BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Immediate Suspension and Dismissal of: BRENT MELBON, a permanent certificated employee, Respondent.	OAH No. 2012050349

DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge (ALJ), Office of Administrative Hearings, in San Juan Capistrano, California, on March 23, 24, 25, 26, 30, and April 1, 2, and 6, 2015.[1]

Daniel R. Shinoff, Esq. and Jeanne Blumenfeld, Esq., Stutz Artiano Shinoff & Holtz, represented the Capistrano Unified School District.

Carlos R. Perez, Esq., Reich, Adell & Cvitan, represented Respondent Brent Melbon, who was present each day.

The record was closed and the case deemed submitted for decision at the conclusion of the hearing on April 6, 2015.

FACTUAL FINDINGS

Parties and Jurisdiction

1. The Board of Trustees (Board) is the duly elected, qualified and acting governing board of the Capistrano Unified School District (District), and is organized, existing and operating pursuant to the provisions of the California Education Code and other laws of the State of California.

2. Respondent was a permanent certificated employee of the District.

[1] On March 19, 2015, the parties jointly stipulated to waive their right to designate a commissioner to hear this matter, and elected to have the ALJ hear the matter alone pursuant to Education Code section 44944, subdivision (c)(1).

3. At a properly noticed Board meeting held on February 27, 2012, a verified written Notice of Charges That There Exists Cause to Discipline a Permanent Certificated Employee (Charges) were filed with the Board and considered. Upon majority vote, pursuant to Education Code section 44934,[2] the Board determined that cause existed as specified in section 44932 to dismiss Respondent from his position as a permanent certificated employee with the District. The Board approved the Charges.

4. On March 2, 2012, the District personally served Respondent with the Charges and a Notice of Intention to Dismiss (Notice), notifying him that, at the expiration of 30 days from his receipt of the Charges and Notice, his employment with the District would be terminated, unless he demanded a hearing.

5. On March 2, 2012, Respondent demanded a hearing to determine if there is cause to terminate his employment with the District.

6. No earlier than May 31, 2012, the District filed an Accusation, alleging that cause existed for Respondent's dismissal as a permanent employee of the District, as set forth in the Charges.

7. On June 12, 2012, a Notice of Defense was filed on behalf of Respondent, which contained a request for a hearing to contest the Accusation.

8. On or after November 15, 2012, an Amended Accusation was filed, alleging cause existed to terminate Respondent's employment with the District.

9. At a properly noticed Board meeting held on October 9, 2013, a verified written Amended Notice of Charges to Suspend Without Pay and Dismiss Certificated Permanent Employee (Amended Charges) were filed with the Board and considered. Upon majority vote, pursuant to sections 44934 and 44939, the Board determined that cause existed to immediately suspend Respondent without pay and to dismiss Respondent from employment with the District. The Board approved the Amended Charges.

10. On October 15, 2013, the District notified Respondent in writing that the Board had approved the Amended Charges, that the Board intended to immediately suspend him without pay and to dismiss him, and that the Amended Charges would be included at the hearing to determine if there is cause to terminate his employment with the District. Respondent's last day of paid employment with the District was October 10, 2013.

11. On or about January 21, 2014, the District filed the Second Amended Accusation, charging that there existed cause for the immediate suspension of Respondent without pay and for his dismissal as a permanent employee of the District, as set forth in the Amended Charges.

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[2] All further statutory references are to the Education Code unless noted otherwise.

Respondent's Background Information

12. In January 1991, and thereafter, Respondent has possessed a Clear Single Subject credential with an authorization in physical education (PE), which has authorized him to teach PE in grades twelve and below, including preschool, and in classes organized primarily for adults. Since 2011, Respondent has also held a Crosscultural, Language and Academic Development (CLAD) Certificate.

13. After graduating from high school, Respondent coached high school football and baseball as a walk-on assistant. He began working as a substitute teacher for the Santa Ana Unified School District (SAUSD) in 1991 after obtaining his credential. He later obtained a full-time job for SAUSD teaching at a junior high school.

14. Respondent first became involved with the District as a walk-on assistant coach while he was still employed by the SAUSD. In 1998, Respondent was hired by the District as a full-time teacher at Dana Hills High School (DHHS) in the subjects of PE and Health. He also served as an assistant football coach.

Funding Football at Dana Hills High School

15. By 2008, it cost approximately $175,000 per season to fund the DHHS football program, which included the freshman, sophomore and varsity teams. That amount included expenses for coaching stipends, equipment, transportation for away games, banquets, awards and uniforms.

16. Despite the District's pledge to carry out a free appropriate public education (FAPE) for students, including not requiring them to "pay" for extracurricular activities such as high school football, the District typically only provided approximately $8,000 to $10,000 per year for the DHHS football program. That funding was barely enough to purchase new and/or refurbish existing safety equipment, such as helmets and pads. The Associated Student Body (ASB) could also provide some funding, but that was limited to very little every year, if at all.

