

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of the Appeal from Dismissal by:

ROY DESMANGLES, JR., Respondent

OAH No. 2022110760

DECISION

Jessica Wall, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on June 27 through 30, 2023, from Sacramento, California.

Monica M. Espejo and Eileen O'Hare-Anderson, Attorneys at Liebert Cassidy Whitmore, represented complainant San Joaquin Delta Community College District (District).

Gary G. Kreep, Robroy R. Fawcett, and Kenneth Ely, Attorneys at Law, represented respondent Roy Desmangles, Jr., who was present throughout the hearing.

The record remained open after the hearing's conclusion for the parties to submit written arguments. They did so timely, the record closed, and the matter submitted for decision on October 24, 2023.

FACTUAL FINDINGS

Jurisdictional Matters

1. The District serves residents of San Joaquin County and other counties around the Central Valley. Located in Stockton, California, San Joaquin Delta College (Delta College) is the District's main campus. The District educates approximately 14,000 students each year, the majority of whom are students of color.

2. The District hired respondent in January 2015 to serve as a full-time Counselor for the AFFIRM Program (AFFIRM) at Delta College. AFFIRM is a learning community that focuses on increasing the retention and transfer rates for African American and Black students. In February 2019, the District's Board of Trustees (Board) approved respondent's employment as a tenured faculty member. During the relevant period, respondent taught a single course in the fall semester titled, "Education and Interpersonal Growth."

3. On March 23, 2022, the District served respondent with a Notice of Intended Termination and an unsigned Statement of Charges. The documents informed respondent the District was recommending his termination based upon his alleged (1) evident unfitness for service; (2) persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the community colleges by the governing board of the community college district employing him; and (3) willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing district. (Ed. Code, §§ 87732, subds. (d), (f), 87735.)

Specifically, the Statement of Charges alleged respondent refused to comply with the District's COVID-19 safety protocols. Respondent received a religious exemption to the District's vaccine mandate. The Statement of Charges alleged respondent refused to agree to the accommodations offered pursuant to that exemption (wear a face covering on campus and test for COVID-19) or provide clarification about his objections to those accommodations in the interactive process. The District alleged these refusals meant the District could not depend on respondent to provide a safe environment for its diverse student body, including the vulnerable students in AFFIRM.

4. On June 21, 2022, Lisa Aguilera Lawrenson, Ph.D., Superintendent and President of Delta College, signed the Statement of Charges and Recommendation for Termination. The Board subsequently voted to terminate respondent's employment on July 5, 2022. Respondent timely requested a hearing under Education Code section 87673 and Government Code section 11506. This hearing followed.

Collective Bargaining Agreement

5. Respondent's position was subject to the collective bargaining agreement (CBA) between the District and the San Joaquin Delta College Teachers' Association (CTA). The CBA was a bilateral and binding agreement between the parties, which they supplemented with memoranda of understanding (MOUs). MOUs addressed significant issues that arose outside of the contract negotiation period and served as addenda to the CBA.

6. The District and CTA negotiated a CBA for the period of July 1, 2021, through June 30, 2024. Under Article II of the CBA, the CTA was "the exclusive representative of all full-time and adjunct faculty of the District, including librarians

and counselors, ... for the purposes of meeting and negotiating.” The CBA provides that any item negotiated and agreed to by both the District and the CTA becomes a part of the CBA. (CBA, § 1.4.)

7. The CBA requires the District to evaluate regular faculty members at least once every three years. (CBA, § 16.1.4.2.) If a faculty member is teaching an online course, the District observes “any communication platform such as live chat rooms, listservs, discussion forums and class and/or service materials excluding email.” (CBA, § 16.1.4.2.3.) If a faculty member’s evaluation indicates unsatisfactory performance in any area, “a performance improvement plan is required.” (CBA, § 16.1.5.)

8. “All faculty are expected to fulfill their professional obligations and to conduct themselves in a manner which is appropriate to an academic environment, is aligned with the District’s Mission Statement, and supports student success.” (CBA, § 29.1.) When a faculty member does not meet professional expectations or does not follow the District’s policies, procedures, or obligations under the CBA, there is a progressive discipline process. (CBA, § 29.3.) Progressive discipline applies unless the Vice President of Human Resources and Risk Management determines that skipping the steps is warranted under Education Code section 87732. The progressive discipline steps are as follows: (1) verbal discussion; (2) conference memorandum; (3) letter of reprimand; (4) formal reprimand letter; and (5) notice of intention to suspend, place on leave, reassign, or dismiss. (CBA, § 29.4.)

COVID-19 VACCINE MOU

9. In August 2021, the Board voted to institute a COVID-19 vaccine mandate as part of the District’s return-to-campus efforts. In the subsequent months, the District and the CTA drafted an MOU on the COVID-19 vaccine mandate (Vaccine

MOU) to effectuate the Board's vote. The Vaccine MOU was a bilateral agreement, executed by both the District and the CTA, which took effect October 11, 2021.

10. Under the Vaccine MOU, all employees had to be fully vaccinated for COVID-19 or apply for a medical or religious exemption by October 15, 2021. Employees who were in the process of complying, but had not fully complied by October 15, 2021, would receive a warning letter, and then had to test for COVID-19 twice a week until they provided proof of full vaccination. If that employee failed to comply fully by December 17, 2021, the employee would receive a final letter with intent to terminate. The District was to "begin the termination process no later than December 31, 2021." The employee would be placed on unpaid status effective January 1, 2022, and remain on unpaid status until the termination process concluded.

11. Employees who refused vaccination and did not apply for an exemption would receive a warning letter by October 16, 2021. That employee then had until December 17, 2021, to comply or be terminated. If at any point that employee refused to complete twice weekly COVID-19 testing, the employee would immediately be placed on unpaid status pending termination.

12. The Vaccine MOU provided policies for how an employee could request a medical or religious exemption to the vaccine mandate. It provided a link to a website with the exemption request form and instructions. Exemption requests were due by October 15, 2021. Once the employee completed the exemption request, the District would contact the employee about "next steps in the interactive process."

13. If the District denied the exemption request, the employee had to immediately comply with the vaccine mandate. Employees who received exemptions were "required to undergo COVID-19 testing twice a week for the indefinite future

even if they are working remotely.” The testing requirement only applied when the employee had an active assignment at the District. Staff did not need to test when classes were not in session.

The 2021–2022 School Year

14. During the 2021–2022 school year, Dr. Aguilera Lawrenson was the Assistant Superintendent/Vice President of Instruction and Planning. In her role, she made recommendations to the Board about termination. She was familiar with respondent from their work together on the Black Faculty Equity Task Force. She testified at hearing about her recollection of the events in the 2021–2022 school year.

15. Lonita Cordova, Ph.D., has been the Assistant Superintendent/Vice President of Student Services at Delta College since March 2021. The Student Services Division includes counseling faculty. During the 2021–2022 school year, Delta College had 30 counselors, including respondent. Dr. Cordova testified at hearing about respondent’s job duties and the District’s COVID-19 safety protocols.

AFFIRM

16. Delta College provided AFFIRM with a center for its learning community to gather. The AFFIRM center contained a front desk, a student study area with computers, and several offices, including respondent’s. Before the pandemic, the AFFIRM center was typically full during its open hours.

17. Respondent’s job was to provide one-on-one counseling to students and to teach. His focus was on supporting AFFIRM’s students so they would attend a four-year university after Delta College. Face-to-face contact was particularly important for students in AFFIRM. Like many staff members, respondent worked remotely at the

start of the pandemic. The District never approved him for permanent remote work. Delta College was repopulating during the 2021–2022 school year. Its learning communities were open, except AFFIRM. Dr. Cordova was concerned that the AFFIRM center remained closed because respondent was still working remotely.

