

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE GOVERNING BOARD OF
SAN DIEGO UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA**

In the Matter of the Proceeding to Dismiss:

KYRIBA DEL CASTILLO, Respondent

OAH No. 2018110463

DECISION

This matter was heard before Administrative Law Judge Debra D. Nye-Perkins of the Office of Administrative Hearings (OAH), State of California, pursuant to a stipulation of the parties as allowed by Education Code section 44944, subdivision (c)(1), waiving their right to convene a Commission on Professional Competence in this matter. This matter was heard by videoconference on October 7, 2020, pursuant to the September 10, 2020, order converting this hearing to a videoconference because of the COVID-19 pandemic.

Kari D. Sullivan, Attorney at Law, San Diego Unified School District, represented San Diego Unified School District (the district).

Kyriba Del Castillo, respondent, represented herself.

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on October 7, 2020.

FINDINGS OF FACT

Jurisdictional Matters

1. Ms. Del Castillo has been employed by the San Diego Unified School District as a high school teacher since March 8, 2005. Ms. Del Castillo's most recent assignment in the district was as a physical education (PE) teacher at Lincoln High School beginning in September 2015.

2. On September 7, 2018, the district sent a letter to respondent informing her of its recommendation for termination based upon her failure to return to her teaching assignment on August 22, 2018, as required.

3. Acacia Thede, Chief Human Resources Officer, signed the Dismissal Charges and Notice of Intent to Dismiss on October 10, 2018, in her official capacity. The Dismissal Charges set forth the facts and laws on which the district was relying and sought to immediately dismiss Ms. Del Castillo from employment with the district on the grounds of persistent violation or refusal to obey regulations and district policies (Education Code section 44932, subdivision (a)(8)).

4. In the Dismissal Charges, the district alleged as follows:

On August 16, 2018, a school district in the state of Georgia called the District's Human Resources Division to verify employment of del Castillo. Human Resources contacted del Castillo, as she was still listed as an active teacher at Lincoln High School. Del Castillo verified via email and telephone that she had, in fact, moved out of state.

Thereafter, del Castillo completed a request for medical

leave of absence, but the leave was denied due to lack of required documentation.

On September 7, 2018, del Castillo received a recommendation for termination via certified mail. She was given until September 21, 2018, to schedule a pre-disciplinary meeting. Del Castillo contacted Human Resources on September 19, 2018, and verified that she was still out of state. Del Castillo has not submitted any new documentation to request a leave of absence. Del Castillo has stated that she does not currently intend to return to the District.

5. On October 20, 2018, Ms. Del Castillo timely appealed the dismissal action, denying that grounds for her dismissal from employment existed, and this hearing followed.

Respondent's Employment and Communications with the District

6. Darin Noyes is employed by the district as a Human Resources Specialist, a position he also held in 2018 during the relevant events of this hearing. Mr. Noyes' responsibilities in his position include assisting employees of the district with leave of absence requests and responding to requests for verification of employment. Mr. Noyes testified at the hearing and the following factual findings are based on his testimony.

7. In May 2018, Mr. Noyes received two requests for employment verification of respondent's employment with the district. The first request Mr. Noyes received was from respondent herself on May 3, 2018, in an email requesting "proof of

employment and any evaluation you may have on me.” On May 31, 2018, Mr. Noyes received an email from an out of state school district named Clover Park School District stating that respondent had listed him as a reference for a job application and seeking information on a reference form regarding respondent’s employment. Mr. Noyes explained that when the district receives such a request from another school district, he completes the information and also notifies the Human Resources officer for the particular school site where the person worked that a member of that school site was seeking employment with another district to alert them to a possible need to recruit for a vacancy. In May 2018, after receiving these requests, Mr. Noyes notified the Human Resources officer for Lincoln High School that the out of state school district requested this information regarding respondent.

8. In August 2018, Mr. Noyes received a second request from Clover Park School District by mail for employment verification for respondent. When Mr. Noyes checked the district records, he learned that respondent was still employed by the district. Mr. Noyes stated that the district has a policy to not provide this information to another district if the teacher is still employed by their district because a teacher cannot be employed by two districts at the same time. Instead, Mr. Noyes sends the request to the Human Resources department to handle, in this case Josue Diaz. Additionally, Mr. Noyes contacted respondent to ask her if she wanted him to respond to the August request from Clover Park School District. According to Mr. Noyes, respondent told him not to respond to the request.

9. Josue Diaz is currently employed at the district as a Human Resources (HR) officer. His duties include providing support for the high school network of the district for staffing, guidance on contract language, disciplinary actions and other supports. Mr. Diaz began working in this position in the last week of July 2018. Mr.

Diaz testified at the hearing and the following factual findings are based on his testimony.

