

**BEFORE THE
COMMISSION ON TEACHER CREDENTIALING
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

LINCOLN DUANE JOHNSON,

Clear Administrative Services Credential

Clear Single Subject Teaching Credential

Educational Specialist Instruction Credential,

Certificate of Eligibility, Respondent.

Agency Case No. 2-57092578

OAH Case No. 2021080346

PROPOSED DECISION

Jennifer M. Russell, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference on January 20, 2022. Deputy Attorney General Mario Cuahutle represented complainant Mary Vixie Sandy, Ed. D., Executive Director, Commission on Teacher Credentialing (Commission), State of California. Respondent Lincoln Duane Johnson represented himself.

Testimony and documents were received in evidence. The record closed, and the matter was submitted for decision at the conclusion of the hearing. Subsequently, pursuant to a February 8, 2022 order the record was re-opened for complainant to submit an unobscured copy of page 7 of the July 17, 2019 Notice of Adverse Action received in evidence as Exhibit 5. Complainant's submission is marked for identification and received in evidence as Exhibit 7. The record closed and the matter resubmitted on February 18, 2022.

Complainant seeks imposition of a 90-day suspension of respondent's credentials and certificate based on the following allegations: in the aftermath of a test breach respondent wrote a memorandum requesting administrative review of a teacher without supporting evidence the teacher engaged in misconduct; respondent falsely claimed he delivered documents pertaining to the test breach to certain personnel; respondent failed to document his absence from work on a certain day; and respondent's employer has taken adverse action against him. Complainant failed to prove by clear and convincing evidence respondent committed acts constituting unprofessional conduct, immoral conduct, and moral turpitude and demonstrated inadequacies indicating evident unfitness to teach. The Administrative Law Judge makes the following Factual Findings, Legal Conclusions, and Order dismissing the Accusation.

FACTUAL FINDINGS

Procedural History and Jurisdictional Matters

1. The Commission is responsible for credentialing public teachers and taking adverse action against applicants and credentialed holders. (Ed. Code, § 44000, et seq.; Calif. Code Regs., tit. 5, § 80001, et seq.)

2. On June 5, 2015, the Commission issued Clear Administrative Services Credential to respondent. The Administrative Services Credential, which was in full force and effect at all times relevant to the charges alleged in the Accusation, expires on July 1, 2025.

3. On June 5, 2015, the Commission issued Clear Single Subject Teaching Credential to respondent. The Teaching Credential, which was in full force and effect at all times relevant to the charges alleged in the Accusation, expires on July 1, 2025.

4. On January 23, 2009, the Commission issued Educational Specialist Instruction Credential, Certificate of Eligibility to respondent. The Certificate was in full force and effect at all times relevant to the charges alleged in the Accusation.

5. On July 30, 2019, the Commission received notification the California Department of Corrections and Rehabilitation (CDCR) dismissed respondent from his employment at the California City Correctional Facility (CCCF), pursuant to a Notice of Adverse Action (NOAA), effective at the close of business on July 25, 2019. Respondent and the CDCR subsequently entered a Stipulation and Release, which, among other things, modifies the penalty imposed by the NOAA from dismissal to a 90-day suspension followed by a demotion. (See Factual Findings 56 through 59.)

6. During meetings held August 19 through 21, 2020, the Commission determined, in accordance with Education Code sections 44242.5 and 44244, probable cause exists to subject respondent's teaching credentials and certification documents to a 90-day suspension.

7. Respondent requested an administrative hearing to challenge the Commission's determination to impose a 90-day suspension of his teaching credentials and certification documents.

8. Pursuant to Education Code section 44242.5, subdivision (3)(c)(B), on May 21, 2021, complainant, acting in an official capacity, filed the Accusation.

9. On June 11, 2021, respondent filed a Notice of Defense.

10. All jurisdictional requirements are satisfied.

Respondent's Background

11. Respondent, who comes from a family of educators, holds a doctoral degree in educational leadership. He explained at hearing, as an educator, he has always been committed to working "in the worst areas with the worst-off students." Respondent has worked in a variety of challenging public-school settings.

12. Respondent was first credentialed in September 1994. Since then, in addition to the credentials and certification set forth in Factual Findings 2 through 4, he held several other credentials that are expired and no longer in effect.

13. Respondent has a prior history of misconduct resulting in multiple adverse actions by the Commission.

(a). In 1998, respondent slapped his spouse who threw liquid in his face. As a consequence, respondent was convicted for inflicting corporal punishment on spouse in violation of Penal Code section 273.5, subdivision (a), a misdemeanor that was subsequently expunged pursuant to Penal Code section 1203.4. Based on that matter, in 2000, the Commission issued respondent a public reproof.

(b) In 1998, respondent stole a tie from a Nordstrom store. As a consequence, respondent was convicted for petty theft in violation of Penal Code section 484, subdivision (a), a misdemeanor that was subsequently expunged pursuant to Penal Code section 1203.4. In 2004, respondent stole \$380 worth of merchandise from a Target store. As a consequence, respondent was convicted for second degree commercial burglary in violation of Penal Code section 459, a misdemeanor that was subsequently expunged pursuant to Penal Code section 1203.4. Based on those two misdemeanor criminal convictions and the prior public reproof, in 2007, the Commission suspended respondent's credentials for 30 days.

