

**BEFORE THE  
COMMISSION ON PROFESSIONAL COMPETENCE  
FOR THE LOS ANGELES UNIFIED SCHOOL DISTRICT  
STATE OF CALIFORNIA**

In the Matter of the Accusation Against,  
  
MARGARITA MORALES,  
  
Respondent.

OAH No. 2012030246

**DECISION**

The Commission on Professional Competence (Commission) heard this matter in Los Angeles, California, on December 11-14, 2012, and February 15, 2013. The Commission consisted of Julie Bliss, Marsha Federico, and Administrative Law Judge Ralph B. Dash, Office of Administrative Hearings, State of California, who presided.

Ernest Bell, Attorney at Law, represented the Los Angeles Unified School District (District).

Richard J. Schwab, Attorney at Law, represented Margarita Morales (Respondent).

The parties submitted the matter for decision on February 15, 2013.

Respondent is a permanent certificated employee of the District assigned to teach fifth grade at Hart Street Elementary School (Hart). District alleged that Respondent demonstrated unprofessional conduct (Education Code<sup>1</sup> section 44932, subdivision (a)(1)), immoral conduct (sections 44932, subdivision (a)(1) and 44939), dishonesty (sections 44932, subdivision (a)(3)) evident unfitness for service (section 44932, subdivision (a)(5)), willful refusal to obey reasonable regulations (section 44932, subdivision (a) (7)), and willful refusal to perform regular assignments without reasonable cause (section 44939), all arising out of Respondent's students taking the California State Test (CST) in March 2010. The essence of the charging allegations is that "Respondent provided inappropriate and unauthorized assistance to her students on the 2010 CST resulting in inaccurate test results." (See, District's Motion in Limine Number 1.)

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All statutory references are to the Education Code unless otherwise noted.

As more fully set forth below, District failed to present any direct evidence that the incident occurred as described in the Amended Accusation. Accordingly, District's Amended Accusation is dismissed.<sup>2</sup>

## **FACTUAL FINDINGS**

1. In making the below Findings, the Commission weighed the testimony of all witnesses and documents. The Commission followed the guidance of the California Supreme Court in arriving at these Findings. In *Stevens v. Parke Davis & Co.* (1973) 9 Cal.3d 51, the court noted that the trier of fact may "accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted." (*Id.* at 67.) The trier of fact may also "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 available material." (*Id.* at 67-68.)<sup>3</sup>

2. The parties entered into a stipulation (Exhibit 30) which established the following:

- a. Respondent is a permanent certificated employee of the District.
- b. Respondent was assigned to teach fifth grade teacher at Hart during the 2009-2010 school year.
- c. Respondent is required to follow the testing protocols and procedures of the State of California for the administration of the CST.

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<sup>2</sup> Because this matter is being dismissed based on a failure of proof regarding the alleged misconduct, all motions reserved for determination in this Decision are moot.

<sup>3</sup> In this matter, the Commission evaluated the credibility of the witnesses pursuant to the factors set forth in Evidence Code section 780: the demeanor and manner of the witness while testifying, the character of the testimony, the capacity to perceive at the time the events occurred, the character of the witness for honesty, the existence of bias or other motive, other statements of the witness which are consistent or inconsistent with the testimony, the existence or absence of any fact to which the witness testified, and the attitude of the witness toward the proceeding in which the testimony has been given. The manner and demeanor of a witness while testifying are the two most important factors a trier of fact considers when judging credibility. The mannerisms, tone of voice, eye contact, facial expressions and body language are all considered, but are difficult to describe in such a way that the reader truly understands what causes the trier of fact to believe or disbelieve a witness.

d. Respondent is required to follow all District policies and procedures for CST testing.

e. Prior to the administration of the March 2010 CST exam, on or about March 9, 2010, Respondent attended test administration training provided by Hart elementary teacher Ceci Salazar.

f. Prior to the administration of the March 2010 CST exam, Respondent signed an affidavit agreeing to abide by all state testing protocols and procedures and further agreed to maintain and ensure the security of all CST materials.

g. Respondent administered the 2009-2010 CST examination between March 16, 2010, and March 26, 2010.

h. The CST examination booklets and Respondent's students' answer sheets were maintained securely at all times relevant to this matter, and that no persons tampered with the answer sheets after Respondent's student's students completed testing and submitted answer sheets for scoring.

i. On or about February 15, 2012, the District received Respondent's Demand for Hearing.

j. On or about March 7, 2012, the District filed a Request to Set Hearing with the Office of Administrative Hearings and enclosed the Accusation and Statement of Charges.