17. The vast majority of funding for the DHHS football program came from the Dana Hills High School 12th Man Football Club, also known as the "Booster Club." The Booster Club was a non-profit organization established to provide organizational and financial support for the DHHS football program. In 2008, the Booster Club developed a budget of $155,000 to support DHHS football for the 2008 season. It was able to do so because it raised approximately $160,000 that year. The Booster Club provided funding and helped purchase the items mentioned above not funded by the District, which included parts of the team uniform (other than helmets and some safety pads), training wear, and apparel for the coaching staff.

18. The Booster Club had its own officers and a board of directors, and was independent of the District and DHHS. Because the District and the DHHS principal had control over entities and people operating on the DHHS campus, the District ultimately had the ability to prevent or prohibit certain Booster Club activities. However, in 2008 it was clear that the District exercised no control over the Booster Club's purchases, nor was the Booster Club required to seek approval from the District before the Booster Club made a purchase for the football program. However, the Booster Club President in 2008, Doug Pearson, thought it expedient to share information about Booster Club activities, including financial reports, with DHHS Principal Robert Nye. Thus, Principal Nye was well aware of the Booster Club purchases and activities that year, and he voiced no objection at any time.

19. The head varsity football coach was viewed by both Principal Nye and Mr. Pearson as the liaison between the District, DHHS and the Booster Club. The head coach was expected to attend most meetings, as well as give direction for the types of items to be placed in the budget.

The Transactions in 2008 Alleged in the Second Amended Accusation

20. The DHHS football program suffered a terrible year in 2007. The varsity football team went winless and the Booster Club's finances were in disarray. The varsity football coach was blamed for those problems, and he resigned abruptly in Fall 2007. Principal Nye and Mr. Pearson worked in conjunction with recruiting and interviewing candidates for the job. They ultimately agreed on hiring Respondent for the position.

21. Respondent was hired as varsity head football coach in January 2008. Although he had been an assistant coach for almost 20 years, he had never before been a head coach. In his new position, Respondent was responsible for the entire DHHS football program, which in 2008 ultimately consisted of approximately 150 student/athletes and 20 coaches. He was also expected to work closely with the Booster Club and Mr. Pearson.

22. One of the first things Respondent had to do was order equipment for spring football practice, as well as for summer practice and the 2008 season. Given the fact that he was starting later than an incumbent coach would, time was of the essence.

23. Respondent asked around for recommendations of vendors who could supply the football teams' (freshman, sophomore and varsity) equipment needs. A few other coaches mentioned Bill Lapes of Lapes Athletic Team Sales (LATS), which was a sporting goods vendor in the area. Respondent was familiar with Bill Lapes and LATS from when he was an assistant coach at DHHS and Scott Orloff was the DHHS varsity head football coach several years before. Because Respondent was short on time to place the order, he went along with the recommendations to use LATS without doing much further research. Respondent conferred with Mr. Pearson of the Booster Club, who agreed with using LATS.

24. Bill Lapes and LATS were well known to Southern California sports programs. LATS sold sporting goods, uniforms and equipment to several high school schools within the District, in Orange and Los Angeles Counties, as well as colleges and professional teams.

25. For many years, Bill Lapes had a policy at LATS of advising coaches that an additional margin amount could be built into the overall price of sporting goods and equipment purchased from LATS. A special account would be developed for each school. The special account number would usually start with a "9." After a margin amount was agreed upon and an order placed, a sales order would be completed by Mr. Lapes. A credit in the amount of the margin paid by the purchaser would be placed into the school's special 9 account. Thus, the credit was based on amounts actually paid by the purchaser to LATS. However, for purchases that were made on behalf of a school district, by the district, no such margin was established and no amount would be paid by the District and/or placed into a school's "9 account." Once the credit was placed into the special 9 account, the coach could use that credit to "purchase" additional goods sold by LATS.

26. A. In the past, LATS had occasionally sold safety equipment to DHHS. When DHHS made such purchases from LATS, it used the official school account number of "DAN09." Those purchases were subject to the District's various purchasing policies and guidelines because the purchases were being made directly by the District. Those purchases were never subject to Mr. Lapes' margin process.

B. However, when DHHS football coaches prior to Respondent ordered from LATS soft goods not purchased by the District, such purchases would often times be made subject to the above-described margin system and the margin amount placed in the school's special account number of 9DAN03. Some of the transactions involving account 9DANO3 were labeled with the term "slush." After Bill Lapes' bankers and accountants objected to the use of that word, the special 9 accounts were referred to as "promotional accounts."

27. In early February 2008, Respondent met with Bill Lapes at DHHS so Lapes could look at the school's football equipment inventory and advise Respondent what he would need for the 2008 season.

28. On or about February 18, 2008, Respondent visited Bill Lapes at the LATS office. At that time, Respondent advised Mr. Lapes that he wanted to order the DHHS "spirit packs" from LATS. Spirit pack is the name given to the package of items players in the DHHS football program would need for spring and summer practice, as well as the upcoming season. Specifically, the spirit packs would include a hooded sweat shirt, two specialty t-shirts, shorts, a reversible mesh jersey, chin strap, shimmel shirt, practice jersey, hex pad girdle, football socks and a mouth protector.