14. On January 11, 2011, the CDCR employed respondent. He has served in various capacities, including Resource Specialist in the Division of Juvenile Justice and Supervisor of Academic Instruction before promoting to Supervisor of Correctional Education Programs in the Division of Adult Institutions. On August 21, 2017, he commenced working at CCCF as Supervisor of Correctional Education Programs. At the time respondent started at CCCF, he had a prior commitment teaching a 15-week teacher's education program at San Diego State University (SDSU) in Calexico. Respondent disclosed this outside teaching activity to his superiors at CCCF, and they granted respondent permission to leave work from CCCF early each Thursday afternoon for his commute to SDSU.

15. At hearing, retired Warden George Jaime testified he considers respondent a compassionate educator. In a February 20, 2019 letter, he touted respondent's hard work and dedication as an educator and recommended respondent for the Senior Leadership Committee at CCCF.

Dr. Lincoln has managed the education department at [CCCF] for the past 18 months. His dedication and commitment to students from different socioeconomic backgrounds and ability levels is a benefit to the institution and the Department. He is able to lead, develop and evaluate programs using innovative techniques and strategies. He would be an asset to the Supervisor [*sic*] Leadership Committee.

Dr. Lincoln has received accolades from different entities for his management of possibly the most successful inmate education college program in the country. He is continually improving the education program at [CCCF]. His hard work and dedication to educate inmates helps them prepare for reentry to society. Dr. Lincoln continues to expertly work with all levels of individuals in the institution and the educational community to coordinate the academic programs. He is very personable and passionate about staff and their students. I frequently receive favorable comments from staff and the public about Dr. Lincoln as a person and educator.

(Exh. D.)

16. As a collegiate football athlete, respondent injured his right knee. Respondent subsequently required more than a dozen surgeries in as many years prior to the November 16, 2020 amputation of his right leg above the knee.

17. On July 31, 2021, respondent resigned from the CDCR pending a medical retirement.

The November 29, 2017 Test Breach

18. Test breaches are a monthly occurrence at CCCF. "We are dealing with criminals. These guys are slick," explained John Abril, Jr., who CDCR employed from 2013 to July 2020. Abril severed in multiple capacities at CCCF, including General Education Development Teacher. Abril further explained when a test breach occurs, testing coordinators "get together to try to close the loop holes." Practice and protocol require cessation of all testing, locking down the testing room, searching inmates before they are returned to their cells, and then "a memo goes out."

19. All personnel, including teachers and testing coordinators, individually prepare a memorandum detailing their handling of testing materials before, during, and after a test administration. The Supervisor of Correctional Educational Programs then compiles those memoranda and prepares a cover memorandum for submission to the CCCF administration and the Office of Correctional Education.

20. On November 29, 2017, just three months into respondent's tenure as Supervisor of Correctional Education Programs at CCCF, there was a test breach in connection with the administration of the Comprehensive Adult Student Assessment Systems(CASAS) Reading Test 187—Series 1 through 21. Abril, who functioned as the testing coordinator, counted and distributed testing booklets and corresponding tests to teachers, including B.M., who in turn were responsible for re-counting and

inventorying the testing booklets and tests before distributing them to the more than 100 students taking the test.

21. At some point during administration of the CASAS, a teacher discovered one of the testing booklets was missing. Respondent emailed Deputy Warden Sandra Green, his immediate supervisor at the time, and Associate Superintendent Jennifer Winistorfer informing them, "We have a potential CASAS security breach. The Testing Coordinator (Abril) and Teacher ([B.M.]) are working on confirming this as we speak. The test coordinator has also stated the process of halting all testing, and I will follow up [with] ISU [Investigative Service Unit] to try and initiate a search of the test takers and clerks who were present. I will follow up as this develops." (Exh. 5 [Internal Affairs Investigation Report at p. 94].)

22. At hearing, respondent testified, "On the day of the test breach, Mr. Abril came into my office and said, 'We have a test breach.' I knew the process, so I started compiling memos." Respondent received a one-page memorandum from B.M. and another teacher. Abril "wrote a statement . . . not a memorandum," (See Factual Finding 48.) According to his testimony, respondent compiled memoranda he received from proctors "in a red folder" and took them to the administrative offices. On his way, respondent encountered Lieutenant Javier Espinoza from ISU, to whom he handed the folder stating, "'We had a test breach and the institution needed to be searched.'"

23. Respondent then went to see Deputy Warden Green. Respondent testified, "My supervisor had some history with Mr. Abril. She asked me if Mr. Abril had given a memo to me. I told her, 'No.' She asked me to draft a request for inquiry on him because he had some discipline issues prior to that day." As Green had instructed him to do, respondent drafted a memorandum requesting an inquiry into Abril's

conduct for her review and approval. Neither party produced an original copy of this November 29, 2017 draft memorandum at the hearing.

24. Respondent did not believe the test breach warranted the course of action Green contemplated. At hearing respondent explained, "I didn't feel that was appropriate. I had only known Mr. Abril for a short period of time but he was very integral to the success of my program. I didn't want to come in and discipline him beyond the progressive discipline that we have." Respondent therefore called the Office of Correctional Education (OCE) and sought the advice of Associate Superintendent Winistorfer. Respondent testified, "I asked her if that was appropriate, that we were doing an investigation, an inquiry into adverse action for Mr. Abril. I thought that was too much; that was too far to go for a test breach as these things are pretty common. She told me I was correct. A request for adverse action would be too far for a lost test unless the teacher aided or abetted the inmate to steal the test." Respondent reported back to Green informing her based on his conversation with Winistorfer, "'We shouldn't do this. I should be writing either a letter of instruction or an employee counseling report.'" Green then "took that under advisement," respondent testified.

