

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS AND THE
COMMISSION ON PROFESSIONAL COMPETENCE
FOR THE FALLBROOK UNION ELEMENTARY SCHOOL
DISTRICT
STATE OF CALIFORNIA**

In the Matter of the Dismissal of:

JENNIFER HUMPHREYS, Respondent

OAH No. 2021110369

DECISION

On March 29 and 30, 2022, a Commission on Professional Competence (Commission) heard this matter by videoconference. The Commission consisted of the following members: Administrative Law Judge Adam L. Berg, Paola Flores, and Karen Schuett.

Jonathan A. Pearl, Dannis Woliver Kelley, represented complainant, Brian Morris, Assistant Superintendent, Human Resources, Fallbrook Union Elementary School District (district).

Jon Y. Vanderpool, Smith Steiner Vanderpool, APC, represented respondent, Jennifer Humphreys.

Oral and documentary evidence was received, the record was closed, and the matter submitted for decision on March 30, 2022.

FACTUAL FINDINGS

Procedural Background

1. Respondent is a certificated elementary school teacher employed by the district as a third-grade teacher at William H. Frazier Elementary School.

2. On September 28, 2021, the district placed respondent on paid administrative leave after she indicated she would not comply with the district's requirement that she either obtain a COVID-19 vaccination or undergo weekly testing.

3. By letter dated October 11, 2021, complainant notified respondent that on October 4, 2021, a Statement of Charges for Dismissal and Immediate Suspension (Statement of Charges) had been filed with the district's governing board, at which time complainant recommended respondent's dismissal and immediate suspension. Complainant wrote that the district's governing board (board) had approved his recommendation and given respondent 30 days to request a hearing.

4. The Statement of Charges was signed and dated on October 11, 2021. Contrary to complainant's statement in the October 11, 2021, letter, no statement of charges was filed on October 4, 2021.

5. Respondent timely requested a hearing before a Commission, and on November 16, 2021, she filed a Motion for Immediate Reversal of Suspension with the

Office of Administrative Hearings. Respondent's motion was denied on December 10, 2021.¹

6. The Statement of Charges alleges the following two causes for dismissal: (1) evident unfitness for service; and (2) "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 or by the governing board of the school district employing him or her." (Ed. Code, § 44932, subds. (a)(6) & (a)(8).)² Complainant also alleges respondent was subject to immediate suspension based on "willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing school district." (§ 44939, subd. (b).)

7. In support of the above causes for discipline and the request for immediate suspension, the Statement of Charges alleges the following: On August 11, 2021, the California Department of Public Health (CDPH) issued a Public Health Order, requiring all workers performing services at Kindergarten through 12th grade (K-12) schools submit proof of vaccination against COVID-19 or undergo weekly diagnostic testing. District policy required all district employees submit proof of vaccination or undergo weekly testing by September 3, 2021. Respondent refused to provide the district with proof of vaccination or weekly testing. On October 4, 2021, respondent

¹ That decision "shall not be considered by the commission in determining the validity of the grounds for dismissal, and shall not have any bearing on the commission's determination regarding the grounds for dismissal." (Ed. Code, § 44939.)

² All future statutory references are to the Education Code unless otherwise indicated.

informed complainant that she would not participate in any form of COVID testing. Complainant alleges respondent violated Board Policy 4119.21 "Professional Standards," Board Policy 4000 "Concept and Roles," and Administrative Regulation 4112 "Appointment and Conditions of Employment."

The District's Evidence

8. The underlying facts are largely undisputed. The following findings are based on the relevant testimony of witnesses and documentary evidence.

CDPH PUBLIC HEALTH ORDER

9. On August 11, 2021, the CDPH Director issued a Public Health Order (CDPH Order) requiring all public and private K-12 schools to require verification of vaccination status for school workers (defined as all adults serving in the school setting) and establish diagnostic screening testing of unvaccinated workers. The CDPH Order required unvaccinated workers to undergo diagnostic testing at least weekly. While the order was effective August 12, 2021, it provided a compliance date for facilities of October 15, 2021.

THE DISTRICT'S COMMUNICATIONS REGARDING THE ORDER

10. Complainant has been the district's Assistant Superintendent for Human Resources since July 1, 2021. In this position, he is responsible for all district personnel issues.

11. At the beginning of the school year in August 2021, COVID-19 continued to have a significant impact on the district's operations. Despite vaccinations, social distancing, and mask requirements, there was an increase in staff and student absences. At that time, the district only offered in-person learning. Staff frequently

were absent because of exposure, sickness, or the need to care for other individuals. These circumstances caused a staffing shortage within the district. At the time, most elementary school aged children were not authorized to receive the COVID-19 vaccine. In sum, there was great concern in the community about COVID-19 and the impact it was having on the educational environment.