DELTA COLLEGE’S COVID-19 SAFETY PROTOCOLS

18. Dr. Cordova was on the District’s COVID-19 Task Force. In setting safety protocols, the District reviewed state and local policies and aligned with the most conservative ones to protect its students and staff. For guidance on testing and masking, the District followed recommendations from the California Department of Public Health (CDPH), the California Division of Occupational Safety and Health (Cal/OSHA), and the San Joaquin County Health Department.

19. San Joaquin County required face masks for in-person interactions. Staff and students were required to wear face masks while interacting with others on campus. Masks were not required when working from home.

20. Local school districts in San Joaquin County imposed vaccine mandates. The District worked to mirror those efforts. All employees were subject to the vaccine mandate unless they received exemptions. This requirement reflected the evolving nature of when different departments returned to campus. Some fields, like nursing and transportation, had continued in person throughout the pandemic. Other departments had worked remotely and were transitioning back to in-person work. In November 2021, the District notified counselors that they were to work from campus in person once per week, beginning in January 2022. Their in-person days were staggered to limit exposure.

The Vaccine Exemption Process

21. Dana Kosaka has worked for the District for 23 years. She is a Human Resources Manager. She was involved in the District's handling of medical and religious exemption requests and tracked COVID-19 testing compliance. Ms. Kosaka testified at the hearing about her recollection of events during the 2021–2022 school year.

22. The District expected many exemption requests, so it retained Shaw Consulting (Shaw) to assist with the exemption process. The process followed a set structure with uniform documentation to ensure staff were treated equally. The first step was to go to the exemption website and fill out a form, indicating the intent to apply for an exemption. For religious exemptions, the form was titled "Religious Exemption Request Form for COVID-19 Vaccination" (religious exemption form). The form explained that the District would consider requests for sincerely held religious beliefs on an individual basis. It stated that religious beliefs included closely held moral/ethical convictions, but not purely personal preferences. Under the terms of the Vaccine MOU, employees had to submit the exemption request form by October 15, 2021.

23. Shaw received the requests and kept track of the interactive process. The District provided Shaw with the criteria that requests should meet, but Shaw did not make decisions for the District. Instead, Shaw aggregated all information and made presentations during weekly meetings with the District. Ms. Kosaka was on the panel that considered these requests. In videoconference meetings, the panel reviewed each request to decide whether to approve it, deny it, or seek more information. The District received a high number of religious requests and approved the vast majority. According to Ms. Kosaka, the standard for religious requests was light.

24. When the District approved an exemption request, the exemption only applied to vaccination. After approval, the employee would receive a standard letter with the same accommodations offered to others with approved exemption requests. For religious exemptions, those accommodations were to wear a face mask and test for COVID-19. The second step was to sign and return the Vaccine Exemption Accommodations Agreement (Accommodations Agreement). The Accommodations Agreement was a brief, one-page form with two checkboxes. The first checkbox stated that the employee would continue to work unvaccinated and agreed to the masking and testing accommodations. The second checkbox simply stated, "I do not agree with the above." It then asked the employee to "Please provide any clarification and/or corrections to the above to assist the parties to understand how best to support you going forward in this interactive process."

25. Employees who checked the second box, stating they disagreed with the accommodations, moved to a third step. The District engaged them in the interactive process to understand the reasons they could not mask or test and to find agreeable accommodations. Several employees completed the third step. Some employees wore face shields instead of face masks. Other employees took saliva-based COVID-19 tests instead of using swab-based tests. No employee with a vaccine exemption received an accommodation to skip COVID-19 testing altogether. This was because employees who worked remotely could choose to come on campus at any time, potentially infecting students and staff.

RESPONDENT'S RELIGIOUS EXEMPTION REQUEST

26. Elizabeth Maloney, Ed.D., is a full-time instructor at Delta College. She has been CTA president for eight years. Dr. Maloney testified about her recollection of the events that took place during the 2021–2022 school year. At the start of that year,

the CTA surveyed its members about the vaccine mandate. The CTA negotiated the Vaccine MOU based on the results of that survey.

27. In late September 2021, respondent was copied on an email chain between a member of his union and Dr. Maloney. The emails addressed the vaccine mandate and the ongoing communications between the CTA and the District about exemption forms. Dr. Maloney also communicated with respondent individually about his options. She spoke with him about the available exemptions and how to fill out forms. In their communications, respondent told her he wanted to work remotely, did not want to wear a mask, and did not want to put chemicals in his nose. He felt the District was being unreasonable, so the CTA referred him to its legal counsel, Eric Lindstrom.

28. On October 11, 2021, respondent emailed the District a list of concerns he had with the exemption process. His concerns included his belief that he taught successfully online; that he had "Natural Immunity" to COVID-19; that he did not agree with the form's options; that he did not feel he had enough time to review the forms; and that he felt entitled to know the ethnic backgrounds of those reviewing exemption requests.

29. Rebecca Wicks is a Senior Consultant at Shaw, where she has worked for the past nine years. She testified at the hearing about respondent's exemption request and the District's attempts to engage him in the interactive process. Ms. Wicks replied to respondent's email the day he sent it. She explained that the District would offer reasonable accommodations to employees with approved exemption requests. She detailed that the accommodations would generally consist of masking and testing. The District was unable to accommodate respondent's "Natural Immunity" request because

of Equal Employment Opportunity Commission (EEOC) rules. Ms. Wicks also offered respondent an extension to submit his request.

Respondent Submitted a Religious Exemption Request

30. On the evening of October 31, 2021, respondent faxed his religious exemption request to the District. On the form, he did not check the box that he worked on campus. Instead, he wrote he was currently working 100 percent online but worked on campus “when there is a normal/usual working environment.”

31. In response to the question asking respondent to describe his sincerely held religious beliefs, practices, or observances that conflicted with the COVID-19 vaccine, respondent wrote:

I am evoking [s/c] my legal right to ethical, moral and religious exemption. My spiritual convictions do not allow for any unwanted or unneeded intrusion on my mind, body or soul. I am exempt from your activities because they are opposed to my sincerely held [s/c] system of commitments. Much like my students with disabilities, I am ready to discuss reasonable accommodations. You are being formally notified that I am exempt from this process/activity based on my sincerely held spiritual commitments. The Most High created me fully equipped with a magnificent and Godly immune system and I will not alter The Most High’s incredible design. It is a moral sin to disavow the will of The Most High. I am completely healthy and have no sickness which might require medication advised by my

doctor when or if needed. It is against my God given conscience to allow anyone or anything to intrude into my body which is a temple of The Most High and I follow his commands. Deuteronomy 7:12-15 ... The Most High will keep me free from every disease ...

Respondent did not define or explain what he believed would be a mental, bodily, or spiritual intrusion. He did not reference masking or testing, or state that his religious objection expanded beyond vaccination.

32. In response to the question asking how respondent has applied his sincerely held religious beliefs about vaccines and preventative medicine in other contexts, respondent wrote:

I do not worry about drugs of any sort because The Most High instructs me in everything that I do. I have been instructed to stay physically fit and to eat of the fruit of the Most High. Timothy 4:8

For physical training is of some value, but godliness has value for all things, holding promise for both the present life and the life to come.

Jeremiah 33:6 Nevertheless, I will bring health and healing to it; I will heal my people and will let them enjoy abundant peace and security.

33. The form also asked if respondent could provide documentation to support his sincerely held religious belief and need for an exemption, providing two checkboxes (Yes or No). Respondent did not check either box or provide

documentation. Instead, he wrote, "By way of this form—I have answered all your questions to the best of my ability. Feel free to reach out if you need to communicate." Respondent signed the form and dated it "10-27-31."