25. On November 30, 2017, Abril prepared a memorandum addressed to respondent with a subject line stating, "Missing 187R Test #2." Abril's November 30, 2017 memorandum delineates procedural steps taken on the days before and during testing to inventory testing materials. Among other things, in that memorandum Abril explains how he initially alerted respondent about the test breach and then how he kept respondent apprised of his and others' efforts to recover the missing test booklet. (Exh. 5 [Internal Affairs Investigation Report at p. 94].)

26. On November 30, 2017, respondent was not at work at CCCF when Green emailed him asking, among other things, who was handling the test breach issue. Respondent's email responding to Green, in part, states, "We have suspended testing. I have memos from the teachers and test coordinators. Just waiting for OCE to make the final determination regarding future testing. And a full audit of test materials has been completed" (Exh. 5 [Internal Affairs Investigation Report at p. 145].)

27. Effective November 30, 2017, Green retired. When respondent returned to work at CCCF on December 1, 2017, he had a new supervisor, Warden John Garza. Respondent described the work atmosphere to which he returned testifying, "It became a finger pointing session. Teachers wanted to update their memos. People felt like they were getting into trouble because the idea of doing an inquiry into adverse action was scaring my staff. So, everybody wanted to rewrite their memos and basically point the finger at each other. We had about three rounds of updating memos."

28. On December 1, 2017, Abril addressed another memorandum to respondent that duplicated, with the exception of minor non-substantive changes, his earlier November 30, 2017 memorandum. (See Factual Finding 25.) Abril's December 1, 2017 memorandum contains the following concluding sentence, "On December 1, 2017 at 1153 I received a phone call from Dr Johnson asking me to write this memo." (Exh. 5 [Internal Affairs Investigation Report at p. 97].) Respondent received Abril's memorandum on December 1, 2017.

29. Respondent testified, "On December 4, 2017, I recompiled all the new emails, all the now approved emails and sent that to everybody. Again, I did not update my original [November 29, 2017] memo that says Mr. Abril didn't give me a memo but his [December 1, 2017] memo was attached to my group of memos."

30. Three memoranda respondent addressed to Warden Garza were received in evidence at hearing: One, dated December 1, 2017, with "TESTING BREACH" referenced as the subject; a second, dated December 4, 2017, with "REQUEST FOR ADMINISTRATIVE REVIEW-[B.M.], ACADEMIC TEACHER" referenced as its subject; and a third, dated December 4, 2017, with "REQUEST FOR ADMINISTRATIVE REVIEW-JOHN ABRIL, ACADEMIC TEACHER" referenced as its subject. (See Exh. 5. [Internal Affairs Investigation Report at pp 70, 71, and 132.]

31. The December 1, 2017 Testing Breach memorandum states, among other things, "The proctoring teachers Ms. [B.M.] and Mr. [M.] have turned in memoranda regarding their involvement. To date I have not received a memorandum from the Testing Coordinator, Mr. Abril." (Exh. 5. Internal Affairs Investigation Report at p. 71.)

32. The December 4, 2017 memorandum requesting an administrative review of Abril states the request is "due to inexcusable neglect of duty and Insubordination." The December 4, 2017 memorandum further states the following:

Specifically, on November 29 2017, Mr. Abril failed to follow testing materials security and administration, and protect the integrity of the Comprehensive Adult Student Assessment System (CASAS) when he distributed CASAS test booklets to Academic Teacher [B.M.], which resulted in the testing security breach of CASAS Reading Test 187R#2." By Mr. Abril's conduct as specified above, he failed to appropriately inventory testing materials, account for all test booklets and answer sheets, and other testing materials. He signed coordinator agreements saying he

understood the pertinence of maintaining integrity and high standard of test security.

Additionally, on November 29, 2017, I gave a directive to Mr. Abril to submit a memorandum to me outlining his involvement and/or handling of the lost materials on the day of the testing breach, before he left institutional grounds. He submitted it on December 1, 2017, 2 days after he was given a directive to submit the memorandum.

(Exh. 5. [Internal Affairs Investigation Report at p. 71.])

33. As discussed in Legal Conclusions 19 and 20, complainant failed to prove by clear and convincing evidence respondent committed acts constituting unprofessional conduct, immoral conduct, and moral turpitude and demonstrated inadequacies indicating evident unfitness for service in connection with the December 4, 2017 memorandum.

Respondent's November 30, 2017 Absence

34. At CDCR, respondent is enrolled in an annual leave program to receive annual leave credits for his use to cover his absences from work. CDCR employees, including respondent, report attendance using Form CDCR 998-A (CDCR 998). Typically, an employee submits the CDCR 998 to a designated supervisor who reviews it for accuracy. If the CDCR 998 contains inaccuracies or is incomplete, the supervisor returns it to the employee for correction. Once the CDCR 998 is corrected, the supervisor forwards it to the Personnel Office for processing.

35. On Thursday, November 30, 2017, respondent's duty hours at CCCF were to begin at 8:00 a.m. Respondent, however, was experiencing pain. At hearing he explained, "At this point, I was at my thirteenth knee surgery. Most of it had to do with my knee hurting. I had a tumor prosthesis put in my leg. They cut my bones and put a tumor prosthesis inside my leg. That tumor prosthesis would hurt some days. There would be too much pressure because it would be pressing against a nerve, and I would have to take medicine to try to take away the pain. This morning I was going to be late for work because my leg wasn't cooperating."