10. During the first few weeks that Mr. Diaz was working in his current position, Mr. Noyes notified him that an out of state school district requested information about respondent for possible employment. Mr. Diaz attempted to contact respondent by telephone and reached respondent's father on the phone number on file at the district. The father told Mr. Diaz that respondent lived out of state and he would tell respondent to call Mr. Diaz. Sometime thereafter, Mr. Diaz had a telephone conversation with respondent. During that conversation respondent told Mr. Diaz that she had been experiencing stress from her job at Lincoln High School, that she had no intention of returning to work at Lincoln High School, and that she was living in another state (specifically Georgia). Respondent told Mr. Diaz that she did not want to resign from her position at the district because she "wanted to remain tied to the district." Mr. Diaz discussed various leave of absence options for respondent and respondent expressed an interest in the medical leave of absence. Mr. Diaz informed respondent about how to get the form to complete to request a medical leave of absence during that call.

11. Mr. Diaz stated that respondent thereafter did apply for a medical leave of absence, however her request was not approved by the school district because she failed to provide the required documentation of a doctor's note for the request. Mr. Diaz explained that he is responsible for approving respondent's medical leave of absence request as the HR officer assigned to her school. He testified that at no point did he ever approve respondent's medical leave of absence request or any other leave of absence request by respondent.

12. Mr. Diaz explained that the 2018-19 school year at Lincoln High School began on August 22 or 23, 2018, only a few days after the district received the employment verification and information request from the out of state school district for respondent. Respondent never reported to her first day of work during the 2018-19 school year at Lincoln High School as required for her position as a physical education teacher. Respondent also failed to notify HR or any other person at Lincoln High School that she was not reporting to work for the beginning of the 2018-19 school year. Mr. Diaz explained that because respondent never resigned from her position and she never had an approved leave of absence, she was expected to report to work for the school year.

13. After receiving the August 16, 2018, request from the out of state school district regarding respondent, Mr. Diaz investigated and conducted a public records search for teacher credentialing in other states for respondent. Through this search he learned that respondent was first credentialed in the state of Georgia for teaching physical education on August 9, 2018. Mr. Diaz used this information to locate the website for Henderson Middle School located in Atlanta, Georgia. The website for Henderson Middle School listed respondent as a physical education teacher at that school on the staff directory at the time he searched in late August 2018. Mr. Diaz printed these search results at that time, which were received in evidence. Mr. Diaz conducted another search of the Henderson Middle School website on a date near this hearing and respondent was still listed on the staff directory as a physical education teacher at that school. Mr. Diaz testified that the district has a policy that prohibits any teacher from being employed as a teacher by the district and also as a teacher at any other school district at the same time.

14. On September 7, 2018, Mr. Diaz, on behalf of the district, wrote a letter to respondent notifying her that the district is recommending her termination from employment based on the information Mr. Diaz learned that she is employed by another school district located in Georgia, and because she failed to show up for work during the beginning of the 2018-19 school year.

15. Acacia Thede is currently employed by the district as the Chief Human Resources Officer. Her duties include supervision of all personnel matters for the district, including recruitment, retention, credentials, monitoring and discipline of teachers. Ms. Thede testified at the hearing and the following factual findings are made based on her testimony and supporting documents received in evidence.

16. Ms. Thede first learned of issues related to respondent when respondent failed to report to work during the beginning of the 2018-2019 school year. Ms. Thede testified that the district verified that respondent had taken employment as a teacher out of state, and that respondent failed to provide services to the district. As a result, respondent was terminated from her position. The process of termination includes notification of the proposed action to respondent, presentation to the board of education for the district for a recommended action of termination, service to respondent of dismissal charges, notification of intention to dismiss, and blank request for hearing. Ms. Thede testified that all required procedural mechanisms were followed to terminate respondent for her failure to provide services to the district, and her violation of district policy for taking another teaching position out of state while still employed by this district.

17. Ms. Thede testified that the district has a policy that prohibits any district employee from taking another position at another school district while still employed by the district. This policy is provided upon employment, as well as annually, and is

posted online and publicly available. Ms. Thede also provided a copy of respondent's offer and acceptance of employment letter, which was received in evidence and showed above respondent's signature dated March 9, 2011, that she "accepts the above offer of employment" and "certify that:"

[¶] . . . [¶]

I will not be employed with any other school district or county superintendent of schools, which will result in a conflict with my employment with the San Diego Unified School District. . . .

18. Ms. Thede presented the information to the board of education for the district regarding respondent's failure to report to work for the 2018-2019 school year, as well as information received from Mr. Diaz that respondent was employed at a school district in Georgia during the time she was also employed by this district. As a result, the board recommended termination of respondent and this process was set in motion.

