

**BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
FOR THE McFARLAND UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

GERALD HOWZE,

Respondent.

OAH No. 2011020866

DECISION

The Commission on Professional Competence (Commission) heard this matter in McFarland, California, on March 5 and 6, 2012. The Commission consisted of Marjorie Sepulveda, Patricia Caillier, and Administrative Law Judge Ralph B. Dash, Office of Administrative Hearings, State of California, who presided.

Chaka C. Okadigbo, Attorney at Law, represented the McFarland Unified School District (District).

Ernest H. Tuttle III, Attorney at Law, represented Gerald Howze (Respondent).

The parties submitted the matter for decision on March 6, 2012.

District employed Respondent as a high school English teacher. District alleged that Respondent demonstrated willful refusal to obey reasonable regulations (Education Code¹ section 44932, subdivision (a)(7)), willful refusal to perform regular assignments without reasonable cause (section 44939), and dishonesty (44932, subdivision (a)(3)) based on a single incident regarding his involvement in the completion of an assignment given to a student in another English class. The District suspended Respondent without pay for 25 days. Respondent disputed the District's characterization of the events and seeks a determination that his conduct did not warrant the suspension.

As more fully set forth below, District failed to establish that Respondent's conduct justified the suspension. Accordingly, District's Accusation and Statement of Charges are dismissed.

//

//

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 67-68.²

2. The District is a California public school district. Respondent was employed by the District, teaching English and other classes, for 28 years. He retired at the end of the 2010-2011 school year. At all times mentioned below, Respondent held a valid teaching credential.

3. Respondent had a reputation for helping students with their schoolwork and other “life issues.” On October 28, 2010, Respondent was teaching English at McFarland High School. During Respondent’s class that morning, a student (D████) who Respondent knew from teaching him during summer school, came into his classroom “in a panic.” At the time, D████’s English teacher was Ada Guzman. D████ was in a panic because Ms. Guzman had given her class an essay assignment which was due the next day. D████, who had “writer’s block,” had not even started on the assignment. He asked Respondent to help him.

4. Respondent told D████ to come back during sixth period (Respondent was free that period, which was the last period of the day) and they would discuss the matter. D████ returned to Respondent’s classroom at the appointed time and talked with Respondent about his assignment. Respondent agreed to help D████ and felt the best way to do it was to “model” the writing of the essay. That is, Respondent would “tease out” the various themes,

² 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.

ideas and theses from the student, and would show him step-by-step how the essay was to be constructed and written.

5. Before beginning this process, Respondent wanted to get Ms. Guzman's consent, so he spoke with her about it. The conversation took place in the school library and was overheard by the librarian, Beverly Meier. Respondent explained his involvement with D ■■■ regarding the essay assignment. Ms. Guzman did not raise any objection. Respondent, in his "modeling" with D ■■■, spent at least two hours with him on October 28, 2010. Respondent also worked with D ■■■ for approximately one-half hour on the morning of October 29, 2010 (before school began), and then again during Respondent's fifth period class that day. Each time D ■■■ visited Respondent's classroom during the school day, he did so with a hall pass he obtained from Ms. Guzman.

6. Respondent finished with D ■■■ during that fifth period class, then had his class review and critique the essay. D ■■■ turned the essay in to Ms. Guzman at the end of that school day. Although D ■■■ knew he was supposed to remind Ms. Guzman that Respondent had worked with him on the essay, he did not do so, but rather attempted to pass the essay off as his own work. The essay clearly was not the work of a student who had to take a remedial English class the preceding summer.

7. Respondent went well beyond the accepted practice of "modeling" and contributed much of his own work to the essay. Some of the ideas conveyed in the essay may have come from D ■■■, in collaboration with Respondent, but Respondent, who actually typed the essay, used his own language to convey those ideas.

8. Immediately upon receiving the essay from D ■■■, Ms. Guzman "rushed" to the office of the interim principal, Shirley Oesch. Ms. Guzman was almost frantic and waived the essay in front of Ms. Oesch, telling her that Respondent had written an essay for one of her students. Ms. Guzman told Ms. Oesch she knew Respondent had helped D ■■■ write the essay because both D ■■■ and Respondent had so informed her, but she "did not realize the extent he helped" writing it.³

9. Ms. Guzman told Ms. Oesch that she was "shocked at the [breach] of ethics and morals" Respondent displayed by writing a paper for a student. Ms. Oesch, who had been interim principal only since the beginning of that school year, asked Ms. Guzman to

³ This statement was not credible. According to Ms. Guzman's testimony, corroborated by a memorandum Ms. Oesch wrote (Exhibit 10) based on what Ms. Guzman told her, Respondent told Ms. Guzman, well before D ■■■ turned the essay in, that he had written the essay for D ■■■. Ms. Guzman testified that after Respondent informed her of his involvement with D ■■■, she could not assimilate what Respondent told her, but later the same day realized that Respondent had, in fact, told her of the extent of his involvement. Her "realization" came to her before D ■■■ turned in the essay. Ms. Guzman never explained why she simply did not return the essay to D ■■■ and give him no credit therefore.

document what she had told her and Ms. Guzman did so in a brief email she sent the following Tuesday.