36. Respondent testified, "That morning, I called and told my assistant and supervisor that I was going to be late. I thought I would only get there at about 10:00 a.m. My assistant kept checking with me as it got closer to 10:00 a.m." Respondent asserted when he realized he would be later than anticipated, at approximately 11:00 a.m., he sent an email to his supervisor and assistant informing them of his changed plans, according to his testimony. Respondent testified he informed his assistant and supervisor he "wasn't going to come." At hearing, respondent explained, "From my perspective, it didn't make sense to come to work for two hours to drive to San Diego State. I was going to relax, and then I would drive to San Diego State."

37. Neither party offered documentation of the email communication respondent testified he sent Deputy Warden Green and his assistant at approximately 11:00 a.m. on November 30, 2017.

38. Documentation of email communications between respondent and his assistant occurring on November 30, 2017, between 12:39 p.m. and 2:04 p.m., with the subject reference "Are you Dead?" were admitted in evidence. Also, documentation of email communications between Deputy Warden Green and respondent between November 29, 2017, at 1:17 p.m. and November 30, 2017, at 1:46 p.m., with the subject

reference "Potential CASAS Breach" were admitted in evidence. (See Exh. 5 [Internal Affairs Investigation Report at pp. 146-149.]

39. Together, these parallel and at times overlapping communications establish respondent initially communicated with his assistant at approximately 8:00 a.m. on November 30, 2017. Respondent's assistant emailed him at approximately 12:39 p.m. stating, "Hey, I'm about to call your boss because I haven't heard from you in 4 hours. I don't want to get in trouble if you are laying in a ditch somewhere." Respondent replied at approximately at 1:33 p.m. stating "I told her where I am."

40. Minutes earlier, at 1:28 p.m., Green asked respondent, "Where are you?" At 1:31 p.m., respondent informed Green, "Enroute to Calexico. It is my last Thursday having to drive down to imperial valley." Green responded, "You were supposed to be handling the CASAS issue. Who is on point? Your secretary indicated you said you were going to be here also???" Respondent replied, "I worked with OCE earlier. We have suspended testing. I have memos from the teachers and test coordinators. Just waiting for OCE to make the final determination regarding future testing. And a full audit of test materials has been completed." (Exh. 5 [Internal Affairs Investigation Report at pp. 146-149.]

41. At hearing, respondent credibly explained the circumstances under which he inadvertently did not claim any leave time on his Form CDCR 998 for November 30, 2017. "That month, I had taken off several days. I got tonsillitis from a plane flight in the middle of the month, I had gone on a trip to Oklahoma to see my nephew play football, and on the plane, I got tonsillitis, so I was out five days for that. I took off two days . . . or three days before the 30th for something else. These were annual leave days. Pretty much I would call and say I'm not coming today or I won't be in today. So, this month, I had seven or eight absences. I inadvertently forgot to put the last

absence. Typically, if it is blank that means you were at work. If you type something in, that means you were out and this is the reason. I had seven of my eight days there. I forgot the last day that I was out.”

42. Contrary to CCCF’s management’s customary practices regarding the processing of Form CDCR 998, respondent was not afforded any opportunity to correct his CDCR 998 to reflect his November 30, 2017 absence before its submission to the CDCR Personnel Office.

43. As discussed in Legal Conclusions 23 and 24, complainant has failed to establish by clear and convincing evidence respondent committed acts constituting unprofessional conduct, immoral conduct, and moral turpitude and demonstrated inadequacies indicating evident unfitness for service in connection with his November 30, 2017 absence.

The Investigation of the November 29, 2017 Test Breach

44. On January 12, 2018, Warden Garza requested an investigation by the Office of Internal Affairs (OIA). Special Agent Richard Lee was assigned the investigation.

45. In May 2018, the lost testing booklet was found.

46. OIA notified Abril it would be interviewing him. On August 1, 2018, Abril asked respondent for a memorandum explaining Abril’s conduct reporting the test breach. Respondent testified, “Mr. Abril comes into my office and says he has this interview and it’s about him not giving me a memo. I tell him, well you did give me a memo, and he asked if I would write him a memo. So, I wrote a memo that was very

general. It said we had the breach, he submitted a memo, we turned the memos in, and we got testing back.”

47. Respondent prepared a Memorandum, dated August 1, 2018, for Abril stating the following:

This memo is regarding the CASAS test breach that occurred on November 29, 2017. With regard to the reporting process, you reported to me immediately once the breach was discovered. Later that day, you provided me a draft of your test breach report via email, which was reviewed but not signed by you until the following morning November 30, 2018. You provided me with all the information, sign in sheets and other pertinent collateral. These items were copied and provided in a red folder to ISU Lt. Espinoza and Chief Deputy Warden B. Hedrick was informed of the breach.

(Exh. 5. [Internal Affairs Investigation Report at p. 101.])

48. During his August 1, 2018 OIA interview, Abril told Special Agent Lee he provided respondent “an initial limited statement that included who lost the test, which test was lost and what he had done so far to try and find it” before he left work on November 29, 2017. (Exh. 5. [Internal Affairs Investigation Report at p. 14.]) Abril “wrote a statement . . . and not a memorandum,” according to Lee’s investigative reporting. “Abril stated he was not asked to write a memorandum by [respondent] prior to leaving work that day. Abril stated he could not write a memorandum that day

because all the criteria for the missing test booklet had not been met.” (Exh. 5 [Internal Affairs Investigation Report at p. 10.])