The District Granted Respondent's Exemption Request and Began the Interactive Process

34. On November 3, 2021, the District granted respondent's religious exemption request. Dr. Vicki Nicholson, the Interim Vice President of Human Resources, sent respondent a letter titled, "Interactive Process Update: COVID-19 Religious Vaccine Exemption Approval & Vaccine Exemption Agreement." The letter said, in relevant part:

[The] District has approved your religious exemption and approved your presence at work unvaccinated with the provision that you will be required to continue to wear an approved face covering until such time [the District] determines unvaccinated employees may remove face coverings. In addition to this, you will be subject to COVID-19 testing and/or other safety measures as required by [the District].

To memorialize the exemption, the District required respondent to sign and return the Accommodations Agreement. The deadline was November 10, 2021.

35. Respondent received a reminder email to sign the Accommodations Agreement on November 9, 2021, the day before the form was due. He responded the next day that he was "send[ing] this info to [his] counselor" and would then respond.

36. When respondent failed to submit the Accommodations Agreement, Dr. Nicholson followed up on December 2, 2021. Like the prior letter, Dr. Nicholson advised respondent that the District had granted him a vaccine exemption, and he needed to submit the Accommodations Agreement. She extended his deadline until December 7, 2021.

37. A week later, respondent emailed his direct supervisor, Elizabeth David, Dean of Student Services, copying Ms. Kosaka and Ms. Wicks. He wrote that he was "in an unknown quandary" because he felt the accommodations were "unreasonable institutional dictates." Respondent repeated that he would not agree "to any unwanted intrusions on or in my body." This time, he specified that his perception of "unwanted intrusions" included "a face mask or drug experiments." He did not define "drug experiments," and Ms. Kosaka testified she did not understand what he meant. Respondent further wrote that he was "not going to place [his] body in any jeopardy because [he was] very healthy and doing great with [his] natural antibodies and a strong and powerful immune system."

38. Respondent did not comply with the Vaccine MOU by the December 2021 deadline. By January 2022, respondent still had not returned that Accommodations Agreement. He emailed District employees again on January 19, 2022, copying his legal counsel, Mr. Lindstrom. In that email, respondent expressed he would not sign the form because he disagreed with the accommodations. His email focused on his health, rather than his religious beliefs. He wrote his "health [was] exceptional" and he had "a strong immune system and strong antibodies." Conversely, he challenged whether the campus was safe enough for him to return since he felt safe at home. He further argued he had "a legal religious exemption from unwanted

intrusions on or in my body.” He did not clarify how masking or testing conflicted with his religious beliefs.

39. Ms. Wicks showed respondent’s email to the panel, who expressed they needed more clarification about how masking and testing conflicted with respondent’s religious beliefs. At the hearing, Ms. Wicks explained how flexible the District tried to be, repeatedly offering individuals extensions and following up when deadlines approached. The District was open to exploring alternative accommodations with respondent. It just needed more information.

40. To better understand the religious basis for respondent’s objections, the District sent him another letter on January 20, 2022. In this letter, Dr. Nicholson requested that respondent submit a Religious Clarification Form, explaining how his sincerely held religious beliefs impacted the accommodations offered by the District. The District gave him until January 27, 2022, to return the completed form.

41. The Religious Clarification Form had four simple questions. First, it asked whether wearing a face mask conflicted with the employee’s religious beliefs. If so, the employee was given room to explain that conflict. Second, if the employee had a religious objection to masking, it asked whether that objection applied to all types of face coverings, such as cloth masks and face shields. Third, the form asked if taking a COVID-19 test conflicted with the employee’s religious beliefs. If it did, the form provided space for the employee to explain the conflict. Fourth, if the employee had a religious objection to COVID-19 testing, the form asked if that objection extended to all types of COVID-19 tests. The employee was required to sign the form, certifying the answers were true and accurate.

The District Closed the Interactive Process

42. Another month passed and respondent did not return the Religious Clarification Form. Ms. Kosaka testified about her perception that respondent was not willing to interact with the District. She wanted to work with him to find a solution. Yet respondent refused to cooperate, return the necessary forms, and provide clarity about his religious objections. The whole process took several months beyond the Vaccine MOU's deadlines because the District repeatedly extended the time for respondent, hoping to gain his compliance.

43. On February 23, 2022, Dr. Nicholson sent respondent a letter titled, "Interactive Process: COVID-19 Religious Vaccine Exemption Notice of File Closure." Over 100 days had passed since the District granted respondent's religious vaccine exemption and began the interactive process. The letter memorialized the communications between respondent and the District from October 2021 through February 2022. It stated, in relevant part:

You did not return a completed Religious Clarification Form by January 27, 2022. As such, the [District] only has your above emails to understand your inability to wear a face covering and COVID-19 test. In reviewing the above emails, it does not appear your objection to wear a face covering and COVID-19 test is religious in nature. As such, please allow this letter to serve as notice that your religious interactive process is being concluded and the District will not provide additional accommodations to you. As such, the San Joaquin Delta Community College will

expect you to wear an approved face covering and COVID-19 testing 2x weekly in accordance with its policies.

44. Three days later, respondent responded. He wrote, in relevant part:

I have said from the beginning while evoking [*sic*] my legal right to a religious exemption that I will not allow ungodly intrusions in or on my body. The experimental drug, the masks and testing have all been mentioned and discussed rather openly throughout this process and they are all unnecessary, unwanted, and ungodly intrusions. I do not sign documents that have pending disagreements. Perhaps, there is a misunderstanding whereby Liz Maloney could be an intermediary or a mediator. In more than 40 years of education employment, I have never had an employer ask me so many questions centered around my spirituality and frankly it is and [*sic*] intrusive and uncomfortable and maybe an illegal process. I remind you that I am working productively from home and have been for 2 years. Masks and testing are very questionable matters, particularly now, and I group these matters in my religious exemption.

He did not provide any further clarification about how face masks and COVID-19 testing violated his religious beliefs. He did not specify whether his objections applied to all face coverings and types of COVID-19 tests.

DISABILITY ACCOMMODATION REQUEST

45. After the interactive process closed on his religious exemption request, respondent sought a disability accommodation to work remotely. Respondent sent the District a March 9, 2022, email requesting medical accommodations. Attached to the email was a "COVID-19 Request for Temporary Reasonable Accommodation" form, dated March 3, 2022. On the form, respondent requested a remote work assignment and stated: "I HAVE MAINTAINED A HIGH WORK LOAD [*sic*] AND PERFORMANCE WORKING REMOTELY AND THAT WILL CONTINUE." He listed the expected duration of his accommodation as March 3 through May 20, 2022. He did not sign the form or certify the accommodation was required because of the COVID-19 pandemic.

46. Respondent also attached an undated letter from his physician, Mohammad Reza, M.D. That letter stated:

Patient had an appointment with Dr. Reza on 3/3/2022.

Please allow patient to continue to work remotely from home until 5/20/22 given his current age and risk factor.

Thank you for your consideration.

47. Initially, there was a delay in responding to respondent's request because he sent it to the wrong email address. On April 12, 2022, the District sent respondent a letter about the disability interactive process. The letter advised him that his doctor's letter did not indicate he required COVID-19-related accommodations. Thus, the letter denied his disability accommodation request.

RESPONDENT'S PERFORMANCE REVIEW

48. Dean David worked for the District from September 2021 through June 2023. She was respondent's direct supervisor and testified at the hearing about remote learning and respondent's 2021 performance review. Dean David was familiar with studies documenting the negative impact that remote learning had on students. Not all students had adequate access to technology and some of the programs offered at Delta College could not be converted to an online equivalent.

49. Between October and December 2021, Dean David evaluated respondent's performance in his online course and a counseling appointment. Dean David is a former faculty member with certifications in online course instruction. She was concerned about the lack of content in respondent's course website. While many instructors would post videos, comparable to a presentation, respondent did not. He also did not provide any activities for student participation.

