[8] A wedgie is typically a prank in which a person's underpants are pulled up sharply from behind in order to wedge the clothing between the person's buttocks. For purposes of conducting a search, a wedgie could reveal whether contraband was hidden inside a student's underpants. No evidence was presented to suggest that this search technique was in any way unlawful.

[9] M[redacted]'s statement does not appear to contain any remarks about a "wedgie." When this was pointed out Mr. Molina, he responded, without explanation, that the "wedgie information came up later."

[10] As a "mandated reporter" Mr. Molina was required to notify Children's Protective Services. However, he noted during his testimony that having students make complaints about security searches was commonplace and "goes with the nature of the job."

9. Mr. Molina's testimony regarding the summer of 2009 investigation differed from his report about that investigation (Exhibit 15), which he wrote on September 30, 2009, more than three years before he testified at this hearing. In that report, Mr. Molina wrote, "On June 29, 2009 I received an e-mail from the office of staff relations with direction to interview students on their return to school. . . . Approximately 60 students that were enrolled in the P.E. class with M[redacted] were summoned and interviewed by an administrator." (Emphasis added.) Thus, according to this report but contrary to Mr. Molina's testimony, 60 (not "90 to 100") students were interviewed, and the interviews took place when the students had returned to school after the summer break, seven months after the alleged incident occurred, and not during the summer of 2009.

10. The second student allegedly involved in this incident was C[redacted] F. (C[redacted]). According to the Accusation and Statement of Charges, on the same day as the incident with M[redacted], Respondent told C[redacted] to "pull up his underwear and show it to him" and also told this student to give himself a wedgie.[11] C[redacted] did not testify nor did the District present any credible evidence, either direct or administrative hearsay, to support these allegations. The District did attempt to offer some corroborative evidence with respect to the allegations. This consisted of the second page of Exhibit 15, Mr. Molina's investigation report. The second page of the report was not admitted in evidence as it only contained Mr. Molina's summary of a statement made by an Assistant Principal regarding a statement made by C[redacted] to that Assistant Principal. This "multiple level hearsay" is not the sort of evidence that reasonably prudent persons would rely on in the conduct of serious affairs[12] and thus had no probative value.

11. Although Respondent did not testify, there was administrative hearsay evidence that Respondent denied any wrongdoing (Exhibit 19, p. 44). Since there was no direct evidence to corroborate Respondent's version of the events, no Finding can be made that his statements were either true or false.[13] However, for context, and as evidence that neither the District's allegations nor Respondent's denials were baseless, even though neither was proven at hearing, the following is Respondent's version of the events as he related the same to a District Investigation Unit (IU) investigator on October 7, 2010: [14]

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[11] According to Mr. Molina, C[redacted] was a "gang member wannabe," was "truant all the time," and would "ditch classes." In other words, C[redacted] was exactly the type of student on whom security personnel would focus.

[12] See, Government Code section 11513, subdivision (c).

[13] The fact that [the trier of fact] may disbelieve the testimony of a witness who testifies to the negative of an issue does not of itself furnish any evidence in support of the affirmative of that issue and does not warrant a finding in the affirmative thereof unless there is other evidence in the case to support such affirmative." (*Hutchinson v. Contractors' State License Bd. of Cal.* (1956) 143 Cal.App.2d 628, 632, citing *Marovich v. Central Cal. Traction Co*. (1923) 191 Cal.295, 304.)

Mr. Parodi stated that on February 9, 2009, M[redacted] was one of 15-20 students that were searched by the handball courts. The search was done in the presence of others and in the same manner as all searches performed.

IU Investigators questioned Mr. Parodi regarding his searching procedures. Specifically, Mr. Parodi was questioned about allegations that he instructed student to give themselves a "wedgie" as a standard part of his search procedures. . . . Mr. Parodi stated that he did instruct students to give themselves a wedgie. . . . Mr. Parodi was asked if he believed that asking students to give themselves a wedgie was appropriate, and he replied, "Yes. It is effective in discovering contraband such as drugs and weapons." Mr. Parodi was asked if he ever inappropriately touched the private areas of students during these searches, and Mr. Parodi responded, "No!"

Mr. Parodi told IU Investigator that his job as a Dean at Van Nuys HS was a difficult one due to the school being infected (*sic*) with gangs and drugs. Mr. Parodi added that he was threatened on more than one occasion by local gang members at the school. Mr. Parodi stated that he was simply trying to do his job.

LEGAL CONCLUSIONS

1. Absent a statute to the contrary, the burden of proof in disciplinary administrative proceedings rests upon the party making the charges. (*Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 113; Evid. Code, § 115.) The "burden of proof" means the obligation of a party, if he or she is to prevail on a particular fact, to establish by evidence a requisite degree of belief or conviction concerning such fact. (*Redevelopment Agency v. Norm's Slauson* (1985) 173 Cal.App.3d 1121, 1128.) The burden of proof in this proceeding is thus on District to prove the charging allegations.

2. The standard of proof in this proceeding is a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1039-1040; (Evid. Code, § 115.) "The phrase 'preponderance of evidence' is usually defined in terms of probability of truth, e.g., 'such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth.' (BAJI (8th ed.), No. 2.60.)" (1 Witkin, Evidence, Burden of Proof and Presumptions § 35 (4th ed. 2000).)

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[14] Although the statement of a party may be introduced as direct evidence against a party under Evidence Code section 1220, the document in which Respondent's statement is contained is itself hearsay, as it is part of a compilation of evidence and neither the author of the document nor any District official with knowledge of the facts was called as a witness to verify the accuracy and/or authenticity of the document. Thus the statement could only be admitted as administrative hearsay.