49. On August 2, 2018, respondent received a call from OIA asking whether he wrote the August 1, 2018 memorandum for Abril. Respondent testified, “I told them, ‘Yes.’ I had written [Abril] a memo because he told me he had an interview where they were saying he never gave me a memo, and he had given me a memo. I received the memo December 1, 2017. So, he didn’t give me a memo the day of the breach, but two days later we were both there together and I now had the memo. So, I resubmitted it. I explained that to [OIA], and that’s when they told me I had messed up their investigation.”

50. On November 14, 2018, Lee interviewed Lieutenant Javier Espinoza from the ISU. According to Lee’s investigative reporting, Lieutenant Espinoza confirmed he received a folder containing documents from respondent. Lieutenant Espinoza claimed, however, he did not know the color of the folder and he did not receive it on November 29, 2017. (Exh. 5 [Internal Affairs Investigation Report at p 44].) Lieutenant Espinoza did not testify at hearing.

51. On January 10, 2019, Lee interviewed respondent. According to Lee’s investigative reporting, respondent provided the following account of the circumstances immediately following the November 29, 2017 test breach. Abril approached respondent in the hallway and informed respondent about the breach. Respondent in turn “informed his staff to stop testing and to look for the missing test booklet to make sure the test booklet was absolutely missing. After Abril reported to [respondent] that the check for the test booklet was completed, [respondent] stated it was time to start writing memorandums [*sic*]. [Respondent] instructed Abril and the staff involved in the breach to write memorandums [*sic*] while [respondent] went to

inform the acting warden, chief deputy warden and associate warden of the test breach. [Respondent] stated he should have received memorandums [*sic*] from everyone involved and gave clear instructions for staff to write a memorandum.” (Exh. 5 [Internal Affairs Investigation Report at p. 32].)

52. Lee reports respondent stated he received an email from Abril on November 29, 2017, but respondent considered the email “insufficient” because it lacked a signature. According to Lee’s reporting, respondent said he instructed Abril “to type up a formal memorandum with his signature on it.” During the investigatory interview, Lee informed respondent a review of respondent’s CDCR email account did not reflect receipt of any email from Abril on November 29, 2017. Respondent “then stated maybe he was mistaken but it seemed that Abril sent him an email on November 29, 2017. Respondent then stated maybe he did not, maybe it was not an email and it was something else, he did not know and Abril would have that information.” (Exh. 5. [Internal Affairs Investigation Report at p. 33].)

53. At hearing, Lee testified during the investigatory interview he discovered respondent “was to be at work” but “no one knew where he was” on November 30, 2017. In the investigative report he prepared, Lee notes respondent “stated he called out sick on November 30, 2017” but respondent’s “CDCR 998 . . . did not reflect any time used on November 29 [*sic*], 2017.” (Exh. 5. . [Internal Affairs Investigation Report at p. 52].)

54. OIA concluded its investigation on March 12, 2019, the date appearing on Lee’s Internal Affairs Investigation Report. It was B.M. who did not account for all the testing materials during the post-testing accounting and inventory processes on November 29, 2017.

55. As discussed in Legal Conclusions 21 through 24, complainant has failed to establish by clear and convincing evidence respondent committed acts constituting unprofessional conduct, immoral conduct, and moral turpitude and demonstrated inadequacies indicating evident unfitness for service in connection with respondent's January 10, 2019 OIA investigative interview.

July 17, 2019 Notice of Adverse Action Dismissing Respondent and September 25, 2019 Stipulation and Release Modifying Dismissal

56. On July 17, 2019, Warden Jaime served respondent with a Notice of Adverse Action alleging the following categories of misconduct: Dishonesty In Your Memorandum to Warden Garza, Dated December 4, 2017; Dishonesty During Your OIA Investigatory Interview on January 10, 2019, which includes Dishonesty Regarding Your Absence From Work on November 30, 2017 and Dishonesty Regarding Your Alleged Submission of the "Red Folder" to ISU; and Absence Without Leave and Falsification of Your November 2017 CDC 998, Employee Record Attendance. The NOAA informs respondent, "You have been dishonest in your written memorandums [s/c], emails and statements to investigators. Dishonesty is a trait that cannot be tolerated by the Department and which demonstrates a high likelihood of reoccurrence. Your actions were intended to perpetrate a fraud on the Department, cover for one of your friends and demonstrates your willingness to lie to the Department. Your actions bring discredit upon you and the Department." (Exh. 5 at p. 8.)

57. The NOAA specifically alleges cause pursuant to Government Code Section 19572, subdivisions (d) [inexcusable neglect of duty], (f) [dishonesty], (j) [inexcusable absence without leave], and (t) [other failure of good behavior, either during or outside of duty hours, which is of such a nature that it causes discredit to the appointing authority or the person's employment], to dismiss respondent from his

position as Supervisor of Correctional Education Programs, effective the close of business on July 25, 2019.

