

BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
FONTANA UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Dismissal of:

ELIZABETH NAVARRO,

A Permanent Certificated Employee,

Respondent.

OAH No. 2009100569

**DECISION OF THE
COMMISSION ON PROFESSIONAL COMPETENCE**

On May 10 and 11, 2010, a Commission on Professional Competence heard this matter in Fontana, California. The Commission consisted of Donald P. Cole, Administrative Law Judge, Joseph Hyde, and Jose Alcala.

Dean T. Adams, Fagen Friedman & Fulfrost LLP, represented complainant Yolanda Mendoza, Associate Superintendent, Fontana Unified School District.

Carlos R. Perez, Reich, Adell & Cvitan, A PLC, represented respondent Elizabeth Navarro, a permanent certificated employee of the Fontana Unified School District, who was present throughout the administrative hearing.

On May 11, 2010, the matter was submitted. On June 10, 2010, Administrative Law Judge Donald P. Cole signed the decision on behalf of the Commission, whose vote in the matter was unanimous.

ISSUES

1. Did respondent Elizabeth Navarro demonstrate evident unfitness for service in the course of her employment as a teacher with the Fontana Unified School District?
2. Did respondent Elizabeth Navarro engage in dishonesty in the course of her employment as a teacher with the Fontana Unified School District?

FACTUAL FINDINGS

Jurisdiction

1. On September 11, 2009, complainant Yolanda Mendoza, Associate Superintendent, Human Resources, Fontana Unified School District, signed the notice of intent to dismiss and statement of charges for dismissal. On September 17, 2009, the district served this document on respondent. On October 1, 2009, the district timely served a request to set for hearing. On October 16, 2009, complainant signed the accusation in her official capacity. On the same date, the district timely served respondent with the accusation and other required jurisdictional documents. On October 20, 2009, respondent timely served an amended notice of defense and request for a hearing. On November 9, 2009, the district timely served respondent with a notice of hearing. On January 7, 2010, the district timely served respondent with an amended notice of hearing. On April 29, 2010, the district timely served respondent with a second amended notice of hearing.

On January 5, 2010, the parties executed a joint motion to continue. On February 18, 2010, the parties submitted a joint motion to continue.

On April 15, 2010, the district timely served notice of its appointment of a Commission on Professional Competence member. On April 19, 2010, respondent timely served notice of her appointment of a Commission on Professional Competence member. Neither nominee was related to respondent, neither was employed by the district, and each held a valid teaching credential and had at least five years' experience in the past ten years in respondent's discipline. Each nominee was qualified to serve on the commission under Education Code section 44944, subdivision (b).

The parties satisfied all jurisdictional requirements.

2. On May 10, 2010, the record in the administrative proceeding was opened and opening statement was presented. On May 10 and 11, 2010, sworn testimony and documentary evidence were received. On May 11, 2010, closing argument was presented, the record was closed, and the matter was submitted. On May 11, 2010, the commission met in closed session to determine the matter, and a unanimous decision was reached.

3. The draft of the decision was circulated between commission members. Due to the difficulties anticipated in attempting to secure the signatures of all three commission members on the final decision, commission members agreed that Administrative Law Judge Donald P. Cole would sign the decision on behalf of the commission.

The NovaNET System

4. The NovaNET System is a computer-based, online learning (credit recovery) system. Students work at their own pace to earn credit for both core and elective courses. NovaNET is primarily used by upper division students who have failed a course or who are behind in credits and need help to graduate on-time.

A NovaNET course is comprised of modules, each of which contains several lessons. Depending on the course, a student takes a pre-test at the beginning of each module. Based on a student's performance on the pre-test, NovaNET assigns lessons to the student. If a student does well on a module pre-test (normally a score of 80 or better), the system either passes the student on to the next module, or assigns lessons and tests in the areas where the student did not do well.

After completing each lesson within a module, a student takes a test. If a student earns a passing score (again, normally 80 or higher), the student moves on to the next lesson until all lessons within a module are completed.

If a student does not earn a passing score on a particular lesson test, the student may retake the test up to three times. After failing a test for the third time, a red flag appears on the student's computer, which a teacher must "clear." Clearing a red flag, among other things, enables the student to review the lesson and retake the test. Teachers can clear red flags in one of two ways, either at the instructor's computer by using an instructor's code, or at the student's computer by using a bypass code. At A.B. Miller High School, where respondent taught, each teacher had a uniquely assigned instructor's code; all NovaNET teachers shared a single bypass code.