12. Neither the district nor its governing board promulgated any written regulations, rules, or policies regarding the implementation of the CDPH Order. Complainant testified that it was his responsibility to implement the CDPH Order to ensure compliance. His intent was to immediately institute the CDPH Order, but he provided a three to four-week grace period before he would begin holding staff accountable. He wanted to provide an opportunity for staff to obtain the vaccine and make sure they were aware of how to upload their vaccine information.

13. On August 11, 2021, complainant notified all district staff of the requirements of the CDPH Order, and that all staff, regardless of vaccine status, would have to wear masks on school campuses while indoors. Additionally, complainant wrote, "I will be providing follow up communication with unvaccinated employees re: the weekly testing protocols and schedule in our District." Complainant also reminded certificated staff that they should have uploaded their vaccination cards by that date. Complainant concluded by providing his phone number for any questions or concerns. The email did not specify a date by which individuals without proof of vaccination would be required to begin testing.

14. Complainant provided all staff with a testing schedule for unvaccinated individuals, which allowed them to test at their school site on Wednesdays during their regular workday. They were then required to upload their test results online.

Complainant also provided staff with information about other testing locations in the community and permitted staff to leave their school to test at another school site.

15. On September 7, 2021, complainant emailed respondent with the subject "8/30-9/3 Proof of COVID Test." In the email, which was addressed to respondent by name, complainant wrote that the district records did not indicate that respondent had submitted proof of vaccination or undergone a COVID-19 test for the previous week. If respondent had submitted this documentation, and there was an error in the database, complainant requested respondent inform her school principal so the error could be corrected. Otherwise, complainant requested respondent "communicate her plan" to him and her school principal regarding the submission of proof of her COVID-19 test for that week. Complainant concluded by providing his cell phone number should respondent have any questions.

Respondent did not respond to this email or take any action.

16. Two days later, on September 9, 2021, complainant resent to respondent the September 7, 2021, email. He copied Arica Rainey, respondent's school principal.

Respondent did not respond to this second (i.e., resent) email or take any action.

17. On September 20, 2021, complainant sent a third email to respondent, again copying Ms. Rainey. The email stated that respondent had not submitted proof that she had had a COVID-19 test for the week of September 13 through 17. Complainant requested respondent let him know if she had completed the test and to submit the test result through the district's portal. Complainant also requested respondent communicate with him and Ms. Rainey as to her plan to be tested that week.

Respondent did not respond to this third email or take any other action.

18. Aside from sending these emails, neither complainant nor Ms. Rainey attempted to call, speak to, or otherwise communicate with respondent about compliance with the district's directive prior to the events described immediately below.

The September 28, 2021, Meeting

19. On Tuesday, September 28, 2021, at 8:25 a.m., complainant sent respondent an email, copying Ms. Rainey, stating that respondent had not submitted proof of vaccination or weekly testing, and he would be meeting with her and Ms. Rainey at 10:00 a.m. at respondent's school, to discuss respondent's plan to be tested. Complainant advised respondent she could have union representation at the meeting.

A meeting was held with complainant, respondent, Ms. Rainey, and respondent's union representative, Lukas Smith. At the meeting, complainant told respondent that according to his records, she had not submitted proof of having taken a COVID-19 test. He asked if this information was correct, to which she declined to answer. Complainant handed respondent a copy of the CDPH Order and explained that staff were required to either be vaccinated or submit proof of a negative COVID-19 test. Respondent said she was unvaccinated. Complainant told respondent that the district's testing team was testing at various schools throughout the day, and he would allow respondent to take paid administrative leave to test at any location. She could return to the classroom that day or the next if she tested negative. Respondent said she had no intention of being tested by the district's testing team. Complainant said there were other places where she could test such as hospitals, clinics, or the fire

department. He told her she could go wherever she wanted, but a self-test would not be accepted. Respondent reiterated that she would not undergo testing but provided no explanation. Complainant told respondent that if she refused to test that day or at some time during the week she would be placed on an unpaid leave of absence and charges would be drafted to terminate her employment. Respondent said nothing. Based on her statement that she would not test, complainant placed her on paid administrative leave and informed her she would have to leave the campus immediately. He allowed Mr. Smith to escort her to her classroom to retrieve personal items before leaving campus. As they were walking out of the building, complainant again informed respondent that Kaiser and California State University, San Marcos, were accepting walk-in appointments for testing.