50. Respondent received positive remarks in most categories on his performance review. Yet in two areas, he failed to meet standards. Under Organization and Use of Time, Dean David noted that respondent needed to improve his organization and align his course curriculum with the themes and number of lecture hours required. Under Presentation/Delivery, he failed to meet standards because his course did not have sufficient instructional content, lecture hours, and activities. Respondent's performance evaluation did not include respondent's noncompliance with the District's COVID-19 protocols because that was not within Dean David's purview to evaluate.

51. On December 9, 2021, Dean David met with respondent via videoconference to answer his questions and provide feedback. She recalled that

respondent felt there would be no impact on his students if he continued to work remotely. She disagreed. Dean David also allowed respondent to go over the evaluation with his union representative. Dr. Maloney was present at the meeting where respondent discussed his objections to the evaluation. She recalled that respondent disagreed with why he received unsatisfactory marks, minimizing the issues as a small part of his job.

52. Dean David sent respondent a copy of the performance evaluation, dated December 15, 2021, for his signature via DocuSign. Above the instructor's signature line, the form stated, in relevant part, "I have reviewed this evaluation, but my signature does not necessarily indicate my agreement with the evaluation." Respondent refused to sign the performance evaluation because he disagreed with the evaluation. He had until March 28, 2022, to provide a response. He did not do so.

53. A performance improvement plan (PIP) is required when a faculty member fails to meet performance standards. The PIP outlines the deficiencies, what support the faculty member needs to succeed, and a timeline for additional review. Dean David found no deficiencies with respondent's counseling session and offered him the opportunity to avoid a PIP if he chose to stop teaching. She recognized, however, that many District employees would be reluctant to give up a part-time teaching assignment because the overtime hours made it so lucrative.

54. If respondent wanted to continue teaching, he needed to follow the PIP. The PIP required respondent to complete training on how to teach an online course, update his course website to include necessary content, find a faculty peer mentor to help him with course design and development, and engage in peer shadowing or research activities related to his deficiencies. Dean David offered respondent time to consider his options and gave him until May 2022 to decide.

DECISION TO TERMINATE

Letter of Warning

55. The District supplied COVID-19 tests for individuals required to test. The individuals tested through a proctored website and reported their results to the District. Ms. Kosaka tracked employee testing and confirmed that respondent never submitted test results during the 2021–2022 school year or requested saliva-based testing.

56. On March 11, 2021, Dean David prepared a Letter of Warning for respondent. The letter stated it was to “serve as a Letter of Reprimand regarding [respondent’s] insubordination by failing to follow the [District’s] vaccination mandate for all employees and students of the [District].” She advised respondent about the grounds for termination later listed in the Statement of Charges.

Specifically, the letter informed respondent that employees granted a religious exemption to the vaccine mandate needed to submit COVID-19 test results twice weekly. Respondent failed to comply. Dean David provided the timeline of respondent’s request for exemption and reminded him that he had failed to return the Religious Clarification Form, which the District interpreted as his disengagement from the interactive process. The letter also warned respondent about the consequences of continued noncompliance, as follows:

Your actions, in continually refusing or otherwise failing to comply with the District’s mandate and the MOU constitutes grounds for discipline under the CTA Contract. Your failure to follow the District’s vaccination requirement places your colleagues, the District’s students, and the

community at risk. Especially during a pandemic and a state of emergency, the District must be able to depend on its employees to comply with directives and act in a safe manner.

The letter gave respondent seven days to come into compliance by testing for COVID-19 twice a week or he would be terminated.

Notice of Intended Termination

57. On March 23, 2022, Dr. Nicholson issued respondent a letter about the District's intent to terminate his employment. She attached the Statement of Charges, which set forth the factual findings underlying the notice. Respondent had until April 15, 2022, to present relevant information to the human resources department.

58. On April 13, 2022, respondent submitted a letter to the District instead of attending a meeting under *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194. In that letter, respondent's attorney, Mr. Lindstrom, argued that respondent's failure to comply with COVID-19 safety protocols did not impact his ability to perform his job duties. He described the interactive process pursued by the District as composed of "cold, inflexible, and untailored form letters," and argued that the District did not consider respondent's individual circumstances. The letter demanded respondent be allowed to work from home indefinitely.

Recommendation to Terminate and Board Vote

59. The District advised respondent that his termination would be considered at the Board meeting on July 5, 2022, and provided him with the relevant documents in advance. Dr. Aguilera Lawrenson signed a Recommendation for Statement of

Decision to Terminate. She recommended the Board terminate respondent's employment. She wrote that respondent's conduct had disrupted the District's orderly administration and negatively impacted student education.

60. On July 5, 2022, the Board voted to terminate respondent. In the Resolution of Termination, the Board noted it had considered Dr. Aguilera Lawrenson's July 2022 recommendation, as well as respondent's December 2021 performance evaluation, in reaching its conclusion. The Board found the charges constituted good cause to terminate respondent under the Education Code. The termination was effective 30 days after respondent was served with notice of his termination.

61. The District served respondent with notice of his termination on July 7, 2022. Respondent sent his notice of defense and requested a hearing on July 11, 2022.

62. On October 18, 2022, the Board passed an additional resolution to address the issue of unpaid suspension. The amended resolution stated, in part:

Pursuant to the provisions of the California Education Code sections 87732, 87735 and 87666 et seq., the Board of Trustees terminates and suspends [respondent] without pay, retroactively to July 5, 2022.

63. The District's witnesses testified about the number of employees terminated because they would not comply with the vaccine mandate and related accommodation requirements. Respondent was one of two permanent employees terminated for this reason. In addition, about 100 adjunct faculty were released for non-compliance. Some chose to resign, while others were terminated.

Respondent's Evidence

RESPONDENT'S TESTIMONY

64. Respondent testified extensively at the hearing. He started as a full-time counselor for AFFIRM in January 2015. Before Delta College, respondent worked with the RISE program at Sacramento City College, a community college in a different district.

65. Respondent lives in Lincoln, California, 80 miles from Delta College. His typical commute to Delta College was 80 minutes each way. He commuted to work in-person for five years, then worked remotely for the first two years of the pandemic. Respondent wanted to continue teleworking because he felt safer at home. He understood that COVID-19 was a serious illness that caused harm. At 66 years old, he was in a high-risk group.

66. Respondent spoke highly of his specialty in assisting high-need students. He believed that his skills and presence transformed AFFIRM. AFFIRM's students needed a lot of coaching. A lot of these students lacked personal computers and internet access, limiting their ability to study at home.

Vaccine Exemption and Accommodations Process

67. At the hearing, respondent did not dispute that the District had granted him a religious exemption to the vaccine mandate. The issue was the accommodation the District offered him. Respondent explained for the first time at the hearing that he did not want to wear a face mask because he has hypoxia and claustrophobia. He did not provide medical documentation about these diagnoses and could not explain how these medical conditions related to his religious beliefs.

68. Respondent also provided further detail about his objection to COVID-19 testing. Respondent did his own research during the pandemic. In that research, he discovered a theory that the swabs used in COVID-19 testing were laced with toxic chemicals. This theory led him to conclude that swab-based COVID-19 tests were ungodly because he would be putting toxic chemicals inside his nose or mouth. Respondent testified that he requested saliva-based COVID-19 testing during the 2021–2022 school year. He was unable to produce any evidence of that request.

69. Respondent testified that the title of the exemption form, "Religious Exemption Request Form for COVID-19 Vaccination," was ambiguous. He thought the form was not specific to vaccination and applied to testing and masking. After the District approved his exemption, respondent recalled receiving the Accommodations Agreement. Feeling like it "imposed upon" him, he sought legal counsel. Because he did not agree with the accommodations offered, he refused to sign it. Respondent testified if he checked the second checkbox, which reflected he did not agree to the accommodations, it would mean he agreed to them. He was offended the District asked him how masking and testing violated his religious beliefs. He considers his religion to be private. He felt the entire process was "delusional."