29. Mr. Lapes advised Respondent that the best way to handle the spirit packs would be to establish a set price for each pack, and have the players' parents come to the LATS office on a given day to purchase the items directly from LATS. In the prior year at DHHS, the Booster Club purchased the spirit packs and resold them to the players. By all accounts, that process was a disaster the Booster Club did not want to repeat in 2008.

30. In addition, Mr. Lapes advised Respondent to add an additional "margin" amount into the total sales price for the spirit packs. Lapes explained to Respondent that the margin was necessary for several reasons: a) up to ten percent of the players' families in the program would not be able to afford the spirit pack and they would have to be given the items at no cost as "a scholarship;" b) some of those who placed orders would end up not playing football and their orders would go unclaimed; c) some of the items would need to be returned because of size and fit problems; and d) the remaining money could be used to purchase items for the program from the credit that was placed into the special 9 account.

31. A. Mr. Lapes advised Respondent that the margin for the DHHS spirit packs should be $50 extra per spirit pack. It was not established by a preponderance of the evidence that Respondent was familiar with the margin process used by Bill Lapes. Although Respondent knew of Lapes from coaching circles and had once before visited his office with Scott Orloff when Orloff was the DHHS varsity head football coach, none of those facts established that Respondent had prior knowledge of the margin process. Respondent denied it during his testimony. Respondent's testimony in this regard was corroborated by Chad Lapes, one of Bill Lapes' sons involved in the LATS business, who testified that he did not think Respondent knew the parameters of the margin system or how it worked.

B. Mr. Lapes explained to Respondent that the margin process was necessary to avoid the football program from being charged for spirit packs that went unpurchased and that the margin process he used was commonly done in the local sporting good community. Based on the testimony of others in this case, including Lapes, his two sons, and Doug Pearson, it was established that Lapes' margin process was, in fact, commonly used by small sporting goods companies such as LATS for purchases not being made directly by a school district.

C. Respondent was not sure how to proceed. He felt $50 per spirit pack seemed excessive. Respondent told Lapes that he would think about the margin amount to be added to the spirit packs. Lapes advised that the margin amount finally agreed upon would be placed in a special account based upon the amount of the spirit pack purchases.

32. On or about February 18, 2008, while Respondent was at the LATS' office, he made the following orders with Mr. Lapes, pursuant to the aforementioned discussion:

A. Sales order number 58392 was generated by Mr. Lapes on that date, in the amount of $5,206.48, for the shorts that would go into the spirit packs. As a result of this order, the amount of $1,120.00 was allocated into the special account (9DAN03) for DHHS.

B. Sales order number 58393 was generated by Mr. Lapes on that date, in the amount of $3,490.02, for the reversible mesh jerseys shirts that would go into the spirit packs. As a result of this order, the amount of $800.00 was allocated into the special account for DHHS.

C. Sales order number 58395 was generated by Mr. Lapes on that date, in the amount of $1,545.35, for the shimmel shirts and practice jerseys that would go into the spirit packs. As a result of this order, the amount of $90.00 was allocated into the special account for DHHS.

D. Sales order number 59010 was generated by Mr. Lapes on that date, in the amount of $4,437.15, for sleeveless t-shirts that would go into the spirit packs. As a result of this order, the amount of $960.00 was allocated into the special account for DHHS.

E. Sales order number 59011 was generated by Mr. Lapes on that date, in the amount of $4,333.71, for hooded sweatshirts that would go into the spirit packs. As a result of this order, the amount of $880.00 was allocated into the special account for DHHS.

F. Sales order number 59012 was generated by Mr. Lapes on that date, in the amount of $10,167.83, for the hex pad girdles, football socks, chin straps and mouth guards that would go into the spirit packs. As a result of this order, the amount of $504.00 was allocated into the special account for DHHS.

33. At or about this time, Respondent conferred with Mr. Pearson of the Booster Club concerning the spirit pack orders. Since the spirit packs would be purchased by the players' parents, this was considered a Booster Club matter. Respondent explained to Mr. Pearson that LATS proposed a margin to be used to help fund the "scholarship kids," as well as to cover problems caused by mis-sized items or orders made by those who would not end up playing football. However, Respondent did not advise Mr. Pearson that any part of the remaining credit from the margin could or would be used to obtain items for the football program. Mr. Pearson felt the margin as explained to him by Respondent was reasonable and he also agreed with Respondent that the margin amount of $50 was too high. Mr. Pearson approved that Respondent communicate a lower margin amount to Mr. Lapes, the exact amount of which was not established. The Booster Club board approved this arrangement.

34. On a date not established, Respondent contacted Mr. Lapes and advised him of the lower margin amount agreed to by the Booster Club. This amount was not established.