k. On March 12, 2012, the District served the Accusation and Statement of Charges alleging cause to dismiss Respondent for unprofessional conduct, immoral conduct, dishonesty, evident unfitness for service, persistent violation of and refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education by the governing board of the school district employing her, and willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the school district employing her.

l. The District received Respondent's Notice of Defense on March 13, 2012.

m. The District filed an Amended Accusation on August 3, 2012, with the Office of Administrative Hearings and served a copy of the same on Respondent. Respondent objects to the Amended Accusation.<sup>4</sup>

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<sup>4</sup> Respondent's objection, though not specifically articulated, is overruled. The First Amended Accusation deletes numerous allegations of statements allegedly made by certain students. It also added new paragraph 11 which essentially states that the students did poorly on the 2011 CST and, based on their 2010, should have done better. Evidence to support this argument could have been presented in support of the original Accusation; thus, Respondent suffered no prejudice.

3. The District failed to prove the charging allegations of the First Amended Accusation. Taking the charging allegations seriatim, the evidence was as follows:

a. The first allegation is that Respondent failed to adhere to State and District testing policies during administration of the 2010 CST. This first allegation is “generic” in nature, the proof of which would have followed from proof of other allegations. However, the District failed to prove any of the other allegations.

b. The second allegation is that Respondent “inappropriately reviewed questions on the [chalk] board before starting testing.” The evidence established that Respondent permissibly reviewed “sample questions” before the start of the test, not the actual test questions.

c. The third allegation is that Respondent “inappropriately read questions aloud and gave hints to students.” As with the second allegation, the evidence established that Respondent was dealing with sample questions. The evidence also established that, throughout the entire school year, Respondent would review and discuss with her students actual test questions from prior CST examinations that had been released for such purposes. Not only did Respondent review these questions on a daily basis, she also taught, from the beginning of the year, “test taking strategies” to show her students how they could easily eliminate two of the possible answers to each question, then analyze the remaining two answers to choose the best one. Respondent spent as much as an hour a day, every school day, going over sample questions and test-taking strategies. She did so, as did other Hart teachers, at the behest of her principal, who emphasized the importance of the students doing well on the CST. In fact, the District’s own evidence showed Hart students doing better year over year on the CST from at least 2006 (Exhibit 3). Respondent and other witnesses attributed this success to the principal’s emphasis on teaching test-taking techniques during the entire school year. Hart had a new principal beginning in the 2010-2011 school year who permitted his teachers to teach test-taking techniques only for two weeks prior to the administration of the CST. The Hart students’ scores plummeted that year.

d. The fourth allegation is that Respondent “inappropriately read portions of the language arts test to the class.” As with the preceding allegations, the evidence was that Respondent did indeed read portions of the language arts tests, but not when the students were taking the 2009-2010 CST. The “support” for this allegation came from interviews of students conducted by Byron Maltez, Lead Director of the Educational Center North, after the results of the 2010-2011 were known. Mr. Maltez interviewed many of Respondent’s students from the prior year who had gone on to junior high school, as well as interviewing other Hart students. He and his assistants gave the students written questionnaires about the CST they had taken more than one year earlier. The assistants would write down the students’ answers. They did not specifically ask the students to distinguish between taking practice tests, discussing the pre-test sample questions, and taking the actual tests. The students’ answers to the questionnaires (Exhibit 1, which included the answers given by only eight students) were vague and generic, such as answering “I tried harder” when asked to

explain why last year's test scores were higher.<sup>5</sup> They also provided such answers as "skip down and go back later" or "I tried solving it" in answer to a question that asked, "What did you do if you did not know the answer to a question?" Even in response to the leading question, "If you got stuck on a question, who helped you?" several students answered "Nobody."

e. The District's attempt to present direct evidence of Respondent's alleged wrongdoing was in the form of student testimony. The fifth allegation alleges that Respondent "inappropriately explained or rephrased questions during the testing." When called to testify, student C [REDACTED] B. stated, when asked, what Respondent's answer was if a student asked a question during the test, "She said that she could not help him." Student A [REDACTED] E. testified that he did not remember taking the 2009-2010 CST, and no further questions were asked of him.

f. The sixth allegation is that student B [REDACTED] S. said that Respondent "would tell us what a word means." When this student testified, he stated that he heard one student ask for help but could not hear either what that student asked or what Respondent said to that student.

g. The seventh allegation is that Respondent told three specifically named students "which answers to throw out during questioning." Student A [REDACTED] E. testified that he did not remember taking the 2009-2010 CST. Neither of the other two students testified.

h. The eighth allegation is that Respondent "inappropriately gave breaks during testing" including those breaks described by student R [REDACTED] C., who did not testify. In any event, Cecilia Salazar, who conducted the Hart teacher training for administration of the CST, testified that it was permissible, and she so instructed, for the teachers to give five minute bathroom or stretch breaks because the tests could run as long as 85 minutes.