70. Respondent agreed he never returned the Accommodations Agreement or Religious Clarification Form to the District. He understood there were deadlines to return the forms, but he wanted "a meeting of the minds." Nevertheless, he also acquiesced that he never requested a meeting. He was "trying to buy time." Similarly, he does not dispute that he never tested for COVID-19.

71. Respondent felt surprised by the Letter of Warning. He found it offensive and rude, believing that it questioned his credibility and professionalism. He described

the Letter of Warning, as well as the Statement of Charges, as “abusive.” Respondent believed that he “engaged with everybody.”

72. Respondent would be willing to return to the District if he was not required to comply with COVID-19 safety protocols. When asked if there was anything he would do differently in retrospect, respondent spoke at length about his desire to communicate. He did not express remorse for his actions or the impact his choices had on students. Likewise, he did not identify anything he would change going forward.

Performance Evaluations

73. Respondent provided several performance evaluations from his time at Delta College. His student reviews were positive. In 2017 and 2018, he received an overall rating of “competent.” The tenure review committee noted in his 2018 review that he lacked responsiveness in “Organization and Use of Time” and needed reminders to complete professional obligations. Nevertheless, he improved after his supervisor addressed the deficiencies with him directly. Right before the tenure decision in January 2019, his rating increased to “strong.” The committee found respondent improved in the areas where he was previously borderline.

74. Respondent did not dispute he received the December 2021 performance review and met with Dean David and Dr. Maloney about his objections. He testified the December 2021 performance evaluation was the first negative review he received in 45 years of education work. Respondent believed he was more knowledgeable about teaching his course than Dean David. He decided to “exert faculty freedom” rather than operate within the normal curriculum requirements. He said a prior dean permitted him to do so.

Specifically, respondent did not like Canvas, the District's official platform for online instruction. He thought it worked poorly. He chose not to use Canvas and substituted with other methods. Respondent taught his course using emails, text messages, and other websites. He testified that he could have used Canvas like his colleagues, but he made "an executive decision" to do something different. He also thought the deficiencies in his online instruction were moot because he was not teaching in Fall 2022. His course no longer qualified for transfer credits.

RESPONDENT'S WITNESSES

75. Respondent offered the testimony of several character witnesses at the hearing. None of his witnesses had reviewed the Statement of Charges or had personal knowledge about the facts alleged, other than what respondent and his attorneys told them.

76. Daniel Fernandez is a professor and counselor with the Puente Program at Delta College, a learning community for Latino students. Mr. Fernandez has worked at Delta College for seven years. During the pandemic, his relationship with respondent grew close because they were both focusing on ethnic-specific programming. He thinks respondent is a good counselor. Mr. Fernandez eventually returned to campus and wore a face mask in common areas. He chose to mask and be vaccinated because he respects other people.

77. Randolph Gaines has worked at Delta College since 1981. He has worked in the position of counselor for 22 years and teaches a course. He believes respondent made AFFIRM more successful during his years at Delta College. Jonathan Harris has been a part-time counselor at Delta College since 2013. He was respondent's colleague in AFFIRM from 2014 until the pandemic began. He testified about how

AFFIRM thrived when it was in-person. During the pandemic, AFFIRM experienced challenges because some students lacked internet access and equipment. Mr. Harris returned to the general counseling department when the campus repopulated.

78. Angela Williams has worked for Delta College since 1993. She has been a resource specialist for the past nine years. She worked with respondent planning activities for AFFIRM. She explained respondent was like a father figure to many students and cared about their success. Ms. Williams returned to campus in July 2022. Many of AFFIRM's students have not come back to campus because they prefer to take classes online. She believed it could help AFFIRM to have respondent, or someone like him, back on campus to reinvigorate AFFIRM. She agreed face-to-face interaction was important in AFFIRM but also thought they used technology to communicate effectively during the pandemic.

79. Destiny Akins is a graduate of AFFIRM. She attended Delta College from 2017 to 2020 and graduated before the pandemic. Ms. Akins used respondent's services as a counselor, teacher, and mentor. She described respondent as an inspirational figure who was dedicated to his students. Ms. Akins spent much of her time at Delta College in the AFFIRM center. During those years, the center was busy, loud, and full of students. Ms. Akins has visited the AFFIRM center since she graduated and testified it is now "bleak" and less populated.

80. Evan Wade is a history professor at Delta College, where he has worked for the past nine years. Mr. Wade teaches courses for AFFIRM and co-chaired the Black Faculty Task Force with respondent. He thinks respondent was an "awesome" colleague who helped AFFIRM improve student outcomes. Mr. Wade is "a Christian, first and foremost," and maintains that his religious beliefs trump District policies. Mr. Wade was able to comply with the District's COVID-19 safety protocols without

violating his religious beliefs. Still, he thinks it was “profound and brilliant” that respondent stood on his religious principles.

RESPONDENT’S LEGAL ARGUMENTS

81. In his briefs and at hearing, respondent presented a plethora of legal arguments. He argued the District violated the California Fair Employment and Housing Act (FEHA) and Title VII of the Civil Rights Act of 1964 (Title VII) by not granting him his preferred accommodation. He contended the District’s vaccine mandate was preempted because the California State Legislature fully occupied the legal field related to the vaccination of employees in state educational facilities. He asserted that the vaccine mandate violated the First and Fourteenth Amendments to the United States Constitution, as well as the California Constitution.

82. Respondent also argued the District failed to impose progressive discipline, in violation of the CBA. He contended that the CBA and Vaccine MOU cannot be considered reasonable regulations. He asserted the Board could not terminate him under Education Code section 87732 because his performance review was unsigned and did not relate to his noncompliance with COVID-19 safety protocols. He argued Education Code section 87735 does not apply to faculty. He asserted the District abused its discretion. Finally, respondent argued multiple issues related to his compensation grievance and termination date.

LEGAL CONCLUSIONS

1. A community college district that seeks to dismiss a tenured academic employee bears the burden of establishing the appropriateness of that action by a preponderance of the evidence. (Evid. Code, §§ 115; 500; *Ricasa v. Office of Admin.*

Hearings (2018) 31 Cal.App.5th 262, 270 (*Ricasa*.) Preponderance of the evidence means "evidence that has more convincing force than that opposed to it." (*People v. Mabini* (2001) 92 Cal.App.4th 654, 663.)

2. "The terms and conditions of employment for community college employees are governed by a comprehensive statutory scheme set forth in the Education Code." (*Ricasa, supra*, 31 Cal.App.5th at p. 272.) Education Code section 87667 provides that a regular employee may be dismissed for one or more of the grounds set forth in Education Code section 87732. "A 'regular' employee is ... one who has achieved tenure." (*Ricasa, supra*, 31 Cal.App.5th at p. 272.)

3. In the dismissal of a regular employee, Education Code section 87671 requires the following conditions to be satisfied:

(a) The employee has been evaluated in accordance with standards and procedures established in accordance with the provisions of this article.

(b) The district governing board has received all statements of evaluation which considered the events for which dismissal or penalties may be imposed.

(c) The district governing board has received recommendations of the superintendent of the district and, if the employee is working for a community college, the recommendations of the president of that community college.

(d) The district governing board has considered the statements of evaluation and the recommendations in a lawful meeting of the board.

4. Education Code section 87732 provides that an academic employee shall not be dismissed except for one or more enumerated causes, including:

(d) Evident unfitness for service.

[¶] ... [¶]

(f) Persistent violation of, or refusal to obey, the school laws of the state or reasonable regulations prescribed for the government of the community colleges by the board of governors or by the governing board of the community college district employing him or her.