58. Respondent appealed the NOAA to the California State Personnel Board (SPB).

59. On September 25, 2019, in the SPB proceedings titled *In the Matter of the Appeal by Lincoln Johnson*, case number 19-1200, respondent and the CDCR entered a Stipulation and Release. Respondent agreed to withdraw his appeal to the NOAA and to waive his appeal rights. The CDCR agreed to modify the penalty imposed by the NOAA from dismissal to a 90-day suspension followed by demotion of respondent from his position of Supervisor of Correctional Education Programs to Teacher (High School-General Education) (Correction Facility). The CDCR additionally agreed to modify the NOAA "to remove the charge of Dishonesty under Government Code section 19572, subdivision (f), and to remove any references to dishonesty in all charges" (Exh. 4.). The CDCR further agreed to remove the NOAA from respondent's Official Personnel File (OPF) upon respondent's written request on or after January 25, 2021. The terms of the Stipulation and Release became effective at the close of business on July 25, 2019.

60. As discussed in Legal Conclusions 25 through 28, complainant has failed to establish by clear and convincing evidence respondent committed acts constituting unprofessional conduct, immoral conduct, and moral turpitude and demonstrated inadequacies indicating evident unfitness for service in connection the July 17, 2019 NOAA and subsequent September 25, 2019 Stipulation and Release.

LEGAL CONCLUSIONS

Applicable Law

1. Education Code (Code) section 44421, among other things, authorizes the Commission to suspend a teaching credential.

The Commission on Teacher Credentialing shall privately admonish, publicly reprove, revoke or suspend for immoral or unprofessional conduct, or for persistent defiance of, and refusal to obey, the laws regulating the duties of persons serving in the public school system, or for any cause that would have warranted the denial of an application for a credential or the renewal thereof, or for evident unfitness for service.

2. Code section 44345, subdivision (e), authorizes the Commission to deny an application for a credential, or the renewal of a credential, made by any applicant who "[h]as committed any act involving moral turpitude."

3. "Unprofessional conduct" is conduct violating the rules or ethical code of a profession or which is unbecoming of a member of a profession in good standing. (*Board of Education v. Swan* (1953) 41 Cal.2d 546, 553.) The conduct in question must indicate unfitness to teach. (*Perez v. Commission on Professional Competence* (1983) 149 Cal.App.3d 1167, 1174.)

4. "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. Commission on Professional*

Competence (1992) 2 Cal.App.4th 1429, 1444.) Evident unfitness for service 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. (*Id.*)

5. "Immoral conduct" has been defined generally as "that which is hostile to the welfare of the general public and contrary to good morals. Immorality has not been confined to sexual matters, but includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, dissoluteness; or a willful, flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare." (*Board of Education of the San Francisco Unified School District v. Weiland* (1960) 179 Cal.App.2d 808, 811.)

6. Conduct reveals moral turpitude for the purpose of professional licensure "if it shows a deficiency in any character trait necessary for the practice of [the profession], (such as trustworthiness, honesty, fairness, candor, and fidelity to fiduciary duties) or if it involves such a serious breach of a duty owed to another or to society, or such a flagrant disrespect for the law or for societal norms, that [public] knowledge of the . . . conduct would be likely to undermine public confidence in and respect for the . . . profession. (*In re Lesansky* (2001) 25 Cal.4th 11, 16, citing *In re Johnson* (1992) 1 Cal.4th 689, 698.)

7. Abstract characterization of a teacher's conduct as "unprofessional" or "involving moral turpitude," for example, is an insufficient basis for discipline. (*Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 235.) A rational connection or nexus must exist between alleged misconduct and competence or ability to teach effectively. The determinative test is whether conduct demonstrates unfitness to teach.

(See *Board of Education v. Jack M.* (1977) 19 Cal.3d 691.) Unfitness to teach is a question of ultimate fact. (*Id.* at p. 698, fn. 3.)

8. *Morrison* identifies several relevant factors, formally codified at California Code of Regulations, title 5, section 80302, for determining unfitness to teach. They are as follows: the likelihood the conduct may have adversely affected students, fellow teachers, or the educational community, and the degree of adversity anticipated; the proximity or remoteness in time of the conduct; the type of credential held by the person involved; the extenuating or aggravating circumstances surrounding the conduct; the praiseworthiness or blameworthiness of the motives resulting in the conduct; the likelihood of recurrence of the questioned conduct; the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the person involved, or other certified persons; and the publicity or notoriety given to the conduct.

9. All *Morrison* factors need not be present to reach a determination regarding fitness to teach. In other words, an item by item analysis of each established individual fact is not required. Rather, *Morrison* calls for a comprehensive analysis of the accumulated established facts. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence*, *supra*, 2 Cal.App.4th at 1457.)

Standard and Burden of Proof

10. Complainant bears the burden of establishing the allegations in the Accusation by clear and convincing evidence to a reasonable certainty. (*Garner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035.)

11. A “clear and convincing” evidentiary standard means complainant must establish the charging allegations by proof that is clear, explicit, and unequivocal—so

clear as to leave no substantial doubt, and sufficiently strong to command the unhesitating assent of every reasonable mind. (*In re Marriage of Weaver* (1990) 224 Cal.App.3d 478.)

Credibility Determination

12. Evidence Code section 780 catalogs several factors for evaluating credibility: the demeanor and manner of the witness while testifying, the character of the testimony, the capacity of the witness to perceive at the time the events occurred, the capacity of the witness to recollect and communicate, the character of the witness for honesty, the existence or nonexistence of bias or other motive, a statement by the witness that is consistent or inconsistent with the testimony, the existence or absence of any fact to which the witness testified, the attitude of the witness toward the proceedings, and admissions of untruthfulness at the proceedings.