10. The following Thursday, Ms. Oesch spoke with Respondent and informed him that D ■■■ had been suspended for one day for plagiarism. Respondent was “nonplussed” at this news and informed Ms. Oesch that Ms. Guzman knew he was writing the paper for D ■■■ and she had not objected to it. In a memorandum Ms. Oesch sent to Kim McManaman, the Assistant Superintendent of Administrative Services, on November 13, 2010 (part of Exhibit 11), Ms. Oesch confirmed that Ms. Guzman said Respondent had in fact told her, before D ■■■ turned in the essay, that he had written it for D ■■■. The only discrepancy was that Respondent said he spoke with Ms. Guzman on Thursday, October 28, 2010, but Ms. Guzman stated the conversation took place on Friday morning, October 29, 2010. However, that dispute does not affect the decision herein as all parties agreed Respondent spoke with Ms. Guzman about his involvement before the student handed in his assignment. Both Respondent and Ms. Guzman told Ms. Oesch the conversation had taken place in the library near the Librarian. For reasons she did not explain, Ms. Oesch did not ask Ms. Meier, the Librarian, anything at all about the conversation she had overheard between Ms. Guzman and Respondent.

11. In a memorandum she wrote on December 9, 2010 (part of Exhibit 8), Ms. Meier stated, in part, “While in the Library, I overheard [Respondent] talking to Ms. Guzman about this assignment. As I remember it, [Respondent] mentioned his writing of the essay, and I did not hear Ms. Guzman object.” In addition, Ms. Meier noted in that memorandum that Respondent told her he was helping a student write a “report” by “doing the actual modeling.” Both in a statement she wrote on December 1, 2010, and in her testimony, Ms. Guzman admitted that Respondent told her, in advance of D ■■■’s turning in the essay, that he had written the essay for D ■■■. It was established beyond any doubt that Respondent in no way attempted to hide his involvement with D ■■■.

12. On the day following his discussion with Ms. Oesch, Respondent wrote a letter (Exhibit 5) to Ms. Guzman in which he reconfirmed that had spoken with her about his helping D ■■■ and her acquiescence in his plan. His letter states, in part: “I remember telling you that I typed the essay for D ■■■ and helped him extensively on organizing the essay. I felt it was OK with you. We were not trying to ‘hide’ or ‘cheat’ on an essay. . . . I really felt you knew and understood it was ‘my model of an essay’ in the sense that I typed it for D ■■■ and explained and demonstrated to him how to put an essay together.”

13. The discipline of teachers is part of Ms. McManaman’s duties. She confirmed it is the District’s policy to use “progressive discipline” with teachers. That is, in an ordinary case, discipline would begin with an oral reprimand, then move on to a written reprimand, then if necessary a second written reprimand, then a suspension shorter than 25 days, then a longer suspension if necessary, and finally, dismissal.

14. Ms. McManaman conducted an “investigation” of the incident involving Respondent and D ■■■. She testified that her investigation included speaking with Ms.

Oesch and reading Ms. Oesch's summary of events (prepared and delivered on November 13, 2010) and Ms. Guzman's statement, which was prepared on December 1, 2010. However, as Ms. McManaman issued the Notice of Proposed Immediate Suspension (Notice) on November 24, 2011 (Exhibit 17), she could not have read Ms. Guzman's statement prior to issuing the Notice. Thus, Ms. McManaman's "investigation" consisted of her reading Ms. Oesch's summary. She did not speak with Respondent prior to issuing the Notice, nor did she speak with Ms. Guzman, Ms. Meier or D[REDACTED] beforehand. Had she spoken with them, it is likely she would have realized that Respondent had been open about his involvement with D[REDACTED]. It is also likely that Respondent would have received the appropriate admonishment regarding his over-zealousness in coming to a student's aid, rather than being suspended for it.