5. Education Code section 87735 provides, in relevant part, that:

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

her suspension, and that 30 days after service of the notice, he or she will be dismissed, unless he or she demands a hearing.

6. Following an evidentiary hearing, "the administrative law judge shall determine whether there is cause to dismiss or penalize the employee. If he or she finds cause, he or she shall determine whether the employee shall be dismissed and determine the precise penalty to be imposed, and shall determine whether his or her decision should be imposed immediately or postponed pursuant to Section 87672." (Ed. Code, § 87680.)

Respondent's Legal Arguments

STATUTORY CIVIL RIGHTS CLAIMS

7. Respondent argued the District should have granted him his preferred accommodation to work remotely. He believes its failure to do so violated his religious rights under FEHA and Title VII.

8. To establish a prima facie case of religious discrimination, respondent had to show "(1) he had a bona fide religious belief, the practice of which conflicts with an employment duty; (2) he informed his employer of the belief and conflict; and (3) the employer discharged, threatened, or otherwise subjected him to an adverse employment action because of his inability to fulfill the job requirement." (*Berry v. Dept. of Social Services* (9th Cir. 2006) 447 F.3d 642, 654.) The District accepted that respondent had a bona fide religious belief when it granted him a religious exemption from the vaccine mandate. Respondent refused to return the Religious Clarification Form, choosing not to provide the information necessary to inform the District about the conflict between his religious beliefs and the proffered accommodations.

9. To the extent respondent argued the District deprived him of his preferred accommodation, that argument fails. (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 228 [“As the Supreme Court has held in analogous circumstances, an employee cannot make his employer provide a specific accommodation if another reasonable accommodation is instead provided.”].) Respondent did not carry his burden with respect to his statutory civil rights defenses.

CONSTITUTIONAL CLAIMS

10. Respondent also argued the District’s vaccine mandate violated the First Amendment’s Free Exercise Clause, the First Amendment prohibition on penalizing an employee for exercising a constitutional right, and similar protections under the California Constitution. Additionally, he contended the District treated him differently because of his religion, and thus violated the Fourteenth Amendment.

11. Neutral and generally applicable laws seeking to protect community health and safety do not violate free exercise rights. (*Doe v. San Diego Unified School Dist.* (9th Cir. 2021) 19 F.4th 1173, 1177, *reconsideration en banc den.* (9th Cir. 2022) 22 F.4th 1099.) Likewise, the desire to curb the spread of communicable diseases through vaccination is a compelling governmental interest that outweighs free exercise concerns under the California Constitution. (*Brown v. Smith* (2018) 24 Cal.App.5th 1135, 1145.)

12. Governmental powers are even broader in the context of the employer-employee relationship. (*Waters v. Churchill* (1994) 511 U.S. 661, 671.) Courts have approved the constitutionality of vaccine mandates and mask/test accommodations at other postsecondary educational institutions. (See, e.g., *Klaassen v. Trustees of Indiana Univ.* (7th Cir. 2021) 7 F.4th 592, 593 (Easterbrook, J.) [“These plaintiffs just need to

wear masks and be tested, requirements that are not constitutionally problematic.”]; *Norris v. Stanley* (6th Cir. 2023) 73 F.4th 431, 437.)

13. On its face, the Vaccine MOU was neutral and applied to all members of the CTA, regardless of religious beliefs. The Vaccine MOU only referenced religion with respect to the process for applying for an exemption. As applied, the Vaccine MOU was also neutral. Respondent did not show he was treated differently than other employees because of his religious beliefs. Multiple witnesses discussed the District’s flexibility with religious accommodations and the light standard imposed for granting religious requests, so long as the employee participated in the interactive process.

14. The evidence showed respondent’s refusal to provide clarification closed the interactive process. Thereafter, his refusal to comply with District COVID-19 safety protocols and test biweekly, not his religious beliefs, resulted in his termination. Respondent did not provide evidence that the District showed any religious animus.

PREEMPTION ARGUMENT

15. Respondent further contended the California State Legislature preempted the issue of vaccination requirements at state educational facilities. In support of this argument, respondent cited to California Code of Regulation, title 8, sections 5199 and 3205; Health & Safety Code section 120360; and *Let Them Choose v. San Diego Unified School Dist.* (2022) 85 Cal.App.5th 693, 705, *review den.* (Feb. 22, 2023) (“*Let Them Choose*”).

16. Cal/OSHA’s “Aerosol Transmissible Diseases” standard (Cal. Code Regs., tit. 8, § 5199) “is limited to only certain employers, such as medical services and facilities, certain laboratories, correctional facilities, homeless shelters, and drug treatment programs.” (*Western Growers Assn. v. Occupational Safety and Health Stds.*

Bd. (2021) 73 Cal.App.5th 916, 927 fn. 2.) Community colleges are not among the listed facilities. (Cal. Code Regs., tit. 8, § 5199, subd. (a)(1).) California Code of Regulation, title 8, section 3205 requires employees to wear face masks when required by a CDPH order and authorizes more protective or stringent local orders and guidance. (Cal. Code Regs., tit. 8, § 3205, subds. (f)(1) & (a)(3).) The regulation is silent on the issue of whether an employer can require employees to be vaccinated for COVID-19.

17. Health and Safety Code section 120360 provides that the statute governing compulsory student vaccination does not apply to adults or minors seeking to enroll in community college. (See also Health & Saf. Code, § 120335, subd. (b).) Correspondingly, in interpreting that statute, the court of appeal addressed preemption solely in the context of vaccination requirements for students in primary and secondary education. (*Let Them Choose, supra*, Cal.App.5th at pp. 705–706.) None of the sources respondent cited addressed requirements applicable to employees working in public postsecondary educational institutions.

EDUCATION CODE ARGUMENTS

Section 87732

18. First, respondent argued the CBA and Vaccine MOU do not qualify for consideration under Education Code section 87732. He asserted the CBA and Vaccine MOU set forth contractual obligations and refusing to comply cannot constitute a violation under Education Code section 87732.

19. Education Code section 87732, subdivision (f), provides that a regular employee may be terminated for persistently violating or refusing to obey “reasonable regulations prescribed for the government of the community colleges by the board of governors or by the governing board of the community college district employing him

or her.” Here, the District’s Board voted to mandate vaccines for all employees in August 2021. The Vaccine MOU effectuated that vote and thus constituted a regulation that the Board prescribed for the health and safety of students and staff. Respondent did not offer evidence demonstrating that this regulation was objectively unreasonable.

Sections 87735 and 87622

20. Next, respondent argued Education Code section 87735 cannot penalize a faculty member. Under respondent’s interpretation of Education Code section 87622, the only section of Article 6 that applies to faculty members is section 87732.

21. Education Code, title 3, division 7, part 51, includes the statutes governing community college employees. Relevant articles include Article 2 (“Employment of Faculty”), Article 4 (“Evaluations and Discipline”), and Article 6 (“Termination of Services and Reduction in Force”). Article 3 (“Community College Faculty”) includes Education Code section 87622, which provides:

The employment, rights, responsibilities, dismissal, imposition of penalties for persons employed by a community college district in faculty positions shall be governed by Article 2 (commencing with Section 87600), and Article 4 (commencing with Section 87660). The employment of faculty by a community college district shall otherwise be governed as provided by law and in a manner consistent with Articles 2 and 4 and with this article (hereinafter referred to in this article, collectively, as “this act”).

This act shall take precedence, for the purposes of community college faculty, over any other act enacted by the Legislature at any session which, explicitly or implicitly, would result in community college faculty being governed by provisions inconsistent with this act.

22. Courts reviewing similar arguments have looked to whether the relevant Education Code sections are distinct from or consistent with section 87622. (See *Santa Monica College Faculty Assn. v. Santa Monica Community College Dist.* (2015) 243 Cal.App.4th 538, 554.) Here, Article 6, section 87735, is consistent with section 87622 and Articles 2 and 4. Section 87735 applies to permanent employees and Article 2, section 87602, subdivision (b), defines “permanent employee” to include tenured faculty members.