13. In addition, the decisional law acknowledges fact finders, including Administrative Law Judges, are permitted to “accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted.” (*Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, 67); to “reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material.” (*Id.*, at pp. 67-68, quoting from *Neverov v. Caldwell* (1958) 161 Cal.App.2d 762, 777); and even to reject testimony that is not contradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.)

14. Witnesses testifying on behalf of complainant played no direct, first-hand role or part in the November 29, 2017 test breach incident. Warden Jaime issued the July 7, 2019 NOAA, but he admitted during his testimony the test breach occurred

“prior to my arrival” at CCCF. Special Agent Lee offered testimony based on his investigation of the test breach and a March 12, 2019 Internal Affairs Investigation Report he prepared within the scope of his duty as a public employee.

15. Under section 11513, subdivision (c), of the Government Code, “[a]ny relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.” Special Agent Lee’s March 12, 2019 Internal Affairs Investigation Report is a public employee record. It is the sort of evidence responsible persons are accustomed to relying on in the conduct of serious affairs. Lee’s testimony explaining his investigation findings is accorded significant weight.

16. Lee’s March 12, 2019 Internal Affairs Investigation Report contains statements from persons other than respondent whom Lee interviewed during his investigation. Complainant offered those third-person statements to support the allegations in the Accusation. Pursuant to subdivision (d) of section 11513, they are hearsay evidence insufficient to support a finding of fact but may supplement or explain direct evidence. (See *Lake v. Reed* (1997) 16 Cal.4th 448, 460-462.) Where those third-person statements contradict direct evidence, they are accorded diminished weight.

17. Respondent’s primary witness was Abril, who exhibited no signs of vindictiveness or personal animosity toward respondent. His testimony is accorded significant weight.

18. Respondent appeared eager effusively narrating the most minute details surrounding the November 29, 2017 test breach, his January 10, 2019 investigatory interview, and his November 30, 2017 workplace absence. He testified without hesitation or prevarication. Respondent presented as credible. His testimony is accorded substantial weight.

Discussion

19. In paragraph 16 of the Accusation, complainant alleges, "On or about December 4, 2017, Respondent wrote a memorandum to the warden of CCCF charging Teacher JA [Abril] with inexcusable neglect of duty and insubordination when there was no evidence to support these charges. As a result, CCCF referred the matter to the Office of Internal Affairs for Investigation [.]"

20. In the immediate aftermath of the test breach, respondent reported to Deputy Warden Green, who directed him to draft a request for an inquiry into Abril's involvement with the test breach when she learned Abril, unlike others, had not submitted a memorandum addressing the test breach when instructed to do so on November 29, 2017. Abril prepared what the evidence variously characterizes as a draft, an initial statement, or statement, not a memorandum. Respondent complied with Green's directive but not before seeking guidance from Green's superiors. Respondent credibly explained he sought Associate Superintendent Winistorfer's advice because in his judgement an inquiry into adverse action for Abril was disproportionate or "too far to go for a test breach as these things are pretty common." On December 1, 2017, two days after the test breach, Abril followed respondent's instructions and submitted a memorandum. An investigation subsequently absolved Abril and determined another person's conduct was responsible to the November 29, 2017 test breach. Even with the benefit of hindsight

and the investigative findings, respondent nonetheless did not engage in misconduct when he obeyed his supervisor's directive. He manifested no personal animus or untoward motives to harm professionally a colleague. Complainant failed to prove by clear and convincing evidence respondent committed acts constituting unprofessional conduct, immoral conduct, and moral turpitude and demonstrated inadequacies indicating evident unfitness for service in connection the December 4, 2017 memorandum.

21. In paragraph 17 of the Accusation, complainant alleges, "On January 10, 2019 and during an OIA interview of Respondent, Respondent stated that he hand-delivered a red folder to Lt. E [Espinoza] of the Investigative Services Unit containing original documents related to his allegations against Teacher JA. Lt. E was interviewed and stated he never received such a red folder from Respondent. On August 1, 2018 and in a memo to Teacher JA, Respondent again claimed he delivered a red folder to Lt. E."

22. Respondent credible testimony detailed his encounter with Lieutenant Espinoza when he was on his way to consult with Associate Superintendent Winistorfer. Respondent handed Lieutenant the red folder informing him, "We had a test breach and the institution needed to be search." At the time, respondent was implementing CCCF's standard protocols for managing a test breach. Lieutenant Espinosa's hearsay statements contained in Lee's March 12, 2019 Internal Affairs Investigation Report contradict respondent's credible testimony he gave the Lieutenant the red folder on the day of the test breach and are therefore not credited. Complainant failed to prove by clear and convincing evidence respondent committed acts constituting unprofessional conduct, immoral conduct, and moral turpitude and

demonstrated inadequacies indicating evident unfitness for service in connection with his statements he delivered a red folder containing documents to Lieutenant Espinoza.

23. In paragraph 18 of the Accusation, complainant alleges, "On January 10, 2019 and during an OIA interview of Respondent, Respondent stated that he called in sick on November 30, 2017. Neither Respondent's supervisor or [sic] anyone else at Respondent's employment was informed of the absence by Respondent. When Respondent's supervisor emailed asking where he was, Respondent responded stating 'en route to SDSU . . . [.]' Further, Respondent submitted his record of attendance Form CDCR998, certifying that all time was correct and accurate, without documenting any time off for November 30, 2017. Respondent was paid for that day."