15. In the Notice, Ms. McManaman told Respondent that she would be recommending to the Governing Board that he be suspended for 25 working days. The Notice stated that the proposed suspension was for "dishonesty," "refusal to obey" regulations promulgated by the Governing Board, and for his "willful refusal to perform regular assignments without reasonable cause." The Notice stated that, although Respondent had written "all or a substantial portion of an essay paper for D[REDACTED] H.," Respondent "knew or reasonably should have known that [D[REDACTED]] was going to turn the paper in as his own work for course credit." Perhaps had Ms. McManaman spoken to Respondent, or Ms. Guzman, or Ms. Meier, or even D[REDACTED], before she issued the Notice, she would have known (or reasonably should have known) that Ms. Guzman was well aware of Respondent's participation in the writing of the essay before D[REDACTED] turned in the work and that D[REDACTED] could not have actually passed-off the paper as his own.

16. The Accusation, based on the information contained in the Notice, alleges three separate but inter-related grounds for discipline. The First Cause for Suspension is Respondent's alleged violation of Board Policy (BP). BP 5131, referenced in the Accusation, deals with student conduct. In particular, item 7 of this policy prohibits a student from committing plagiarism, and requires District employees to "provide appropriate supervision to enforce" this standard of conduct. BP 5151.9 requires staff (including Respondent) to create and maintain "a positive school climate that encourages honesty." The Accusation alleges that not only did Respondent fail to report D[REDACTED]'s "academic fraud," he actually participated in that fraud in violation of the regulations.

17. The Second Cause for Suspension alleges that Respondent "willfully refused to perform regular assignments without reasonable cause" by "knowingly assisting a student in cheating." This allegation is not otherwise explained, defined or described in the pleading. The Third Cause for Discipline alleges that Respondent "engaged in dishonesty by knowingly assisting a student in cheating on an academic assignment."

18. In his 28 years with the District, Respondent has never received a negative performance evaluation. No one from the District who was involved in this disciplinary process felt it would have been appropriate to reprimand Respondent, but rather they felt that his conduct was so dishonest and "outrageous" that it warranted immediate suspension.

While his conduct may have gone beyond the bounds of “helping a student,” the evidence established that Respondent never attempted to hide his involvement with David’s assignment, which was fully known to Ms. Guzman before David handed in his paper. Thus he did not deceive, or attempt to deceive, anyone. Nor could Respondent have reasonably believed that David would attempt to “palm-off” the essay as his own. From Respondent’s perspective, David’s teacher was fully aware of Respondent’s involvement in its writing so she could not reasonably believe that the work was David’s.

LEGAL CONCLUSIONS

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

2. 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.

3. 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).)

4. 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.)

5. The customary degree of proof for noncriminal cases is the preponderance-of-the-evidence standard. It requires a party to convince the trier of fact that the existence of a fact sought to be proved is more probable than its nonexistence. The standard of proof in a teacher dismissal proceeding is a preponderance of the evidence. (*Ibid.*; *Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1039-1040.)

6. Education Code section 44932 provides in part:

(a) No permanent employee shall be dismissed except for one or more of the following causes:

[¶] . . . [¶]

(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 . . . ”

7. 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.

8. 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.

9. Although the Accusation alleges three bases for Respondent’s suspension, the essence of the allegations is that Respondent’s conduct, as set forth in Findings 3 through 7, involved dishonesty. The word “dishonesty” has been defined as “not honest, lying, cheating, etc.” (Webster’s New World Dictionary of American English, Third College Edition, 1988.) In *Midway School District v. Griffeth* (1946) 29 Cal. 2d 13, 18, the California Supreme Court held: “An approved definition of dishonesty connotes a disposition to deceive.” As used in the Accusation, “dishonesty” is used as a synonym for “deceit” which “implies an intent to make someone believe what is not true, as by giving a false appearance, using fraud, etc.” (Webster’s, *supra*.) In *Paulino v. Civil Service Commission* (1985) 175 Cal.App.3d 962, 972, the appellate court held: “Dishonesty is not an isolated act; it is more a continuing trait of character.”

10. No evidence was presented that Respondent has dishonesty as “a continuing trait” of his character. Overzealousness in helping a student does not equate with dishonesty. Nor does it equate with Respondent violating school regulations prohibiting student plagiarism or his duty to promote honesty as a school virtue. In short, the District simply

failed to establish that Respondent should have been suspended for the acts alleged in the Accusation.

11. 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 did not occur as alleged, it is not necessary to discuss the “*Morrison* factors” as they relate to that conduct.

ORDER

The Accusation and Statement of Charges are dismissed.

DATED: _____

RALPH B. DASH
Administrative Law Judge
Office of Administrative Hearings

DATED: _____

MARJORIE SEPULVDA
Commission Member

DATED: _____

PATRICIA CAILLIER
Commission Member