By using the bypass code, a teacher can review answers to test questions with the student, assign a new lesson to help the student learn the concepts missed on the test, reassign the test, or move the student on to the next lesson (e.g., if the student received a passing score but for some reason the system did not advance the student to the next lesson). In other words, the bypass code is intended primarily to provide a one-on-one teaching and learning opportunity between teacher and student.

By using the instructor code, a teacher can change a student's score on a test to a passing score, change the amount of time (in minutes) a student spent on a lesson or test, change the number of attempts a student made to work through a lesson or take and pass a test, and change a lesson or test from a "not started" or "not completed" to a "completed"¹ status. Similar changes can be made with regard to post-tests. A teacher cannot accomplish any of these modifications using the bypass code. Any changes made by using the instructor's code are recorded on NovaNET's servers at its national headquarters.

At Smith, once a student earned a passing score on each lesson within a module, and completed each module within a course, the teacher completed and signed a "pass slip" and sent it to the student's counselor so that the student received credit for the course.²

¹ By changing a lesson to "completed," the student may then move on to the next lesson.

² The facts contained in this Finding are taken almost verbatim from an investigative report prepared by Deborah Cesario, counsel for the district, in December 2008. These particular facts are not in dispute.

5. During the 2007-08 academic year, three A.B. Miller teachers, including respondent, taught NovaNET. Each teacher was assigned to teach NovaNET during one specific class period during the school day. NovaNET instruction took place in the computer lab. About 27 to 30 students were formally assigned to each of the three NovaNET periods.³ The assigned teacher monitored a student's progress during the course of study, and signed off on the student's completion of the course. However, students were, with a teacher's permission, allowed to work on a NovaNET course during periods other than their formally assigned NovaNET period. Students often worked on their NovaNET courses during zero period (which started at 6:30 a.m., before the regular school day began) or as part of "Project Hope," an afterschool program (4:00 to 6:00 p.m.) designed for students who had dropped out of school or who were far behind the academic credits needed to graduate.

Respondent's District Employment

6. Respondent has been a high school teacher with the district for about 13 years. During the 2007-2008 school year, she was assigned to A.B. Miller High School, where she taught English Language Development, World History, and NovaNET. She was assigned to NovaNET during "zero" period. In addition, twice per week, she taught/monitored Hope Academy, where, as noted, students also worked on NovaNET courses.

Allegations Re Respondent's NovaNET Activities

7. Mark Ullrich was one of the three NovaNET instructors at Miller High School during the 2007-08 school year. Late in that year, within the week or two before graduation (which took place on June 10, 2008), Ullrich noticed that certain students seemed to be progressing through their NovaNET courses much more quickly than had previously been the case. By using a NovaNET feature ("Insight") that enabled him to view in real time the computer screen a NovaNET student was viewing, he discovered that a particular student was entering the bypass code so that she could repeatedly take a test, view the answers to the test and eventually, after repeating this process a number of times, obtain the correct answers to all possible test questions for the lesson she was working on. As a result, Ullrich contacted the NovaNET company and requested an action log of all NovaNET activity at the school for the previous 60 days, i.e., from April 8 to June 6, 2008.

8. The NovaNET log, which was received in evidence at the hearing, reflected an inordinate amount of NovaNET activity (record modifications) by respondent, i.e., nearly 400 instances during the two-month period covered by the log, including about 260 instances in the last week (June 2 to 6) alone, when respondent used her instructor code to perform such actions as: (i) Changing post-tests from "not started" to "completed"; (ii) changing test scores from "no score" (i.e., test not yet taken) to passing scores; (iii) increasing the time spent on a particular lesson; (iv) increasing the time spent on a particular test; (v) changing

³ Students who took more than one NovaNET course during a particular semester were assigned to one NovaNET period for each such course.

the number of attempts at working through a lesson (e.g., from zero to one); (vi) changing lessons from “not started” to “completed”; and (vii) changing post-test scores to passing. More specifically, the NovaNET log reflected approximately: 75 grade (test score) changes, including 41 during the final week covered by the log; 162 lesson or tests changed to completed, including 92 during the final week; 90 changes in the amount of time students spent on a lesson or test, including 69 during the final week; and 70 changes in the number of lesson attempts, including 56 during the final week.⁴ The log also reflected that most of the changes were made during zero period, when respondent taught NovaNET, or in the late afternoon, at or after the time when respondent participated in the Hope Academy program.⁵ Finally, the log reflected numerous instances where changes were made in rapid succession (e.g., a minute apart or less) for a number of different students.