35. Respondent and Bill Lapes scheduled the DHHS football program Team Night to be on Tuesday, May 6, 2008, from 4:00-7:00 p.m. at the LATS office. The spirit packs would be sold that night to each player for $198.11, which amount included the margin agreed upon by Respondent after conferring with the Booster Club. The Team Night for freshmen players would be on June 24th from 1:00-6 p.m. at the LATS office. The cost of the spirit packs for the freshman team was $193.80. Flyers for these events were made and circulated among the players.

36. A. The total amount of credits placed in the DHHS special 9 account based on the aforementioned orders was $4,354.00. The amount of the credit allocated to the special 9 account was based on the sales prices of the aforementioned orders, though the amount of the margin or the exact process used for calculating it was not established.

B. Although it is alleged that the credits from the aforementioned orders were placed in the 9 account on various dates in March 2008, such was not established by a preponderance of the evidence. The only evidence presented on this topic was a copy of a LATS Customer Inquiry report for the DHHS 9 account as of August 2008. The dates in question are listed on that document as a "Due Date," which does not indicate the dates the credits were placed. The only witness who shed light on that document was Teresa Sando, an investor who took control of LATS a few months later as described in more detail below. Mrs. Sando admitted in her testimony that she had no other documentation showing what went into the credit account or out of it. The date Mrs. Sando assigned to when the credit was allocated was essentially based on her speculation. No other evidence was presented indicating when the credit into the special account was made. Based on these circumstances, it is simply assumed the credit was placed into the special 9 account on the date the sales order was generated on or about February 18, 2008.

37. A. On or about February 29, 2008, Respondent placed an order with Bill Lapes for a number of t-shirts and shorts to be used by him and his coaching staff. This order generated LATS sales order number 59107. (Ex. 27.) Mr. Lapes testified that this order was placed by Respondent, which was not contradicted by Respondent in his testimony. The amount of the order was $1,805.40, excluding tax. Mr. Lapes did not add tax to his sales orders when the items in the order would be "purchased" through the credit placed in the special 9 account, since those items in essence had already been paid for in connection with the order that generated the credit. Respondent testified that, in his experience, coaches generally do not pay for such apparel, but instead receive funding for them from booster or support clubs. Thus, Respondent suggested that the Booster Club, through the players' parents, was essentially funding this purchase, which was not unusual to him for the items in question.

B. Although some of the items had been purchased by LATS from outside vendors, it was not established by a preponderance of the evidence that the items reflected in this sales order were delivered to Respondent or that the transaction was completed. No documents from Teresa Sando showed when deductions from the special 9 account were made or for which sales orders. Mrs. Sando also admitted on cross-examination that she had no documentary proof that these items had been delivered to DHHS. Since Respondent and his staff also had shirts and shorts purchased for them directly by the Booster Club outside of Mr. Lapes' margin process, the fact that coaches had shirts and shorts for the 2008 season does not establish that they came from this order.

The Transactions in 2008 Not Alleged in the Second Amended Accusation

38. The transactions described above are the only ones specifically alleged in the Second Amended Accusation. However, there was evidence presented concerning a number of other related transactions. For example, at or about the time that Respondent ordered the spirit pack items described above, Bill Lapes also gave him two "spec" sales orders for team football helmets and safety pads, in case Respondent wanted to use LATS for acquiring those items. (Exs. 17 & 25.) However, those were basically quotes by Lapes, as he explained that such a purchase would be funded by the District and, for that reason, the District's purchasing policies would have to be followed. Mr. Lapes provided two such quotes to Respondent, depending on how much the District decided in the summer of 2008 to allocate for such equipment. However, Mr. Lapes did not create a sales order at that time and Respondent did not order those items at that time. For reasons discussed in more detail below, Respondent never ordered this equipment from LATS. He ultimately threw away the two quotes from Mr. Lapes. There was never any discussion between Bill Lapes and Respondent of linking such a District-involved transaction with Mr. Lapes' margin process.

39. On or about February 18, 2008, Bill Lapes completed a sales order for one football for the DHHS football program. (Ex. 26.) The sales order indicated that the football would be funded by the credit in the special 9 account for DHHS. Respondent was listed on the sales order. Since Respondent was always listed on DHHS sales orders, his name on this document does not necessarily mean he placed the order. Mr. Lapes has no independent recollection of this order and Respondent testified he did not remember receiving a football from LATS then. Thus, it was not established by a preponderance of the evidence that this order was ever made by Respondent or that the football was delivered to DHHS.

40. In late February 20, 2008, Respondent ordered from LATS a number of football jerseys and shirts for members and friends of the Boosters Club. The orders would be paid for by the Booster Club. (Exs. 18 & 19.) The transactions were not subject to Mr. Lapes' margin process. It appears that more Booster Club orders were placed for t-shirts and other items in March and April 2008. (Exs. 33-37.) Those sales orders did not involve the special 9 account for DHHS football. Instead, the orders were made by and for the Booster Club. There is insufficient documentation to demonstrate all of the items in all of the orders were actually delivered to and paid for by the Booster Club; it was only established that some of these orders were completed.