23. Read as a whole, the sections in Article 4 set forth the procedures to be followed before pursuing termination or other penalties under Article 6. For instance, Article 4, section 87667 provides that a regular employee may be dismissed or penalized for one or more grounds listed in Article 6, section 87732. Article 4 also provides that employees can be subject to penalties other than dismissal. (Ed. Code, §§ 87666–87669). Specifically, Article 4, section 87668 considers suspensions, the subject of Article 6, section 87735, and includes unpaid suspensions. Recognizing that Article 4 procedures generally apply to Article 6, only one exception was specified: suspensions for sex and narcotics offenses under section 87736. (Ed. Code, § 87670.)

24. Indeed, Article 4 recognizes there are “[o]ther provisions of [the Education] code which govern the evaluation of, dismissal of, and the imposition of penalties on, community college faculty,” and requires those other provisions apply consistently with Article 4. (Ed. Code, § 87660.) In sum, Education Code section 87735

is consistent with section 87622 and Articles 2 and 4. This conclusion aligns with precedent, under which other districts have suspended faculty members under Education Code section 87735. (See, e.g., *West Valley-Mission Community College Dist. v. Concepcion* (1993) 16 Cal.App.4th 1766.)

Sections 87671 and 87672

25. Finally, respondent asserted the Board could not terminate him under Education Code section 87732 because his performance review was unsigned and did not detail his noncompliance with COVID-19 safety protocols. In support of this argument, he cited Education Code section 87671. He also argued the Board only offered him “an incomplete and imprecise decision and its reasons,” violating Education Code section 87672.

26. Under Education Code section 87671, the District may dismiss or penalize a regular employee if one or more of the grounds outlined in Section 87732 are present and the following criteria are satisfied. Here, respondent’s last performance evaluation was performed in Fall 2021. His supervisor, Dean David, did not assess his failure to comply with the District’s COVID-19 protocols because that was outside her purview. Instead, she assessed his counseling and teaching. While the former was fine, the latter was deficient. As detailed above, respondent’s performance evaluation was unsigned because he refused to sign it. There is no factual dispute that he received it and had meetings with Dean David and Dr. Maloney to review his objections. Respondent was evaluated as required. He cannot use his refusal to sign the evaluation to exculpate himself.

27. At the July 2022 meeting, the Board was provided with respondent’s evaluation, as well as the Statement of Charges, Dr. Aguilera Lawrenson’s

recommendation, the Vaccine MOU, respondent's exemption request, interactive process letters, emails between respondent and the exemption/accommodation team, the Letter of Warning, and respondent's February 2022 response. These documents included "all statements of evaluation which considered the events for which dismissal or penalties may be imposed." Respondent did not argue any documents were improperly omitted. Rather, he interpreted section 87671 to require his December 2021 performance evaluation to detail the reasons for which he was terminated. The Education Code does not require this. All the documents that the Board must consider were present at the time the Board made its decision.

28. On July 7, 2022, the Board sent respondent the Notice of the Decision to Terminate. This letter set forth that the Board decided there was cause to terminate respondent based on the reasons outlined in the Statement of Charges. The notice satisfied the Education Code's requirement that the Board provide respondent with a written statement setting forth the Board's complete and precise decision and its reasons therefor. (Ed. Code, § 87672.)

CONTRACTUAL ARGUMENTS

29. Respondent also argued the District violated the CBA by not engaging in progressive discipline. He asserted the CBA only allows the District to skip the steps of progressive discipline for violations related to Education Code section 87732, which he does not believe he violated.

30. The CBA provides that when a faculty member violates District policies and procedures, progressive discipline will be used unless skipping steps is warranted because the conduct related to an Education Code section 87732 violation. (CBA, § 29.3.) The Vaccine MOU gave employees until December 17, 2021, to comply or be

terminated. It required employees who applied for or received a vaccine exemption to test for COVID-19 twice a week. Employees who failed to comply were to be placed on unpaid status effective January 1, 2022, and remain on unpaid status throughout the termination process.

31. Based on the language in the CBA and Vaccine MOU, the issue is not that the District denied respondent a right or process to which he was entitled. The Vaccine MOU clearly stated that refusal to comply with the District's COVID-19 protocols would result in a letter of intent to terminate and unpaid status during the termination process. Here, the evidence indicates the District offered respondent repeated warnings and additional time to comply—more time than he was contractually entitled to receive. Under the contractual terms, the termination process should have begun in December 2021. Respondent's compensation should have stopped on January 1, 2022. His termination was based on conduct related to an Education Code section 87732 violation, which similarly allows skipping of progressive discipline under the CBA.

32. Given the volume of respondent's legal arguments and the varied analysis he provided for each, only the most cogent were analyzed here. All other legal arguments he presented were considered and rejected.

Causes for Discipline

33. The evidence provided at the hearing showed respondent refused to follow the District's COVID-19 safety protocols throughout 2021–2022 school year, resulting in his inability to perform on-campus assignments that began in January 2022. His CBA required him to fulfill his professional obligations and conduct himself in a manner that supported student success. Because the Vaccine MOU was incorporated into the CBA, respondent was required to comply with the Vaccine MOU.

For individuals with vaccine exemptions, those obligations included testing twice weekly for COVID-19 and wearing a mask in common areas on campus. Respondent chose not to comply with the Vaccine MOU, placing his preference for telework above the needs of his students.

34. From the start, respondent's communications with the District were amorphous and confusing. He told them he did "not worry about drugs" and anything he felt was unnecessary or intrusive violated his religious beliefs. He spoke at length about his excellent health and superior immune system before claiming the opposite. At the hearing, respondent offered areligious reasons for his refusal to accept the accommodations. He testified he could not wear a mask because of hypoxia and claustrophobia. His objection to COVID-19 testing was based on his belief in a theory that the swabs contain toxic chemicals. Notably, respondent refused to provide either explanation to the District before his termination.

35. The District did not dispute the sincerity of respondent's religious beliefs and put forth a good-faith effort to engage him in an interactive process. After granting his vaccine exemption, the District reached out on multiple occasions, seeking clarification about exactly what respondent objected to and why. Was his objection to all facial coverings, including face shields, or just face masks? Did he have an objection to all COVID-19 tests or just certain ones? Respondent chose not to provide the information that would have enabled the District to offer additional accommodations.

36. Instead, respondent insisted he was entitled to his preferred accommodation: telework. He argued in closing briefing that the District should have reassigned his in-person duties to other staff so he could continue teleworking. Yet the law does not allow an employee to dictate the terms of his employment unilaterally. (*Am. Postal Workers Union v. Postmaster Gen.* (9th Cir. 1986) 781 F.2d 772,

777 ["In other words, a reasonable accommodation need not be on the employee's terms only."].)

EVIDENT UNFITNESS FOR SERVICE

37. Section 87732, subdivision (d), authorizes dismissal for "evident unfitness for service." The term "evident unfitness for service" means "clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies." (*Woodland Joint Unified School Dist. v. Com. on Prof. Competence (Woodland)* (1992) 2 Cal.App.4th 1429, 1444.) The term "connotes a fixed character trait, presumably not remediable merely on receipt of notice that one's conduct fails to meet the expectations of the employing school district." (*Ibid.*) To assess unfitness for service, the factors listed in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214 (*Morrison*) are used. (*Id.* at p. 1445.)