RESPONDENT'S ACCOMMODATION REQUEST

20. On Thursday, September 30, 2021, respondent submitted to the district a request for a "religious exemption" for a COVID-19 vaccination or testing. Respondent's request was almost entirely directed at the vaccination, and she did not address testing, except to claim that there are false positive rates up to 16.7 percent, which is likely higher, and based on "guidance from the Holy Spirit and the Holy Bible, I cannot conscientiously take the Covid-19 tests and/or shots under these circumstances."

21. On Monday, October 4, 2021, the district convened an interactive accommodation meeting to address respondent's request. Present at the meeting were respondent; complainant; Lindsay Tatnall, a representative from the California Teachers Association; Jennifer Mariucci, president of the Fallbrook Elementary Teachers Association (FETA); Dale Leonard, an FETA representative; and the district's counsel, Mr. Pearl. At the meeting, complainant explained the district's obligation to

comply with the CDPH Order and asked respondent if she had any recommended accommodations. Respondent said she would go to her doctor for a weekly health screening in lieu of weekly testing. However, complainant stated that this would not comply with the CDPH Order. Ms. Mariucci inquired whether there was a virtual teaching assignment available, but complainant said the CDPH Order applied to all staff. Complainant reiterated that staff could test wherever they wished, except that home tests were not acceptable. He suggested that a saliva test (oral swab) would also be acceptable. However, respondent stated that she would not submit to any form of COVID testing. Mr. Leonard asked if an unpaid leave of absence was possible. Complainant responded that, due to the current labor shortage, this was not possible.³ An unpaid leave of absence was not acceptable to the district because of the indefinite period, which would require the district to find substitute teachers. Complainant confirmed that respondent had been on paid administrative leave since September 28. Complainant informed respondent that he would be recommending to the board at its meeting later that evening that respondent be dismissed. He said he would contact her the next day to discuss the next steps.

22. Complainant believed respondent exercised poor judgment by continuing to come to work without testing, which he believed jeopardized the health and safety of her students. Complainant had received a previous report from Ms. Rainey that respondent was not enforcing the district's mask mandate. Ms. Rainey

³ Complainant testified that his concern was to ensure consistency in the classroom, and it was not in the students', or the district's best interest to proceed in this manner. Although complainant's reasons for declining this request are not relevant to these proceedings, they were reasonable under the circumstances.

had observed an incident where a student was not wearing a mask and respondent did not address the situation.

On September 21, 2021, Ms. Rainey emailed respondent. The email informed respondent that Ms. Rainey had observed a student not wearing a mask during a visit to respondent's classroom. Ms. Rainey added that on September 8, she had emailed respondent and expressed the same concern, as two of respondent's students had not been wearing a mask on that date. Ms. Rainey also noted respondent did not reply to the September 8 email. Ms. Rainey reiterated that respondent must enforce the district's protocol.

Other school staff had informed Ms. Rainey on several occasions that they had seen respondent enter the office without wearing a mask. which was required while indoors on campus. Ms. Rainey also observed occasions where respondent's mask was not completely covering her nose. Ms. Rainey did not speak (i.e., verbally) to respondent on such occasions, but, as was her practice with other employees, she would point to the nose to indicate it needed to be covered. Although there were instances of non-compliance with the mask mandate on the part of other school employees, Ms. Rainey noticed that this occurred more frequently with respondent.

23. Ms. Rainey had evaluated respondent's performance since she became principal in 2017. Ms. Rainey testified respondent had previously been responsive to feedback.

Respondent's Testimony

24. Respondent has taught for the district for 21 years. She holds a bachelor's degree in elementary education and a master's degree in educational administration. She holds a multitude subject teaching credential in elementary

education and a preliminary administrative services credential she has never used. She has taught first through sixth grades. She has never received a performance evaluation with less than a satisfactory rating in any metric. Her last evaluation indicated she was "effective" in all categories. During her career, she has participated in multiple school committees and has served as a FETA site representative and was a member of the bargaining team.

25. During the second half of the 2020-2021 school year, the district returned to in-person learning. The district implemented COVID-19 protocols such as requiring everyone to wear masks indoors and performing temperature checks. Respondent complied with all protocols and recognized her responsibility to protect the health and safety of her students and coworkers. Respondent complied with all of the safety requirements, including wearing a mask.

26. During the 2020-2021 school year, respondent developed a sore throat. At the time, the district was instructing teachers to quarantine and stay home if they were sick. Respondent wanted to return to the classroom, so she went to one of the district's COVID-19 drive-in testing sites at a community center where she underwent a nasal swab. Respondent thought it concerning that the tester asked respondent for an email address to send the "negative results," suggesting that the results were "predetermined." Respondent was uncomfortable that this was not a medical facility, and she did not know who employed the testers or where her information was being sent.