i. The ninth allegation is that Respondent "inappropriately went over problems with the students that were on the test" as witnessed by student R [REDACTED] C. This student did not testify and the District offered no evidence on this allegation.

j. The 10th allegation is that Respondent "inappropriately checked answers during testing" based on two statements made by student B [REDACTED] S. and one statement made by student R [REDACTED] C. B [REDACTED] S. testified but was not asked whether he made the statements attributed to him. Student R [REDACTED] C. did not testify. The District offered no other evidence in support of this allegation.

l. The 11th and final allegation, the allegation upon which the entirety of the District's proof rested, is that Respondent's students who took the 2011 CST for both

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<sup>5</sup> The answers on the questionnaires were "multiple level hearsay" because they consisted of the assistant taking down the statement of the student, then offering the questionnaires without either the student or the assistant testifying.

English Language Arts and math “performed very poorly” in comparison to their 2010 CST results. The allegation goes on to state that the students’ actual scores “differed significantly from their predicted scores resulting in a high mean residual score” and that “such outcome is most consistent with inappropriate and unauthorized assistance” provided by Respondent.

In order to prove/disprove this allegation, each party offered the testimony of expert statisticians. Each statistician looked at most of the same data, although Respondent’s expert analyzed additional data, including how the “non-Respondent” students in the sixth grade classes who took the CST fared on the 2011 CST. They all did poorly, not just Respondent’s students. This result highlighted the weakness in the use of “regression analysis” to prove Respondent helped her students cheat on the 2010 CST.

Regression analysis includes different techniques for analyzing variables. It is focused on the relation between one or more independent variables and one dependent variable. Regression analysis can help determine a correlation between phenomena, but, as each of the experts who testified at trial stated, regression analysis can’t help determine any definitive causality for this correlation. The variables could include “cheating” but could also include such things as “intensive test preparation,” or “having the greatest teacher,” or a “having parents who speak English” in the home, or a student “having siblings who act as tutors.”

Another variable could be the length of time the students were out of school between the two tests. Respondent’s fifth grade students were on the “fourth track” meaning their school year ended in January. They did not begin sixth grade until the following August. They apparently received none of the extensive training they had received from Respondent during the school year they took the 2011 CST. The sixth grade CST is notoriously more difficult than the fifth grade CST and students typically do not fare as well on the former as the latter. With so many “independent variables” it was impossible for either of the experts to point to a definitive reason why Respondent’s students did not perform as well on the sixth grade CST as their fifth grade CST scores “predicted.”

## LEGAL CONCLUSIONS

1. Absent a statute to the contrary, the burden of proof in disciplinary administrative proceedings rests upon the party making the charges. (*Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 113; Evid. Code, § 115.) The “burden of proof” means the obligation of a party, if he or she is to prevail on a particular fact, to establish by evidence a requisite degree of belief or conviction concerning such fact. (*Redevelopment Agency v. Norm’s Slauson* (1985) 173 Cal.App.3d 1121, 1128.) The burden of proof in this proceeding is thus on District to prove the charging allegations.

2. The standard of proof in this proceeding is a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1039-1040; Evid. Code, § 115.) “The phrase ‘preponderance of evidence’ is usually defined in terms of probability of truth, e.g., ‘such evidence as, when weighed with that opposed to it,

has more convincing force and the greater probability of truth.’ (BAJI (8th ed.), No. 2.60.)” (1 Witkin, Evidence, Burden of Proof and Presumptions § 35 (4th ed. 2000).)

3. The term “administrative hearsay” is a shorthand reference to the provisions of Government Code section 11513, subdivision (d), to the effect that hearsay evidence that is objected to, and is not otherwise admissible, may be used to supplement or explain other evidence but may not, by itself, support a factual finding. Administrative hearsay, coupled with direct, though circumstantial, evidence, may be sufficient to support a finding. As an example, in *Komizu v. Gourley* (2002) 103 Cal.App.4th 1001, a report of blood alcohol content did not qualify for an exception to the hearsay rule but was admitted subject to Government Code section 11513, subdivision (d) as administrative hearsay. The report was properly used to explain and supplement a police officer’s report, which contained certain direct but circumstantial evidence of the driver’s blood alcohol level. Combined, these two sources provided the trial court with evidence sufficient to support a finding of fact.

4. One must distinguish between the admissibility of evidence and the weight to be given that evidence. The following excerpt from an article in Loyola of Los Angeles Law Review is instructive:<sup>6</sup>

California statutory law expressly provides that all agencies affected by the APA are not bound by “the technical rules relating to evidence.”