41. On or about February 29, 2008, Bill Lapes completed a sales order for coaches' hats and visors in the amount of $425.50. (Ex. 28.) The purchase of those items would be funded by the credit in the special 9 account for DHHS. Respondent was listed on the sales order. However, it is not clear from the involved paperwork who actually placed the order. DHHS employee Gloria Watson later signed for receipt of delivery of a box with a manifest sheet indicating the contents were the hats and visors. Ms. Watson testified that her practice at that time was to notify the teacher to whom the item was addressed so they could pick up the item, in this instance Respondent. Respondent did not address this transaction in his testimony.

42. On or about February 29, 2008, Bill Lapes completed sales orders for a few hooded sweatshirts in the amount of $188.00. (Ex. 29.) The purchase of those items would be funded by the credit in the special 9 account for DHHS. Respondent was listed on the sales order. However, it is not clear from the paperwork who actually placed the orders. Moreover, Teresa Sando conceded in her testimony that she had no documentation showing any of the credit from the special 9 account was removed as a result of this order. Nor was it established that these items were ever delivered to DHHS or Respondent.

43. On or about April 17, 2008, a sales orders for 40 t-shirts was completed. (Ex. 30.) Bill Lapes is listed on the sales order, but he testified that he had left the company by that date. Respondent was also listed on the sales order but, as discussed above, the fact that his name was on the sales order does not necessarily mean he placed the order. Teresa Sando testified this order did not involve the special 9 account, meaning it was not to be funded by using credit from the special 9 account. Although there is some documentation indicating the items were purchased by LATS from another vendor, Chad Lapes cast substantial doubt on that when he testified that LATS had stopped spending money on acquiring such items at that time, as explained in more detail below. Although delivery documentation was also presented, it does not show from where the items came or what was actually shipped. Moreover, the time frame for delivery listed in the documentation from the other vendor does not match the delivery time frames reflected in the delivery documentation. Thus, it was not established that this transaction was consummated or completed.

LATS Liquidates and is Replaced by C & A Athletics

44. LATS was owned by Bill Lapes. His two sons, Adam and Chad Lapes, were his key employees at LATS. As his business lagged over time, Bill Lapes took capital investments from Geoffrey and Teresa Sando.

45. In 2008, Mr. Lapes was heavily indebted to the Sandos. By their account, the Sandos had invested approximately $650,000 in the LATS business. The Sandos were not involved with the business at that time, though Mr. Sando had been monitoring LATS' books and finances for several years, first as an auditor hired to consult with the company, and later as an investor. Mr. Sando had known for years about Bill Lapes' margin process and apparently never voiced an objection.

46. By February 2008, the LATS business was doing poorly and Bill Lapes was in default on his promissory notes and investment agreements with the Sandos. In April 2008, the Sandos called their notes and ultimately took control of LATS. Bill Lapes left the company in April 2008. By April 28, 2008, LATS no longer took orders and basically stopped doing business. At that time, LATS was put in liquidation mode by the Sandos. Other employees were let go by early May 2008. Chad and Adam Lapes were allowed to remain with the company to assist the liquidation process until they were also let go in May 2008.

47. Soon after the Sandos took over LATS in April 2008, Bill Lapes contacted Respondent and advised him that LATS could not fulfill the DHHS spirit packs order. Mr. Lapes advised Respondent to contact his two sons, Chad and Adam, who were forming their own business. Respondent panicked, because he was against hard deadlines to begin with and this situation might result in his football program not having critical items in time for spring practice. As a fledgling head coach, the notion of not having spring practice gear on time would have been an embarrassment to Respondent. He was desperate to fix the situation. At or about this time, Respondent conferred with Mr. Pearson of the Booster Club. Mr. Pearson agreed that it made sense to use the Lapes sons because they were familiar with the DHHS football program through their employment with LATS. Mr. Pearson was also concerned the Booster Club could be dragged into bankruptcy should LATS take that route and he felt using affiliated employees might remedy that situation.

48. At some time in May 2008, Mrs. Sando was put in charge of the liquidation efforts. While that was happening, Chad and Adam Lapes were forming a separate business, C & A Athletics (CAA), which was the same type of sporting good vendor as LATS had been. The Lapes sons were working toward liquidating LATS at the same time that they were forming and operating CAA.[3]

49. Respondent contacted Chad Lapes immediately. Chad Lapes told Respondent that his new company, CAA, could fill the order in time. Respondent agreed to virtually the same spirit pack as had been previously devised by Bill Lapes, at the same price. There was no discussion or agreement to add a margin into the spirit pack price. The players' parents would pay CAA directly for the spirit packs. A new Team Night was scheduled for Wednesday, May 14th from 4:00 to 7:00 p.m., this time at the DHHS football weight room.