27. Respondent decided she would not obtain the COVID-19 vaccine. She explained that she is not an "anti-vaxxer." Her mother had polio, so she understands the importance of vaccinations. However, respondent's sister was born with brain damage that respondent attributed to her mother being prescribed certain medication

during pregnancy. Consequently, respondent is very reluctant to take anything without being sure that it is safe. Respondent has always obtained a tuberculosis test as required by the district.

28. The 2021-2022 school year began in August 2021. At the start of the school year, there was an indoor mask requirement. Respondent was not aware of any complaints by parents about masks. Her class attendance was excellent, which compared favorably with that of some other classrooms. Ms. Rainey never told respondent that parents had been concerned about masking in her class. Respondent did not recall seeing specific emails from Ms. Rainey about masks until the September 20, 2021, email. Respondent thought it was odd that Ms. Rainey would send an email instead of speaking to her directly. To respondent, it seemed like a non-issue because the child in question pulled up his mask. Instead, it felt to respondent that it was a "gotcha" email because others, including complainant, were copied.

29. Respondent admitted that she did not comply with the directive to vaccinate or begin weekly testing. Regarding her decision not to test, respondent did not feel comfortable with the testing locations (such as in dirt lots) or with sharing her health data with others. Respondent was hoping that there could be an alternative to testing, which would be as good as, or better than, testing. She believed that a health check by her doctor would reveal if she had a temperature or other symptoms of COVID-19, which she believed was similar to the screening methods the district previously employed earlier in the pandemic.

30. Respondent admitted that she did not respond to complainant's emails or otherwise make her position known. Respondent was not trying to be disrespectful. She ignored the emails because she did not know what to say or how to say it. She did not know if complainant would understand or attempt to accommodate an alternative.

When asked why she did not request a meeting to discuss her concerns, respondent said complainant's emails seemed "canned" or were mass emails to other people. To respondent, it felt like the emails were just part of the district's "protocol," as if the district was "going through the motions" and not necessarily something it was actively attempting to enforce. Respondent's belief at the time was that if the district was concerned, Ms. Rainey or someone would reach out to her. There was nothing in the emails referencing consequences for failure to comply. Respondent hoped that the situation would "just go away," but she now regrets taking that approach and admits it was a mistake not to reach out to Ms. Rainey at the time she received the emails. Similarly, respondent did not contact anyone in the union. She did not think she needed representation, because the emails never set forth any consequences for non-compliance. Respondent reiterated that she made a mistake in failing to respond to the emails, but she did not know that her failure to respond would subject her to dismissal.

31. Respondent did not see complainant's email on the morning of September 28, 2021, advising her of a meeting later that morning. Instead, Ms. Rainey asked her if she saw the email and told her she needed to go to the meeting with complainant. Ms. Rainey asked if respondent wanted Mr. Smith present, which she did. At the meeting, complainant asked her if she was vaccinated or if there was a mistake in their records. Respondent said she did not feel comfortable answering. Complainant told her that if she did not get tested, she would be terminated. He asked her if she would get tested, and she responded that she would not. He asked her if she had any personal belongings in her classroom and said Mr. Smith would escort her to her classroom and then off campus. Respondent went to her classroom and told her teaching teammate she had just been terminated. Respondent believed she had just

been fired. She never saw her class again and never received any written communications from the district.

32. The following day, respondent texted Ms. Mariucci, who told respondent that she had not been terminated. Ms. Mariucci asked respondent if she wanted to obtain a medical exemption and take the rest of the year off, which interested respondent. Ms. Tatnall reviewed the exemption request she wrote and made some suggestions of things to include.

33. At the October 4, 2021, accommodation meeting, respondent shared her request to undergo a weekly health assessment by her physician in lieu of testing. The union representatives inquired about online learning or taking an unpaid leave of absence, which complainant rejected. Complainant did reiterate that respondent could test at any location (but could not take a home test) and even suggested she could test in a "dirt lot" across from a cemetery. This served to reinforce respondent's concerns about the testing that it was not being performed at a medical facility. However, respondent was "crystal clear" at the meeting that she did not want to test. She did not tell complainant the reasons for her concerns because she felt that the meeting was not interactive as she was the only one making suggestions for accommodation. She did not feel complainant was open to hearing what she wanted, and she was worried that anything she said could be used against her. At the end of the meeting, complainant told her that he would be going to the board that evening seeking her dismissal. Respondent had no experience with the disciplinary process and thought this was the proper procedure.

34. Respondent does not believe she put her students or colleagues at risk. She felt by doing temperature checks and visual screening she could accomplish the same goal. If the district believed she was a danger, she questions why it did not

remove her from the classroom earlier. She would never hurt her students and disagreed that she was putting her personal interests ahead of their safety. She was willing to take a leave of absence from her position to support her belief. She believes she has consistently complied with all the district's COVID-19 protocols.