The foregoing practice necessarily permits the *admission* of hearsay evidence. “There [being] no reason for administrative bodies to be more restrictive than courts . . . , evidence competent in judicial proceedings, including hearsay with an exception, is generally held competent in administrative proceedings.” Even incompetent hearsay is admissible. The question turns on whether incompetent hearsay, without more, is sufficient to satisfy the moving party’s burden and thereby support the agency’s findings. In order to avoid confusion, it is important that the “admissibility” issue not be viewed in the same light as the “sufficiency” standard; they are different creatures. Admissibility is not the equivalent of evaluation; the former makes certain concessions in the interest of full and complete discovery while the latter, in the interest of fairness, withholds legal sanction to evidence found not to be trustworthy. Unlike the common practice in judicial proceedings, the fact that evidence may be admissible does not therefore guarantee the sufficiency of such evidence to sustain a finding. Consequently, evidence which is deemed *admissible* is generally considered to be “*competent*.” On the other hand, evidence once admitted which is *capable of sustaining a finding* will amount to “*sufficient*” evidence. Finally, determining what constitutes sufficient evidence will depend upon the applicable judicial or statutory rule. (Italics in original.)

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All footnotes have been omitted.

(Ronald Kenneth Leo Collins, *The Sufficiency of Uncorroborated Hearsay in Administrative Proceedings: The California Rule* (1975) 8 Loy. L.A. L. Rev. 632, 642.

5. A permanent District employee may be dismissed for cause only after a dismissal hearing. (Sections 44932, 44934, and 44944.)

6. Under 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.

7. When a school board recommends dismissal for cause, the Commission may only vote for or against it. Likewise, when suspension is recommended, the Commission may only vote for or against suspension. The Commission may not dispose of a charge of dismissal by imposing probation or an alternative sanction. (Section 44944, subdivision (c)(1)(3).)

8. Section 44932 provides in part:

(a) No permanent employee shall be dismissed except for one or more of the following causes:

(1) Immoral or unprofessional conduct.

[¶] . . . [¶]

(3) Dishonesty.

[¶] . . . [¶]

(5) Evident unfitness for service.

[¶] . . . [¶]

(7) 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 of Education or by the governing board of the school district employing him or her.



[¶] . . . [¶]

9. Section 44932, subdivision (b) provides that a district may suspend a permanent employee without pay for a specific period of time if it follows the same procedures as for dismissal of a permanent employee.

10. Section 44939 provides in part:

Upon the filing of written charges, duly signed and verified by the person filing them with the governing board of a school district, or upon a written statement of charges formulated by the governing board, charging a permanent employee of the district with immoral conduct, . . . with willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing school district, . . . the governing board may, if it deems such action necessary, immediately suspend the employee from his duties and give notice to him of his suspension, and that 30 days after service of the notice, he will be dismissed, unless he demands a hearing.

11. No direct evidence was presented that Respondent committed any of the acts alleged as a basis for discipline in the Amended Accusation and Statement of Charges. Thus the District failed to prove by a preponderance of the evidence that Respondent demonstrated unprofessional conduct (Education Code section 44932, subdivision (a)(1)), immoral conduct (sections 44932, subdivision (a)(1) and 44939), dishonesty (section 44932, subdivision (a)(1), evident unfitness for service (section 44932, subdivision (a)(5)), willful refusal to obey reasonable regulations (section 44932, subdivision (a) (7)), or willful refusal to perform regular assignments without reasonable cause (section 44939). The District simply failed to establish that Respondent should be dismissed for the acts alleged in the Accusation.

12. In *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 235, the California Supreme Court held that “an individual can be removed from the teaching profession only upon a showing that his retention in the profession poses a significant danger of harm to either students, school employees, or others who might be affected by his actions as a teacher.” The court concluded that a teacher’s conduct cannot abstractly be characterized as “immoral,” “unprofessional,” or “involving moral turpitude” unless the conduct indicated that a teacher is unfit to teach. (*Id.* at p. 229.) The court set forth guidelines to aid in determining whether the conduct in question indicated this unfitness. However, as it has been determined that the conduct was not proven as alleged, it is not necessary to discuss the “*Morrison* factors” as they relate to that conduct.

## **ORDER**

The Amended Accusation is dismissed.

DATED:\_\_\_\_\_

\_\_\_\_\_  
RALPH B. DASH  
Administrative Law Judge  
Office of Administrative Hearings

DATED:\_\_\_\_\_

\_\_\_\_\_  
JULIE BLISS  
Commission Member

DATED:\_\_\_\_\_

\_\_\_\_\_  
MARSHA FEDERICO  
Commission Member