50. The Team Night was held as scheduled. The players' parents paid CAA directly for the spirit packs. No credit or margin was offered or given to DHHS or Respondent. But the event was chaotic. The Lapes arrived to the Team Night late. Although they were able to procure the spirit pack items, there were still problems with some of the spirit packs sold. Several parents complained about missing items or those that did not fit properly, both that evening and thereafter. Respondent was displeased with the quality of some of the goods and the chaos.

51. Although Respondent and Mr. Pearson were thankful that CAA was able to step into the breach and provide the goods in time for spring practice on such short notice, Respondent decided to not use CAA in the future for team supplies or spirit packs. In fact, in 2009 Respondent used Sport Chalet for the DHHS football program spirit packs.

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[3] A dispute later arose between the Sandos and the Lapes sons over the events described below. The dispute lead to a civil lawsuit filed by the Sandos against the Lapes sons. The litigation was resolved by a confidential settlement, the terms of which were not revealed. It is outside the scope of this case to decide the particulars of that dispute, nor were such established by a preponderance of the evidence based on the record presented.

The Alleged Kick-Backs or Bribes from LATS

52. It was not established by a preponderance of the evidence that Respondent accepted bribes or kick-backs from LATS, accepted payments from LATS to influence his purchasing decisions, or that LATS asked Respondent to ignore the District's purchasing policies. It was not established that LATS provided Respondent with bribe money, gifts, or other things of value so that he would purchase football equipment and sporting goods for the DHHS football teams from LATS and/or not require LATS to submit competitive bids or quotes for its sales to the District. Since the above-described orders were not being made by the District, the District's purchasing policies did not even apply. In fact, Respondent received nothing of value from LATS for placing the orders, since the credits allocated to the special 9 account correlated exactly with amounts actually paid to LATS by the players' parents.

53. It was not established by a preponderance of the evidence that the credits to the special 9 account for the DHHS football program totaling $4,354.00 constituted bribes or payments of bribes or kick-backs to Respondent. The special 9 account established by Bill Lapes was not Respondent's special or personal account but rather an account maintained by LATS for the DHHS football team that had been started by Lapes as a promotional tool many years before Respondent was hired in early 2008. LATS also had been an authorized vendor of the District for safety items, such as helmets and pads, and on occasion for the DHHS football team, for many years. Respondent did not purchase personal items from LATS by use of the promotional account. In late February 2008, Respondent ordered shirts and shorts for his coaching staff, and perhaps hats and visors for the coaching staff. Those purchases were covered by the special 9 account set up by Bill Lapes, and were intended for the coaching staff, not for Respondent's personal use. Respondent testified that such items were generally not purchased by the coaches themselves, but rather by booster clubs.

54. The testimony of Teresa Sando that these transactions equated to bribes or kick-backs was not persuasive, in that she was not involved in the LATS business at the relevant times, but rather after the events in question (as discussed in more detail below). Her knowledge of the documents generated at the times in question was shaky, often based on speculation and hearsay, and ultimately unreliable unless otherwise corroborated. Bill Lapes, and his two sons, denied that the credits to the special 9 account served as kick-backs or bribes. So did Respondent. As discussed in more detail below, Mrs. Sando expressed her opinions to the Orange County Sheriff's Department, who investigated the matter. No criminal charges were ever brought against Respondent.

District Policies and Related Laws

55. The Second Amended Accusation alleges that a number of District policies were violated by Respondent for his actions in 2008 that are specifically alleged in that pleading. Those events, as well as the events in 2008 not alleged in the pleading, are analyzed below to determine whether Respondent violated the following District policies or state laws.

56. A. It is alleged that Respondent violated Board Policy 3290 by giving and accepting bribes, circumventing the District's open bidding requirements, and engaging in a conspiracy to defraud the District.

B. Board Policy 3290 regulates "Gifts, Grants and Bequests." Under this policy, the Board may accept any bequest or gift of money or property on behalf of the District. The Board has stated under this policy that it fully supports athletic and academic programs and competitions as an extension of the educational program. If a school wishes to augment District-funded positions, this policy states it is permissible to seek donations from parents, guardians, or private donors. Gift money will be accepted for stipend payment for co-curricular activities but will not be accepted to pay for the primary employment of employees. Upon acceptance of funds and equipment by the District, the policy requires that all monies are to be deposited into a District-based account which has been established for each school site and which must be monitored by the school principal. All gifts, grants, and bequests become District property.

C. It was not established that Respondent violated this policy. As discussed above, Respondent did not receive or seek bribes or kick-backs. No probative evidence was presented to show that Respondent received any gift of materials, supplies, or money from Bill Lapes or his company LATS. Moreover, since this policy is aimed at gifts to the District, it was not shown to be applicable to Respondent as an employee.

57. A. It is alleged that Respondent violated Board Policy 3291 for the same reason as alleged concerning Board Policy 3290.

B. Board Policy 3291 regulates "Gifts to School Personnel." Under this policy, the Board recognizes that sometimes students, parents, and community members give nominal gifts to District employees to show their appreciation for a job well done, and that vendors sometimes distribute free marketing materials or stationary items to staff members. The policy describes the type of gifts that cannot be accepted by District employees, including those intended to influence an employee's exercise of discretion in District purchases.