35. After receiving notice of her dismissal, respondent had a COVID-19 test on October 25, 2021, at a medical clinic in Temecula. She went to this clinic because she trusted it to provide accurate results. She provided this test result and results from two more weekly tests to complainant, without response. She was paying for these tests, and because she was receiving no response from the district, she stopped testing.

36. Respondent agreed that the district provided her with the option to take a COVID-19 test anywhere she wished. However, she did not just want to go "anywhere," but wanted to go to a medical facility. She found the clinic in Temecula after some research. At the time when all this was happening, she "didn't know what she didn't know," and only after research, did she find somewhere she would be comfortable with.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. The standard of proof in a teacher disciplinary proceeding is a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1039-1040.) "Preponderance of the evidence" means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that one is unable to say that the evidence on either side of an issue

preponderates, the finding on that issue must be against the party. (*People v. Mabini* (2000) 92 Cal.App.4th 654, 663.)

Applicable Law

2. A permanent employee may be dismissed for cause only after a dismissal hearing. (§§ 44932, 44934, & 44944.)

3. When a school board recommends dismissal for cause, one may only vote for or against the dismissal; the Commission may not dispose of a charge seeking dismissal by imposing probation or an alternative sanction. (§ 44944, subd. (d)(1).)

4. A permanent certificated teacher may be dismissed for “evident unfitness for service,” and “[p]ersistent 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 or by the governing board of the school district employing him or her.” (§ 44932, subds. (a)(6), (a)(8).)

5. Upon the charge of “willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing school district,” a district may immediately suspend the employee from his or her duties. (§ 44939, subd. (b).)

Applicable District Policies

6. Board Policy 4119.21, titled, “Professional Standards” provides:

The Governing Board expects district employees to maintain the highest ethical standards, exhibit professional behavior, follow district policies and regulations, abide by

state and federal laws, and exercise good judgment when interacting with students and other members of the school community. Employee conduct should enhance the integrity of the district, advance the goals of the district's educational programs, and contribute to a positive school climate.

[¶] . . . [¶]

Inappropriate employee conduct includes, but is not limited to:

[¶] . . . [¶]

Engaging in any conduct that endangers students, staff, or others, including, but not limited to, physical violence, threats of violence, or possession of a firearm or other weapon . . .

7. Board Policy 4000, titled "Concepts and Roles" provides in relevant part:

The Governing Board recognizes that the success of district students and programs hinges on effective personnel. The Board desires to establish safe and supportive working conditions that will attract and retain staff members who are highly qualified and dedicated to the education and welfare of students. The district's personnel policies and related regulations shall be designed to ensure a supportive, positive climate and shall be consistent with

collective bargaining agreements and in conformance with state and federal law and regulations. . . .

8. Board Policy 4118, titled "Dismissal/Suspension/Disciplinary Action," provides in relevant part:

The Governing Board expects all employees to exhibit professional and appropriate conduct and serve as positive or inappropriate conduct in accordance with law, the district's collective bargaining agreement, Board policy, and administrative regulation.

9. Administrative Regulation 4112, titled "Appointment and Conditions of Employment," requires staff to comply with certain conditions, including that they "[f]ulfill any other requirements as specified by law, collective bargaining agreement, Board policy or administrative regulation."

Evaluation

PERSISTENT VIOLATION/REFUSAL

10. The district alleges that respondent is subject to dismissal for persistent violation of, or refusal to obey, laws or the district's regulations. (§ 4492, subd. (a)(8).) As grounds for dismissal, the Statement of Charges alleges the following: respondent violated the CDPH Order; respondent violated district policy requiring compliance with the CDPH Order by September 3, 2021; and respondent violated three board policies and an administrative regulation.

11. The district must first establish that respondent's refusal to follow district policy was "persistent." Courts interpreting this provision have focused on whether

there has been a pattern of refusal to obey rules and whether an employee was intentionally insubordinate. For example, in *Governing Board of the Oakdale Union High School District v. Seaman* (1972) 28 Cal.App.3d 77, 82 (*Oakdale*), the Court of Appeal reversed a judgment for a school district in an action for dismissal where a teacher requested a leave of absence to accompany her husband abroad to study foreign special education programs. The district never responded to her request, and she returned to school a month after the school year started. The court held that under the circumstances, the teacher's violation of the school's regulations was not "persistent." (*Id.* at p. 82.) In doing so, the court rejected as "specious" the district's argument that every day she was absent was a separate violation and demonstrated the "persistent" requirement of the statute. Instead, the court referenced the dictionary definition of "persistent," to mean "refusing to relent; continuing, especially in the face of opposition . . . stubborn; persevering . . . constantly repeated," and to judicial decisions, where the word has been interpreted to mean "continuing or constant." (*Ibid.*) The court noted, "The Legislature undoubtedly intended that opportunity for correction be available and refrained from providing for dismissal for a single violation of regulations, or until repeated violations could be considered persistent." (*Ibid.* citing *Midway School Dist. v. Griffeath* (1946) 29 Cal.2d 13, 18). The court also noted that the teacher had been employed by the district for eight years, and there was no evidence in the record to prove that she ever violated a school law or a regulation of the governing board prior to the incident in question. (*Ibid.*)