38. In *Morrison*, the California Supreme Court provided a list of factors for assessing a person's fitness to teach. The inquiry includes (1) the likelihood that the conduct may have adversely affected others and the degree of such adversity anticipated; (2) the proximity or remoteness in time of the conduct; (3) the type of certification held by the party involved; (4) the extenuating or aggravating circumstances, if any, surrounding the conduct; (5) the praiseworthiness or blameworthiness of the motives resulting in the conduct; (6) the likelihood of the recurrence of the questioned conduct; and (7) the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the person involved or other people in the profession. (*Ricasa, supra*, 31 Cal.App.5th at p. 285 [citing *Morrison, supra*, 1 Cal.3d at p. 229].)

39. “The [*Morrison*] factors are not rules, but broad classes of issues to be considered to assist in determining whether to impose discipline.” (*Ricasa, supra*, 31 Cal.App.5th at p. 285.) Not all the *Morrison* factors must be considered, only the most pertinent ones. (*West Valley-Mission Community College Dist. v. Conception, supra*, 16 Cal.App.4th at p. 1777.) The factors may apply to all charges in the aggregate, considering the totality of offensive conduct. (*Woodland, supra*, 2 Cal.App.4th at pp. 1456–1457 [“When a camel’s back is broken we need not weigh each straw in its load to see which one could have done the deed.”].) The determination of fitness for service required by *Morrison* is a factual one. (*Fontana Unified School Distr. v. Burman* (1988) 45 Cal.3d. 208, 220–221.)

Likelihood of Adverse Impact

40. The District established through its witnesses’ testimonies that respondent’s refusal to comply with COVID-19 safety protocols harmed the District, and specifically AFFIRM’s students. Because respondent would not agree to test for COVID-19 and wear a face mask, he was not cleared to return to campus and reopen the AFFIRM center. Both parties’ witnesses spoke about how many students in AFFIRM lacked access to technology, which increased the urgency of reopening the center to provide students with resources. During the relevant period, AFFIRM was the only learning community that had not reopened. Indeed, respondent was well-acquainted with the struggles his students faced. Yet he placed his preference for telework above their needs. The AFFIRM center did not reopen until July 2022. Accordingly, respondent’s conduct adversely impacted AFFIRM’s students.

Proximity of Remoteness in Time

41. The conduct at issue here occurred close in time to when the District filed the Statement of Charges. The alleged conduct occurred between November 2021 and March 2022. Respondent did not attempt to remedy his conduct before termination.

Extenuating or Aggravating Circumstances

42. Respondent did not present evidence of any circumstances that would justify or mitigate his conduct. While he argued in his closing belief that his religious beliefs constituted extenuating circumstances, he received a religious exemption from the vaccine mandate. He then refused to provide the District with clarification about how masking and taking a COVID-19 test violated his religious beliefs, instead hoping to “buy time” until the semester ended.

Praiseworthiness or Blameworthiness of the Motives

43. Respondent claims his religious beliefs motivated his conduct. Yet there is no evidence that the District retaliated against him because of his religion. Indeed, the District accommodated respondent’s religious beliefs by granting him a vaccine exemption. Thereafter, he chose not to comply with COVID-19 safety protocols or explain the reason he could not accept the accommodations offered.

Likelihood of Recurrence

44. Respondent has not acknowledged any wrongdoing. He was unwilling or unable to concede his position, despite the District’s many attempts to work with him, educate him about rules and regulations, and offer him opportunities to correct his behavior. Consistent with his view that he is without fault in this matter, he did not provide rehabilitation evidence.

45. Respondent's testimony suggested his likelihood of violating policies again in the future is high. He insisted he knew better than his supervisor about instructing online courses, even though she held certifications he lacked. He maintained he had the authority to operate outside of normal curriculum requirements. He lacked insight and seemed to believe that he need not adhere to the rules required of others. Returning respondent to employment with the District presents the risk that respondent will violate other District policies and procedures because he views himself to be exempt from directives he disfavors.

Chilling Effect Upon Constitutional Right

46. Respondent made a myriad of arguments about how the District violated his rights. As detailed in the legal arguments above, respondent's constitutional arguments lack merit. While respondent told others that his termination was based on religious discrimination, the evidence overwhelmingly showed his termination was based on unprotected conduct rather than unlawful discrimination. Witnesses also confirmed other employees with sincerely held religious beliefs successfully received exemptions and accommodations from the District. Thus, respondent's termination did not and will not deter others from exercising their constitutional rights.

47. After considering the relevant *Morrison* factors and the totality of the circumstances, respondent's conduct in the aggregate indicates a factual nexus between his conduct and unfitness for service. A preponderance of the evidence demonstrated that respondent has temperamental defects that make him unfit for District employment. Therefore, the District established cause to dismiss respondent for evident unfitness for service.

PERSISTENT VIOLATION/REFUSAL TO OBEY SCHOOL LAWS OR REASONABLE REGULATIONS

48. The Education Code empowers the governing board of each district to promulgate rules and regulations about the operation and administration of the community colleges within its jurisdiction, including “specific standards which it expects its faculty to meet in the performance of their duties.” (See Ed. Code, § 87664.) To constitute a “persistent violation of, or refusal to obey ... reasonable regulations prescribed for the government of the community colleges” under Education Code section 87732, subdivision (f), the District must show more than a single violation of its regulations. (*Governing Bd. of the Oakdale Union School Dist. v. Seaman* (1972) 28 Cal.App.3d 77, 83.) Instead, the District must show respondent’s “intentional and continual refusal to cooperate” with reasonable regulations. (*San Dieguito Union High School Dist. v. Com. on Prof. Competence* (1985) 174 Cal.App.3d 1176, 1196.)

49. As a member of the CTA, respondent was bound by the requirements of the CBA. These included the requirement to follow District policies and directives, or face discipline. Those policies and directives included the requirements imposed by the Vaccine MOU. (CBA, § 1.4.) As a condition of his religious vaccine exemption, respondent was required to test twice weekly for COVID-19. The District repeatedly advised respondent of the testing requirement and attempted to learn more about his objections. Nevertheless, between November 2021 and March 2022, respondent never tested or otherwise complied with COVID-19 safety protocols. His repeated refusal to obey this reasonable regulation, imposed to protect the safety of students and staff, meant he was never cleared to return to campus and reopen the AFFIRM center. The District established cause to dismiss respondent for persistent refusal to obey reasonable regulations by a preponderance of the evidence.

WILLFUL REFUSAL TO PERFORM REGULAR ASSIGNMENTS

50. Under Education Code section 87735, a district's governing board may immediately suspend an employee for "willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing district." "Although the term 'willful' has no 'single, uniformly applicable' definition, it refers generally to intentional conduct undertaken with knowledge or consciousness of its probable result." (*Patarak v. Williams* (2001) 91 Cal.App.4th 826, 829.)

51. Respondent's job duties included holding counseling hours, coordinating AFFIRM, and teaching. Beginning in January 2022, the District required him to return to campus on a hybrid schedule so the AFFIRM center could reopen. Respondent's refusal to comply with the District's COVID-19 safety protocols prevented him from returning to campus. Thus, he could not perform his regular assignments in person, as required. The District established cause to dismiss respondent for willful refusal to perform regular assignments by a preponderance of the evidence.

Conclusion

52. Cause exists to dismiss respondent for evident unfitness for service (Ed. Code, § 87732, subd. (d)), persistent violation of or refusal to obey the reasonable regulations prescribed by the governing board of the community college district employing him (*Id.* at subd. (f)), and willful refusal to perform regular assignments without reasonable cause (Ed. Code, § 87735). The District's decision to dismiss respondent from employment is reasonable and supported by a preponderance of the evidence.

ORDER

The San Joaquin Delta Community College District's decision to terminate respondent Roy Desmangles, Jr.'s employment is AFFIRMED.

Respondent is dismissed from his employment with the District, effective immediately.

DATE: November 13, 2023


Jessica Wall (Nov 13, 2023 14:32 PST)

JESSICA WALL

Administrative Law Judge

Office of Administrative Hearings