C. While this policy may be more applicable to an employee like Respondent, as opposed to policy 3290 dealing with gifts to the District, Board Policy 3291 went into effect in June 2008, after the events in question involving Respondent. Therefore, it cannot be concluded that Respondent violated this policy.

58. A. It is alleged that Respondent violated Board Policy 3300 for the same reason as alleged concerning Board Policy 3290.

B. Board Policy 3300 regulates "Expenditures/Expending Authority." Under this policy, the Board authorizes the District Superintendent or his/her designee to purchase supplies, materials and equipment, as well as enter into service contracts below the bid limits for work to be done. All contracts entered into must be approved by the Board.

C. It was not established that Respondent violated Board Policy 3300. The transactions in question between Respondent and LATS or Respondent and CAA were not District purchases subject to this policy. They were transactions between those business entities and either the Booster Club or the players' parents. While the District may be interested in such transactions, since they involved students of the District, there is nothing in policy 3300 indicating that it was intended to apply to non-District purchases. While Bill Lapes gave Respondent two quotes or bids for safety equipment that would normally pertain to this policy, nothing came of those bids. Most revealing was the testimony of District Executive Director of School Services, Philippa Geiger, and then DHHS Principal Nye (he is no longer with the District), who both agreed that the District has no oversight or approval power over Booster Club purchases. Since the District shunts almost all of the funding for football to the Booster Club, it would be unfair to still apply the District's own unique purchasing policies to transactions made by that independent entity.

59. A. It is alleged that Respondent violated Board Policy 3310 by failing to obtain prior approval from the District Purchasing Director, the school principal, or the school athletic director for purchases he made with District funds.

B. Board Policy 3310 regulates "Purchasing Procedures." Under Board Policy 3310, the Board has the authority and responsibility for all purchase contracts of the District. This authority and responsibility can be delegated with certain restrictions as set forth in the Government and Education Codes. The Superintendent or his/her designee must maintain effective purchasing procedures in order to ensure that the District receives maximum value for the money it spends and that records are kept in accordance with the law. Insofar as it is possible, this policy provides that goods and services purchased will meet the needs of the person or department ordering them at the lowest price consistent with standard purchasing practice. Maintenance costs, replacement costs, and trade-in values shall be considered when determining the most economical purchase price. The Superintendent or her/his designee may issue and sign purchase orders and shall submit them to the Board for its approval. The purchasing department conducts all purchase transactions for the District.

C. It was not established that Respondent violated Board Policy 3310 for the reasons explained above regarding Board Policy 3300. Respondent did not use District funds for the transactions in question. None of the purchases were made by or for the District, but rather by the Booster Club or the players' parents. Principal Nye was well aware that Respondent, as the DHHS varsity head football coach, would be making such purchases through the Booster Club. He voiced no concern that such purchases were done outside of the District's purchasing policies. The only transactions that would seemingly apply to this policy were the quotes for the safety goods provided by Bill Lapes. However, nothing came of those quotes.

60. A. It is alleged that Respondent violated Board Policy 3311 by not requiring LATS to submit a competitive bid or by intentionally misrepresenting bids submitted by LATS to the District.

B. Board Policy 3311 regulates "Competitive Bidding." Under Board Policy 3311, the Board has stated, in part, that the District shall purchase equipment, supplies, and services on a competition bidding basis when required by law or whenever it is in the best interest of the District.

C. It was not established that this policy was applicable to the charges or facts in this matter. The evidence established that the soft goods purchased by the Booster Club or players' parents for the DHHS football program were not required to be made on the basis of a competitive bidding process, since they were not District purchases. Director of School Services Geiger and Matthew Reid (who was the DHHS Athletic Director at the time) were clear in their testimony that DHHS football purchases had not been subject to the bidding process in 2008 or previously.

61. A. It is alleged that Respondent violated Board Policy 3315 for the same reason as alleged concerning Board Policy 3290.

B. Board Policy 3315 regulates "Relations with Vendors." Under this policy, the Board has provided that vendors shall contact the District's purchasing department to arrange for sales presentations. If visits to other departments and school sites are required, the purchasing department shall make the arrangements for such visits. The purchasing department is prohibited from extending favoritism to any vendor. Each purchase order is to be placed on the basis of quality, price, and delivery, with past service being a factor if all other considerations are substantially equal. The purchasing department is to conduct all price negotiations with vendors when necessary. Vendors are to be referred to the purchasing department by other District personnel if direct contact is made with a school or department. In interviews with vendors, no one who is not a member of the purchasing department shall commit herself by implication or otherwise as the District's source of supply for any product.

C. It was not established that this policy was enforced or followed by the District in 2008 relative to the football program. The District freely allowed football coaches to negotiate directly with LATS and other sporting goods vendors to view and select football equipment and to obtain quotes to buy football equipment for their high school football teams, probably because most of the funding came from sources other than the District.