In contrast, in *San Dieguito Union High School District v. Commission on Professional Competence* (1982) 135 Cal.App.3d 278 also concerned whether cause existed to dismiss a teacher for persistent violation of or refusal to obey school rules. In that case, over a four-year period, the teacher was absent 21 percent of the time and she failed to supply lesson plans to substitute teachers numerous times,

despite having received several written and oral communications instructing her to provide thorough lesson plans when she planned to be absent. The appellate court concluded that “[w]ithout question a persistent refusal to prepare lesson plans for substitute teachers, viewed in light of the number of absences Harris [the teacher] was experiencing, might be sufficient to constitute ‘persistent violation . . . of school rules’ within the meaning of Education Code section 44932, . . .” (*Id.* at p. 287-288.)

12. On August 11, 2021, the district notified all staff that it would be immediately implementing the CDPH Order issued the same date, requiring all staff to either obtain a COVID-19 vaccination or submit to weekly testing. The district’s board did not promulgate a policy or regulation; rather, complainant was tasked with implementing the CDPH Order.⁴ The same day, complainant notified staff that he would be reaching out to unvaccinated staff regarding the weekly testing protocols. On September 7, 2021, complainant emailed respondent directly requesting that she “communicate” to him and Ms. Rainey “her plan” to submit proof of the COVID-19 test that week. Respondent did not respond to the email, and two days later, complainant resent it, this time copying Ms. Rainey. Again, respondent did not respond. Approximately two weeks later, on September 20, 2021, complainant again emailed respondent. The email noted that respondent had not uploaded the test results for the previous week. The email requested that she communicate her plan to submit the test

⁴ In this regard, the district’s allegation that respondent violated the CDPH Order is misplaced. On its face, the order is applicable to school institutions, not individual employees. Moreover, the order did not require compliance until October 15, 2021. Finally, the CDPH Order is neither a state school law, nor a district or Department of Education regulation.

results through the portal and to inform Ms. Rainey of her plan to test that week. Again, respondent did not respond to the email.

On Tuesday, September 28, 2021, complainant met with respondent and Ms. Rainey in person for the first time to discuss her failure to test. At this meeting, respondent (for the first time) conveyed her intention not to comply with the district's requirements to test. Complainant then informed respondent that her refusal would result in her dismissal. Complainant placed her on administrative leave based on her failure to submit to the district's testing requirements, although respondent believed she had been immediately terminated.

After learning from the union president that she had not been terminated, respondent submitted an accommodation request to the district two days later. The district then scheduled an interactive meeting on Monday, October 4, 2021. At the meeting, the district rejected respondent's requested accommodation to undergo a health check in lieu of testing, because this was not in compliance with the CDPH Order. The district also rejected a suggestion that respondent be placed on unpaid leave. Complainant informed respondent that he would be seeking the board's approval later that evening to dismiss respondent, which apparently occurred.

13. On these facts, it cannot be concluded that respondent's failure to undergo weekly testing constituted "refusing to relent," "continuing, especially in the face of opposition," "stubborn," "persevering," or "constantly repeated," such that it satisfies the statutory meaning of "persistent." It is true that the district sent respondent three emails inquiring about her test results – two within a two-day period and the third two weeks later - to which respondent did not respond. However, these emails did not contain any direction other than to advise complainant if there was an error in the database, upload the results of her negative test, and communicate with

Ms. Rainey about her plan to get tested. The emails lacked a compliance deadline or any statement suggesting to respondent that failure to comply would result in disciplinary action. When respondent did not respond or comply with the first two emails, the only follow-up by the district was to send a third (almost duplicate) email to respondent two weeks later.