9. Evelyn Calderon, who graduated from Miller High in the summer of 2008, was enrolled in respondent’s NovaNET course during the second semester of her senior year. Calderon testified that several of her friends, though not she herself, knew the NovaNET bypass code and used it to ascertain the correct answers to lesson tests. On two occasions, a friend of Calderon used the bypass code to help Calderon herself secure the answers to a test.

Calderon testified that on about four occasions, respondent changed a test grade of hers to a passing grade.⁶

10. In late 2008, at the district’s request, Deborah Cesario, a partner with a law firm⁷ that represents the district in certain legal matters, conducted an investigation of alleged misuse of the NovaNET system by Miller students and staff during the 2007-08 academic year. Several students told Cesario that they had personally used, or knew of other students

⁴ Several estimates of the numbers involved were proffered by witnesses at the hearing. The numbers reflected here are based on the commission’s own review of the NovaNET action log.

⁵ The action log also reflected record modification activity by another NovaNET instructor, Kevin Gerke. However, the amount of Gerke’s activity was much less than that of respondent. During a subsequent district investigation of improper NovaNET use (see below) by respondent and Gerke, the latter was determined to have “provided reasonable explanations and written documentation supporting his actions,” so that it was concluded that Gerke “did not misuse the NovaNET system.”

⁶ Calderon also testified that two female students knew respondent’s code. However, Calderon was vague as to how she knew this, saying no more than that she learned it from her “guy friends.” More importantly, her testimony was also vague with regard to whether she really had respondent’s personal *instructor* code, as opposed to the common *bypass* code, in mind. During the district’s investigation, Calderon told the investigator that she “believed that Ms. Navarro did something on the teacher’s computer to indicate that she completed a lesson even though she had not. . . .” This imprecisely-worded statement suggests that Calderon did not even know of the existence per se of an instructor code. This is consistent with statements of other students to the investigator (see below). For all of these reasons, the evidence did not establish that any students told Calderon that they had obtained respondent’s instructor code, or that any students had in fact obtained that code.

⁷ Another attorney with the same firm represented the district at the administrative hearing in this matter.

who had used, the bypass code to secure answers to test questions. No students told her they had used, or knew of other students who had used, an instructor's code to change grades or manipulate other NovaNET data.⁸

11. Respondent testified that she never used the bypass code during the 2007-08 academic year. She did clear red flags (i.e., through her instructor's code) to permit students to move forward to the next module, on occasions when a student had taken the same test numerous times and had genuinely tried but could not pass the test, and when the student's score was close to a passing score. On these occasions, respondent accomplished the change by entering "completed" in NovaNET. She did this once or twice per week. She confirmed that the students in question had made a genuine effort to learn the material by reviewing the student notebooks that she required students to maintain, and by looking at the amount of time the student spent on the module in question. She testified further that on two occasions, she changed a student's status in a module from "started" to "completed." She said she did this because she had seen the student working on the module on a particular day, and on the next day the NovaNET system for some reason did not have a record that the student had ever started the module, i.e., some sort of computer glitch had occurred. On a few other occasions, respondent changed a student's status within a module from "not started" to "completed." She denied that she entered any other changes, such as changing a student's score or changing the amount of time a student spent on a module. She denied making the nearly 400 changes reflected in the NovaNET action log. She did not affirmatively claim that any students or other persons had obtained her instructor code, and she could not explain how students might have acquired it. She did, however, state that she had written out NovaNET instructions as well as her instructor code and kept them in her unlocked desk, for use by substitute teachers. She thus suggested the possibility that students might have had access to the code.

Respondent's Alleged Lateness and Absence From Class

12. Calderon testified that respondent frequently was late for class or left the computer lab during the NovaNET class period. She estimated that respondent was present during class time about 55% of the time. However, Calderon's attendance record reflected that she herself was absent from respondent's NovaNET class over 44% of the time. It thus appears that it was Calderon, not respondent, who was present about 55% of the time. Further, no other student testified that respondent was frequently late or absent from class. Respondent testified that she was late for class perhaps twice during the 2007-08 academic year. She denied that she left her classroom for significant periods of time during the NovaNET period. No teacher attendance records, which might have shed documentary light on respondent's attendance, were proffered at the hearing. Accordingly, the evidence as a whole did not establish that respondent was late to or absent from class a significant portion

⁸ Students did not use the term "bypass" or "instructor" code. However, their description of how the code was used implied that it was the bypass code to which they had access. No students described the kinds of modifications that could only be accomplished with an instructor's code.

of the time. It thus was not established that any improprieties of respondent with regard to the NovaNET system were motivated by a desire to mask irregular attendance.