Respondent's Testimony

19. Respondent is currently employed as a physical education teacher with the DeKalb County School District in Georgia. She has held this position since August 2018. Respondent testified that she went on medical leave in November 2017 from her position as a teacher with the district at Lincoln High School, where she had worked for three years. Respondent stated that she went on medical leave "because of harassment" at the school where she worked and for her "mental health." According to respondent, she was on medical leave from her position for six months during which she received therapy. As part of her therapy, she was asked to "see what other jobs

were out there in different states” in order to “get over what was going on” at her current job. Respondent applied for jobs in various states, including Washington, Oregon, California, New York, and Georgia. Respondent stated that there was “no harm” in applying for other jobs, and she was “hoping for a change” when she returned to the school environment at Lincoln High School. However, respondent stated that after returning to Lincoln High School, the “bullying continued.”

On cross-examination, respondent admitted that she was out on medical leave of absence beginning in March 2018 for a hernia repair surgery, which happened to overlap with her psychiatric treatment for her mental issues.

20. After respondent applied for the position in Atlanta, Georgia, and received an offer of employment, she decided to take the job. Thereafter, sometime before the beginning of the 2018-2019 school year in the district, respondent contacted Mr. Diaz “to let him know I would not be returning to Lincoln High School because of the harassment I was getting and because I did not feel safe mentally there.” Respondent testified that she told Mr. Diaz that she was currently living and working in Georgia, she would not be returning to work, and she requested a “leave of absence.” Respondent testified that she applied for the leave of absence “because I did not know if I would want to stay in Georgia forever” and she did not know if she “would like it” in Georgia. Respondent received the required documents to request the medial leave of absence from the district and sent in the documents to the district on August 17, 2018. Respondent later received a letter notifying her that the district denied her leave of absence request because her request lacked sufficient documentation from a physician.

21. Respondent thereafter received a letter dated September 7, 2018, from the district wherein she was notified of the recommendation for termination of her

employment based upon her failure to report to work on the first day of the 2018-2019 school year on August 22, 2018, as well as respondent's report that she had moved to Georgia and would not be returning.

22. Respondent testified that prior to September 19, 2018, she again returned her request for a medical leave of absence to the district with additional paperwork as required prior to that date. However, respondent admitted during her testimony that the district never approved that request for a medical leave of absence.

23. Respondent argued that she did inform the district prior to the August 22, 2018, first day of the 2018-2019 school year that she would not return to her position at Lincoln High School. Respondent argued that this notification was sufficient for her to avoid termination from her position.

LEGAL CONCLUSIONS

Applicable Code Sections Regarding Dismissal Actions

1. A permanent employee may be dismissed for cause only after a dismissal hearing. (Ed. Code, §§ 44934 and 44944.)

2. Education Code section 44932 provides the grounds for dismissing a permanent employee. Subdivision (a)(8) authorizes dismissal for 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 her or district policies.

3. Education Code section 44944 establishes the right to a hearing, the process for selecting the three-member Commission on Professional Competence, and

sets forth the Commissions' authority regarding its final decision. Education Code section 44944, subdivision (c)(1), allows for both parties to waive their right to convene a Commission on Professional Competence and stipulate to having the hearing conducted by a single administrative law judge.

4. Education Code section 44938 outlines the procedures the governing board must follow before acting on any charges brought against a permanent employee.

Burden and Standard of Proof

5. The "burden of proof" means the obligation of a party, to convince the trier of fact that the existence of a fact sought to be proved is more probable than its nonexistence. (*Redevelopment Agency v. Norm's Slauson* (1985) 173 Cal.App.3d 1121, 1128.) The district has the burden of proof to establish cause to dismiss its employee.

6. The standard of proof in a teacher dismissal proceeding is a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1039-1040.) A preponderance of the evidence means that the evidence on one side of an issue outweighs, preponderates over, and is more than, the evidence on the other side of the issue, not necessarily in number of witnesses or quantity, but in the convincing effect the evidence has on those to whom it is addressed. In other words, the term refers to evidence that has more convincing force than that opposed to it. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

Relevant Judicial Authority

7. The seminal case for teacher dismissals is *Morrison v. State Board of Education* (1969) 1 Cal.3d 214. There the Supreme Court held that where persistent refusal to obey regulations or policies are raised in teacher dismissal cases, the applicable standard is whether the person is fit to teach. The factors outlined in *Morrison* must be analyzed to determine, as a threshold matter, whether the cited conduct indicates unfitness for service. (*Id.* at p.229.)

8. A violation of Education Code section 44932, subdivision (a)(8), must be established by reference to the *Morrison* factors. If unfitness to teach is shown, then the district must further establish that the employee's refusal to follow the laws or regulations was "persistent," i.e., "stubborn and continuing." (*San Dieguito Union High School District v. Commission on Professional Competence* (1985) 174 Cal.App.3d 1176, 1183.) Isolated incidents or incidents involving an issue unresolved over a period of time are not generally considered "persistent." (*Bourland v. Commission on Professional Competence* (1985) 174 Cal.App.3d 317.)