To be clear, and as she conceded at hearing, respondent should have responded to the emails and expressed her concerns about testing, rather than simply ignoring complainant's request. However, respondent's failure to respond to complainant's initial three emails cannot reasonably be viewed as "persistent refusal" to comply with district policy. Not until the face-to-face meeting did the district first inform respondent that she would be subject to disciplinary action if she failed to test. At this point, respondent willfully refused to comply, which was unreasonable given the numerous options provided to her to obtain a COVID test at a location of her choosing. Moreover, she made it clear, and under no uncertain terms, that she would not comply with the policy. But this was *first* instance that respondent indicated she was refusing to comply with the policy and the first instance the district learned of this refusal. Also, for the first time, the district placed respondent on notice that her failure to comply would result in disciplinary action. This is significant because the district had no written policy regarding testing that respondent could have consulted, and nowhere in any of the district's communications had it informed her or staff that failure to comply would result in disciplinary action, including dismissal.

At her interactive meeting several days later, respondent again confirmed that she would not test, but the purpose of the meeting was to address her accommodation request, which the district declined. Even if her failure to agree to undergo testing at that meeting constituted a separate act of refusal or defiance of the

board's policy, these two refusals, within the span of one week, are not sufficient to establish that her refusal to test was persistent.

In sum, while respondent was insubordinate at the October 28, 2021, meeting when she refused to comply with the directive, this was the first instance of respondent conveying to the district that she would not comply. It is true that respondent was unequivocal in her refusal and appeared determined not to comply with the policy. This begs the question as to how many more opportunities would the district have to have provided before the refusal could be deemed "persistent." However, as highlighted by the *Oakdale* court, the Legislature intended that a district cannot proceed with dismissal until a teacher is provided the opportunity for correction of a single violation of regulations, or until repeated violations could be considered persistent. In this case, the district did not provide respondent with such an opportunity. Instead, it placed respondent on leave, and within a week, had dismissed and suspended her without pay.

The commission is sympathetic to the district's position. There is no question the district was required to comply with the CDPH Order. Moreover, the district's belief that immediate implementation of the order was required to abate the impact COVID-19 was having on the district's operations is not questioned and entirely within the district's prerogative. The district was more than reasonable in attempting to accommodate its unvaccinated employees by providing on-site testing during work hours, time-off to test at other locations, and almost unfettered choice about the manner and location where they received their tests. Complainant's written correspondence with respondent was nonconfrontational and conducive to dialogue. In contrast, respondent failed to communicate to the district her concerns, and instead ignored the requests to get tested. During the first face-to-face meeting, respondent

was insubordinate and her proffered rationale for refusing to test was objectively unreasonable given the multitude of locations available for her to test.

However, in seeking respondent's immediate dismissal, the district is attempting to force a square peg into a round hole by arguing that respondent's refusal was "persistent." The *Oakdale* court highlighted this point:

We do not quarrel with [the district's] contention that the school district board had the right to adopt rules governing the conduct of its employees and to require the employees to observe the rules. We hold, only, that a single violation of a school board's rules is not of itself cause for the dismissal of a permanent teacher The subsection pertains to unintentional as well as intentional transgressions, and hence the Legislature, apparently to allow opportunity for a correction, has decreed that a single violation is not sufficient to warrant dismissal; "it is the persistent disregard" of school rules that the subsection is designed to regulate. [Citation].

We have limited our discussion in this case to the only charge which was made against appellant and to the evidence actually presented; we do not consider innuendos as to evidence which conceivably could have been presented by the district. Also, in reversing the judgment, we do not suggest that a single willful act of disobedience is never cause for the dismissal of a permanent school employee. Common sense, alone, tells us that a blatant

defiance of lawful school authority which attacks effective school administration cannot be tolerated; such conduct, obviously, is unprofessional and grounds for dismissal
(*Oakdale, supra*, at p. 84.)

The court then highlighted that the school district had not alleged unprofessional conduct, only persistent refusal. This statutory scheme reflects the legislative intent to provide sufficient time for a teacher to remediate his or her conduct before dismissal.

EVIDENT UNFITNESS

14. Section 22932, subdivision (a)(6), authorizes dismissal for “evident unfitness for service.” Evident unfitness for service is established by conduct demonstrating that the teacher is “clearly not fit, not adapted or suitable for teaching, ordinarily by reason of temperamental defects or inadequacies.” (*Woodland and Joint Unified School District v. Commission on Professional Competence* (1969) 2 Cal.App.4th 1429,1444.)

In this case, assuming arguendo that after application of the factors outlined in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214 respondent’s refusal to comply with the district’s testing directive evidences an unfitness to teach, as it reasonably could impact the health, safety, and welfare of her students and coworkers, the district failed to establish that respondent has a temperamental defect making her ill-adapted to teaching. As previously noted, upon further reflection following her dismissal, respondent did submit to testing for several weeks in an attempt to show the district that she would remediate her behavior. This, and respondent’s sincere testimony at hearing, reflect her understanding that compliance with the district’s testing policy, as mandated by the CDPH Order, is a condition of her employment with

which she should have and now will comply. Moreover, respondent's failure to abide by the district's requirement must be weighed against her 21 years with the district – which by all evidence, was at least satisfactory. Instead, respondent made a mistake based on an erroneous belief that she should not have to abide by the district's testing requirements or that the district was required to provide an alternative to testing. Respondent repeatedly expressed contrition about her interactions with the district, and the record as a whole does not establish that she is temperamentally unfit to teach. That Ms. Rainey observed several of respondent's third-grade students (or respondent herself) not wearing masks appropriately does not alter this conclusion or suggest that respondent was defiant of, or hostile to, the district's COVID-19 policies.