24. On November 30, 2017, respondent experienced pain associated with the tumor prosthesis placed in his leg. Respondent's testimony established he informed his assistant and Deputy Warden Green at approximately 8 o'clock he would not arrive at CCCF for work until 10:00 a.m. Email communications document two hours after expiration of respondent's anticipated 10:00 a.m. arrival at CCCF, respondent's assistant emailed him at 12:39 p.m. stating she last heard from him four hours earlier. Her statement corroborates respondent's testimony at 8 o'clock he provided notice of an anticipated two-hour absence on a day he is typically permitted to work a partial day ending at 12:00 noon. Green's parallel email exchange with respondent establishes his assistant communicated to her respondent's plans for work that day. "Your secretary indicated you said you were going to be here also???" Respondent's assistant and Deputy Warden Green did not testify at hearing. Special Agent Lee did not interview them as part of his investigation. No statements attributed to them were offered in evidence. Respondent's testimony regarding his November 30, 2017 absence is credible. Respondent's omission of his November 30, 2017 absence from

his Form CDCR 998 was inadvertent. Complainant failed to prove by clear and convincing evidence respondent committed acts constituting unprofessional conduct, immoral conduct, and moral turpitude and demonstrated inadequacies indicating evident unfitness for service in connection with his November 30, 2017 absence.

25. In paragraph 19 of the Accusation, complainant alleges "On July 17, 2019, adverse action was taken against Respondent dismissing him from his position as Supervisor of Correctional Education Program at the CCCF. Pursuant to a settlement agreement dated September 25, 2019, CDCR modified the penalty imposed by the NOAA from dismissal to a suspension for 90 days."

26. To the extent the Stipulation and Release constitutes a disciplinary act, by its own terms, it is not predicated on any charge or evidentiary finding of dishonesty. The CDCR specifically agreed to the removal of allegations charging respondent with dishonesty under Government Code section 19572, subdivision (f), as a basis for adverse action against respondent.

27. Government Code section 19572, subdivision (f), provides, "Dishonesty generally requires a showing of an intentional misrepresentation of known facts, or a willful omission of pertinent facts, or a disposition to lie, cheat, or defraud; untrustworthiness, lack of integrity." Consistent with Government Code section 19572, subdivision (f), courts recognize dishonesty connotes a disposition to deceive. "It . . . denotes an absence of integrity; a disposition to cheat, deceive or defraud[.]" (*Gee v. California State Personnel Bd.* (1970) 5 Cal.App.3d 713, 718-719.) Courts understand integrity to mean "'soundness of moral principle and character, as shown by a person's dealings with others, in the making and performance of contracts, in fidelity and honesty in the discharge of trusts. In short, it is used as a synonym for probity,

honesty, and uprightness in business relations with others.'" (See *In re Estate of Gordon* (1904) 142 Cal. 125, 132 quoting *In re Bauquier* (1891) 88 Cal. 307.)

28. The Stipulation and Release, although a binding contract between the CDCR and respondent, avoided an administrative adjudication of the charges alleged in the NOAA. Consequently, without more, the NOAA and Stipulation and Release do not prove respondent is predisposed to lie, cheat, or defraud or engage in dishonesty thereby rendering him unfit to teach. This administrative hearing before the Commission is a trial de novo. (Cal. Code. Regs., tit. 5, § 80317.) No competent, credible evidence offered during this hearing established respondent was dishonest with respect to his December 4, 2017 memorandum to Warden Garza, his January 10, 2019 OIA investigatory interview, his November 30, 2017 absence from CCCF, his submission of a red folder with documents to Lieutenant Espinoza, or his November 2017 Form CDCR 998. Complainant failed to prove by clear and convincing evidence respondent committed acts constituting unprofessional conduct, immoral conduct, and moral turpitude and demonstrated inadequacies indicating evident unfitness for service in connection the July 17, 2019 NOAA and subsequent September 25, 2019 Stipulation and Release.

29. In paragraph 20 of the Accusation, complainant alleges, "In a declaration dated January 17, 2020, Respondent stated, 'CCCF did in fact initiate Adverse Action against me in my position as Supervisor of Correctional Education Program for allegedly lying about receiving a memo from one of my instructors and turning in a red folder to the Investigative Services Lieutenant with required collateral materials. In additional [*sic*], on my November Timesheet, I forgot to include November 30, 2017, as a day off.'"

30. Respondent's acknowledgement of the CDCR adverse action and charges it alleges against him is not proof of any misconduct rendering him unfit to teach. Respondent's declaration stating he forgot to include November 30, 2017 as a day off on his time sheet is consistent with the credible evidence his oversight was inadvertent. Complainant failed to prove by clear and convincing evidence respondent committed acts constituting unprofessional conduct, immoral conduct, and moral turpitude and demonstrated inadequacies indicating evident unfitness for service in connection with his January 17, 2020 declaration.

31. In sum, complainant failed to satisfy its evidentiary burden to prove by clear and convincing evidence cause exists pursuant to Code sections 44421 and 44345 to suspend respondent's teaching credentials and certification documents for a 90-day period.

ORDER

The Accusation is dismissed.

DATE: 03/22/2022

Jennifer Russell

JENNIFER M. RUSSELL

Administrative Law Judge

Office of Administrative Hearings