9. The word "persistent" is defined by lexicographers as "refusing to relent; continuing, especially in the face of opposition . . . stubborn; persevering . . . constantly repeated." (*Governing Board of the Oakdale Union School District v. Seaman* (1972) 28 Cal.App.3d 77, 82.) Education Codes section 44932, subdivision (8), pertains to unintentional as well as intentional transgressions, and hence the Legislature has decreed that a single violation is not sufficient to warrant dismissal, apparently to allow for correction; "it is the persistent disregard" of school rules that the subdivision is designed to regulate. (*Id.* at p.84.)

Morrison Factors

10. In *Morrison, supra*, the Supreme Court suggested seven factors to consider when evaluating whether the school employee should be dismissed: (1) the likelihood that the conduct adversely affected students or fellow teachers and the degree of such adversity; (2) the proximity or remoteness in time of the conduct; (3) the type of teaching certificate held by the teacher; (4) the existence of extenuating or aggravating circumstances and publicity, if any, surrounding the conduct; (5) the praiseworthiness or blameworthiness of the motives resulting in the conduct; (6) the likelihood of recurrence of the questioned conduct; and (7) the extent that the discipline may adversely impact or have a chilling effect on the constitutional rights of the teacher.

11. The *Morrison* factors may be applied to the charges in the aggregate. When a camel's back is broken, the trier of fact need not weigh each straw in its load to see which one could have done the deed. A trier of fact is entitled to consider the totality of the offensive conduct. (*Woodland Joint Unified School District v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1456-1457.)

12. Only the pertinent *Morrison* factors need to be analyzed. (*Broney v. California Commission on Teacher Credentialing* (2010) 184 Cal.App.4th 462, 476.)

Other Disciplinary Considerations

13. An administrator's loss of confidence in the educator and doubt regarding the educator's ability to serve as a role model for students are factors that may be considered. (*San Diego Unified School District v. Commission on Professional Competence* (2011) 194 Cal.App.4th 1454, 1460.)

14. The Commission is vested with discretion not to dismiss an employee even if grounds for discipline exist. (*Fontana Unified School District v. Burman* (1988) 45 Cal.3d 209.)

Evaluation of the Charges

15. Ms. De. Castillo was employed by the district beginning on March 9, 2011. Ms. Del Castillo's issues seemed to begin during the 2017-18 school year when she was out on a medical leave of absence for various reasons. Respondent was expected to return to work for the 2018-19 school year on August 22, 2018, and she failed to return to her position. Additionally, a few days prior to the August 22, 2018, date, respondent informed Mr. Diaz that she would not be returning to her position, she was employed as a teacher in Georgia, and she requested paperwork for a medical leave of absence. However, respondent did not resign from her teaching position during her conversation with Mr. Diaz and informed him that she intended to remain employed by the district while working as a teacher in Georgia. The district has a policy, as written on respondent's letter of acceptance for her position, that an employee of the district may not also be employed by any other school district during the time he or she is employed by the district. Respondent's acceptance of a teaching position in DeKalb County, Georgia violated that school policy.

Respondent's failure to return to her position without being on approved leave was also a violation of the regulations of the district and the expectation that respondent work as a teacher as her position requires. Respondent's argument that she informed the district that she would not return to her position because of harassment does not address respondent's failure to properly follow the district's policies that she not be employed by the district and any other school district at the same time and that she fulfill her duties as a teacher for the district. Respondent's

argument that she had no intention of resigning from her position as a teacher at the district while also working as a teacher at another school district in Georgia demonstrates her lack of understanding of her obligations to follow district policies. Respondent's actions left her students in the district with no teacher at the beginning of the 2018-19 school year and the district scrambling to obtain a substitute teacher.

Cause Exists to Dismiss Ms. Del Castillo

16. Cause exists to dismiss Ms. Del Castillo pursuant to Education Code section 44932, subdivision (a)(8), because the evidence established that Ms. Del Castillo persistently violated district policies, regulations and school directives when she refused to return to her position as a teacher in the district at the beginning of the 2018-19 school year and when she violated school policies by taking another teaching position at another school district located out of state while still employed as a teacher at the district.

ORDER

Ms. Del Castillo's appeal of her dismissal from employment with the San Diego Unified School District is denied. The district's request to dismiss Ms. Del Castillo is granted. Ms. Del Castillo shall be dismissed from the district.

DATE: December 16, 2020

Debra Nye-Perkins
Debra Nye-Perkins (Dec 16, 2020 15:06 PST)

DEBRA D. NYE-PERKINS

Administrative Law Judge

Office of Administrative Hearings