3. The term "administrative hearsay" is a shorthand reference to the provisions of Government Code section 11513, subdivision (d), to the effect that hearsay evidence that is objected to, and is not otherwise admissible, may be used to supplement or explain other evidence but may not, by itself, support a factual finding. Administrative hearsay, coupled with direct, though circumstantial, evidence, may be sufficient to support a finding. As an example, in *Komizu v. Gourley* (2002) 103 Cal.App.4th 1001, a report of blood alcohol content did not qualify for an exception to the hearsay rule but was admitted subject to Government Code section 11513, subdivision (d) as administrative hearsay. The report was properly used to explain and supplement a police officer's report, which contained certain direct but circumstantial evidence of the driver's blood alcohol level. Combined, these two sources provided the trial court with evidence sufficient to support a finding of fact.

4. One must distinguish between the admissibility of evidence and the weight to be given that evidence. The following excerpt from an article published by the Loyola of Los Angeles Law Review is instructive:[15]

> California statutory law expressly provides that all agencies affected by the APA are not bound by "the technical rules relating to evidence."
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> The foregoing practice necessarily permits the *admission* of hearsay evidence. "There [being] no reason for administrative bodies to be more restrictive than courts . . . , evidence competent in judicial proceedings, including hearsay with an exception, is generally held competent in administrative proceedings." Even incompetent hearsay is admissible. The question turns on whether incompetent hearsay, without more, is sufficient to satisfy the moving party's burden and thereby support the agency's findings. In order to avoid confusion, it is important that the "admissibility" issue not be viewed in the same light as the "sufficiency" standard; they are different creatures. Admissibility is not the equivalent of evaluation; the former makes certain concessions in the interest of full and complete discovery while the latter, in the interest of fairness, withholds legal sanction to evidence found not to be trustworthy. Unlike the common practice in judicial proceedings, the fact that evidence may be admissible does not therefore guarantee the sufficiency of such evidence to sustain a finding. Consequently, evidence which is deemed *admissible* is generally considered to be *"competent."* On the other hand, evidence once admitted which is *capable of sustaining a finding* will amount to *"sufficient"* evidence. Finally, determining what constitutes sufficient evidence will depend upon the applicable judicial or statutory rule. (Italics in original.)

(Ronald Kenneth Leo Collins, *The Sufficiency of Uncorroborated Hearsay in Administrative Proceedings: The California Rule* (1975) 8 Loy. L.A. L. Rev. 632, 642.

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[15] All footnotes have been omitted.

5. A permanent District employee may be dismissed for cause only after a dismissal hearing. (Sections 44932, 44934, and 44944.)

6. Under section 44944, subdivision (b), the dismissal hearing must be conducted by a three-member Commission on Professional Competence. Two members of the Commission must be non-district teachers, one chosen by the respondent and one by the district, and the third member of the Commission must be an administrative law judge from the Office of Administrative Hearings.

7. When a school board recommends dismissal for cause, the Commission may only vote for or against it. Likewise, when suspension is recommended, the Commission may only vote for or against suspension. The Commission may not dispose of a charge of dismissal by imposing probation or an alternative sanction. (Section 44944, subdivision (c)(1)(3).)

8. Section 44932 provides in part:

> (a) No permanent employee shall be dismissed except for one or more of the following causes:
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> [¶] . . . [¶]
>
> (3) Dishonesty.
>
> [¶] . . . [¶]
>
> (7) Persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him or her . . . ."

9. Section 44932, subdivision (b) provides that a district may suspend a permanent employee without pay for a specific period of time if it follows the same procedures as for dismissal of a permanent employee.

10. Section 44939 provides in part:

> Upon the filing of written charges, duly signed and verified by the person filing them with the governing board of a school district, or upon a written statement of charges formulated by the governing board, charging a permanent employee of the district with immoral conduct, . . . with willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing school district, . . . the governing board may, if it deems such action necessary, immediately suspend the employee from his duties and give notice to him of his suspension, and that

30 days after service of the notice, he will be dismissed, unless he demands a hearing.

11. No direct evidence was presented that Respondent committed any of the acts alleged as a basis for discipline in the Accusation and Statement of Charges. Thus the District failed to prove by a preponderance of the evidence that Respondent demonstrated unprofessional conduct (Education Code section 44932, subdivision (a)(1)), immoral conduct (sections 44932, subdivision (a)(1) and 44939), evident unfitness for service (section 44932, subdivision (a)(5)), willful refusal to obey reasonable regulations (section 44932, subdivision (a) (7)), or willful refusal to perform regular assignments without reasonable cause (section 44939). The District simply failed to establish that Respondent should be dismissed for the acts alleged in the Accusation.

12. In *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 235, the California Supreme Court held that "an individual can be removed from the teaching profession only upon a showing that his retention in the profession poses a significant danger of harm to either students, school employees, or others who might be affected by his actions as a teacher." The court concluded that a teacher's conduct cannot abstractly be characterized as "immoral," "unprofessional," or "involving moral turpitude" unless the conduct indicated that a teacher is unfit to teach. (*Id*. at p. 229.) The court set forth guidelines to aid in determining whether the conduct in question indicated this unfitness. However, as it has been determined that the conduct was not proven as alleged, it is not necessary to discuss the "*Morrison* factors" as they relate to that conduct.

ORDER

The Accusation and Statement of Charges is dismissed.

DATED: _____

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RALPH B. DASH
Administrative Law Judge
Office of Administrative Hearings

DATED: _____

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Philip Ramos
Commission Member

DATED: _____

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Temisha Brame
Commission Member