Evaluation

13. The evidence established that during the two-month period from April to June 2008, and especially during the first week of June, respondent improperly used the NovaNET system on an extensive basis to change student test scores to passing scores, to increase the time spent on particular lessons, to change the number of attempts a student made on a particular lesson, and to change lesson status from not started to completed, among other modifications as described above.

The foregoing changes are amply documented in the NovaNET action log for the period in question. The log clearly identified respondent as the individual whose instructor code was used to accomplish the changes. No direct evidence was presented that any students somehow gained access to respondent's instructor code. It did not, in fact, appear that students were even aware of the existence of the instructor code. Further, the pattern of use (e.g., during zero period and after school, and changes made for multiple students in very close temporal proximity) was consistent with respondent having made the changes herself, and the pattern of changes was inconsistent with individual students having done so.

Without question, the bypass code had been compromised and disturbing numbers of students used the code to gain answers to test questions. However, the bypass code used to gain those answers could not have been used to make the kinds of modifications attributed to respondent as reflected on the action log.

Since it was not established that respondent was frequently late for class or that she left the computer lab during substantial portions of class time, no clear motive for the misuse of the NovaNET system can be discerned. However, establishing a motive is not required, particularly here where the documentation of respondent's misconduct was clear and unimpeachable.

Finally, while it is true that a teacher should retain a certain amount of discretion in determining whether a student has passed a class, respondent's conduct went far, far beyond what could possibly be deemed an exercise of reasonable discretion. Her conduct can only be characterized as falsifying NovaNET data in a variety of ways to enable students to receive credit for coursework they did not earn. Such conduct goes to the very core of a teacher's responsibilities, duties, and public trust.

LEGAL CONCLUSIONS

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

Under Education Code section 44944, subdivision (b), the dismissal hearing must be conducted by a three-member Commission on Professional Competence. Two members of the commission must be non-district teachers, one chosen by the respondent and one by the district, and the third member of the commission must be an administrative law judge from the Office of Administrative Hearings.

When a school board recommends dismissal for cause, the commission may only vote for or against it. The Commission may not dispose of a charge seeking dismissal by imposing probation or an alternative sanction. (Ed. Code, § 44944, subd. (c)(1)-(3).)

2. 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.) The preponderance-of-the-evidence standard requires a party to convince the trier of fact that the existence of a fact is more probable than its nonexistence. (*Redevelopment Agency v. Norm's Slauson* (1985) 173 Cal.App.3d 1121, 1128.)

3. Education Code section 44932, subdivision (a)(2) provides that a permanent employee may be dismissed on the ground of "dishonesty." Based on the evidence presented, the Commission concluded that respondent's conduct constituted dishonesty.

4. Education Code section 44932, subdivision (a)(5) provides that a permanent employee may be dismissed based on the ground of "evident unfitness for service."

Morrison v. State Board of Education (1969) 1 Cal.3d 214, identified certain criteria to be applied in determining an individual's fitness for service. These criteria include "such matters as the likelihood that the conduct may have adversely affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness or blameworthiness of the motives resulting in the conduct, the likelihood of the recurrence of the questioned conduct, and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. These factors are relevant to the extent that they assist the board in determining whether the teacher's fitness to teach, i.e., in determining whether the teacher's future classroom performance and overall impact on his students are likely to meet the board's standards." (*Id.*, at p. 229-230.)

The Morrison criteria "must be analyzed to determine, as a threshold matter, whether the cited conduct indicates an unfitness for service. [citation omitted] If the *Morrison* factors are satisfied, the next step is to determine whether the 'unfitness' is 'evident'; i.e., whether the offensive conduct was caused by a defect in temperament." (*Woodland Joint Unified School District v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1445.)

Applying the *Morrison* factors, the commission concluded that the preponderance of the evidence established respondent's unfitness to teach, and that such unfitness was evident.

5. By reason of Findings 1 through 13, and Conclusions 1 through 4, cause exists to dismiss respondent from her teaching position with the Fontana Unified School District.

DISPOSITION

The Accusation and Statement of Charges are sustained. Respondent shall be terminated from her employment.

DATED: _____

DONALD P. COLE
Administrative Law Judge
Office of Administrative Hearings

For the Commission on Professional
Competence