The district's arguments that respondent's failure to comply with the district's policy put her children at risk are slightly exaggerated. While respondent ignored the district's directive to test for over three weeks, the district could have removed her from the classroom if it felt she posed a danger to students. Additionally, the CDPH Order did not require compliance by institutions until October 15, 2021. While respondent exercised, among other things, poor judgment and a lack of professionalism by failing to respond to the emails and comply with the district's mandate, she is not "evidently unfit" to teach.

Conclusion

15. Cause does not exist to dismiss respondent pursuant to Section 44932, subdivisions (a)(6) and (a)(8). Moreover, the Commission is vested with discretion not to dismiss an employee even if grounds for dismissal exist. (*Fontana Unified School District* (1988) 45 Cal.3d 208, 219-223.) In that case, the California Supreme Court explained, "nothing in the statutory scheme indicates that the commission must be bound by the district's choice to the extent that it is required to approve an

employee's dismissal if it is not persuaded, in the exercise of its discretion, that an offense is serious enough to warrant that step We thus cannot accept the proposition that discipline *must* be imposed, when a finding is made that cause for discipline exists." (*Id.* at p. 219.)

In this case, within *hours* of informing respondent that it would not agree to her accommodation request, the board authorized respondent's dismissal. Considering the district failed to comply with the procedural requirements of Section 44934, subdivision (b),⁵ it is quite evident that the district rushed to dismiss respondent, which

⁵ That provision provides: "Upon the filing of written charges, duly signed and verified by the person filing them, with the governing board of the school district, or upon a written statement of charges formulated by the governing board of the school district," charging that there exists cause to dismiss the employee, the board may, upon majority vote, give notice of its intention to dismiss the employee at the expiration of 30 days, unless the employee requests a hearing. In this matter, complainant signed and served the Statement of Charges *after* the board purportedly authorized respondent's dismissal. While the district violated the procedural requirements of Section 44934, subdivision (b), this was a nonsubstantive, nonprejudicial procedural error. (§ 44944, subd. (d)(2) [the Commission's decision that an employee should not be dismissed "shall not be based on nonsubstantive procedural errors committed by the school district or governing board of the school district unless the errors are prejudicial errors"]; *DeYoung v. Commission on Professional Competence* (2014) 228 Cal.App.4th 568 [violation of requirement to consider written charges before giving notice of intent to dismiss teacher did not invalidate his dismissal].)

is contrary to the legislative intent embodied in the statutory scheme and deprived respondent a meaningful opportunity to remediate her behavior. Under these circumstances, the Commission would also reject dismissal in its exercise of discretion.

16. In this case, the grounds for immediate suspension do not mirror the charges for dismissal. A preponderance of the evidence established that respondent willfully refused to “perform regular assignments without reasonable cause,” based on her refusal to submit to COVID-19 testing without reasonable cause when instructed to do so on September 28, 2021. (§ 44939, subd. (b).) Although there were grounds to suspend respondent without pay pending a hearing, the Commission is only authorized to suspend an employee if suspension proceedings were authorized pursuant to Section 44932, subdivision (b). (§ 44944, subd. (d)(3). In other words, the immediate suspension without pay is predicated upon upholding dismissal. Therefore, respondent is entitled to be made whole for any lost wages, benefits, and compensation from the time she was suspended without pay.

17. Any other assertions advanced by the parties not addressed above and inconsistent with this decision, have been considered and are found to be either moot or unpersuasive.

ORDER

The appeal by respondent Jennifer Humphreys is granted. The Fallbrook Union Elementary School District’s decision to dismiss respondent and immediately suspend her without pay is reversed. The district shall provide respondent back pay for any lost wages, benefits, and compensation from the time she was suspended without pay.

DATE: Jun 3, 2022


Adam Berg (Jun 3, 2022 10:53 PDT)

ADAM L. BERG


Administrative Law Judge

Office of Administrative Hearings


Paola Flores (Jun 3, 2022 10:54 PDT)

PAOLA FLORES

Commission Member


Karen R. Schuett (Jun 3, 2022 15:51 PDT)

KAREN SCHUETT

Commission Member