62. A. It is alleged that Respondent violated Board Policy 4119.21 for the same reason as alleged concerning Board Policy 3290.

B. Board Policy 4119.21 provides a "Code of Ethics." Under this policy, the Board expects employees of the District to maintain the highest ethical standards, to follow District policies, and to abide by state and national laws. Employee conduct should enhance the integrity of the District and the goals of the educational program.

C. Based on the above, it was established by a preponderance of the evidence that Respondent violated the District's Code of Ethics in 2008 by failing to disclose to Doug Pearson and the Booster Club the fact that a margin to be built into the DHHS football spirit

packs would include a credit he could use to make purchases on behalf of the football program. Although Respondent disclosed that a margin would be built into the order, he only disclosed to Mr. Pearson that the margin was for gear for scholarship players and to address clothing sizing problems and errors or for packs that went unclaimed. Mr. Pearson was surprised to learn, for the first time during the hearing, that the margin included credit for program purchases. That was a significant detail to omit, especially because Mr. Pearson had made clear to Respondent how important financial transparency was to the Booster Club given its disastrous financial situation following the 2007 season. Unlike many of the other District policies involved in this case, this policy applied to all District employees under all circumstances substantially related to District activity. The fact that the purchases in question involved the Booster Club and students of the District, for a District supported activity, provides the nexus between the policy and Respondent's activity. In failing to disclose a key fact to the Booster Club, Respondent did not demonstrate or maintain the highest ethical standard or comport himself with complete integrity. In this regard, Respondent's conduct did not enhance the integrity of the District. However, since there was no margin built into Respondent's transaction with CAA, Respondent did not violate this policy relative to that transaction. Respondent made full disclose to Mr. Pearson about the CAA deal.

63. A. It is alleged that Respondent violated provisions of various school laws of the state by giving and accepting bribes, circumventing the District's open bidding requirements, and engaging in a conspiracy to defraud the District, and that such activity also violated California Penal Code sections 424, subdivision (a), and 641.3.

B. The District argues that Education Code sections 60071, 60072 and 60073 were violated because Respondent accepted bribes and kick-backs. As discussed above, it was not established that Respondent did so. Moreover, those Education Code sections do not apply because they discuss inducements relative to the purchase of "instructional material." It is not clear that football equipment could or should be considered as "instructional material." In addition, it was not established that Respondent's conduct violated California Penal Code sections 424, subdivision (a) (appropriation or misuse of public monies or falsification of public monies account), or 641.3 (commercial bribery). Although the matter was investigated by the Orange County Sheriff's Department and discussed with personnel from the Orange County District Attorney's Office, no criminal charges were ever filed or prosecuted against Respondent. No evidence was presented indicating that any such charges were brought against Bill Lapes, his two sons, or any other District employee involved in similar activity with LATS. Thus, the evidence was insufficient to demonstrate that Respondent committed such crimes.

The Sando's Complaints and the District's Investigation of Respondent

64. During the summer of 2008, Teresa Sando spent much of her time trying to reconstruct LATS's business records and pursuing amounts she believed were owed to LATS by various customers, including DHHS and Respondent. The Sandos were trying to recover as much of their $650,000 investment in LATS as possible through the liquidation process.

65. While trying to collect outstanding accounts receivable, Mrs. Sando discovered that LATS had set up various special 9 accounts to track the amount of credits that had been allocated to various schools pursuant to Bill Lapes' margin process described above. One document showed approximately 80 high schools with such 9 accounts, many of those within the District. As discussed above, this should not have been a surprise to the Sandos, as Mr. Sando had intimate access to the LATS books and records for several years.

66. While working on collecting the accounts receivables, Mrs. Sando saw documents pertaining to Respondent's spirit pack orders, as well as some of the other transactions discussed above. By this time, the Sandos had fired Bill, Chad and Adam Lapes. Mrs. Sando did not have a complete understanding of the documents or what they reflected. Based on what she could gather, she believed LATS had provided substantial goods to the DHHS football program but had not been paid for them.

67. On a date not established in 2008, Mrs. Sando tried to call Respondent about collecting on the account receivable she believed existed. She was unable to reach him. Respondent testified that he did not remember receiving such a phone call.

68. In December 2008, Mrs. Sando mailed an invoice to Respondent's attention at DHHS in an attempt to collect the amount she believed LATS was owed. Respondent testified that he did not receive that letter, so he did not respond to it.

69. In March 2009, an attorney representing the Sandos and LATS sent a demand letter and copies of invoices to Respondent's attention. Respondent was surprised to receive the demand letter, because LATS had failed to provide the spirit packs. Respondent conferred with Chad Lapes, who told him that because CAA had obtained and provided the spirit packs, nothing was owed to LATS. Chad Lapes told Respondent about the dispute between CAA, LATS and the Sandos, and that unfortunately Respondent and the District had become ensnared in it. Respondent explained this to Principal Nye, who seemed satisfied by Respondent's explanation. Since this was not a District purchase, the District took no action. The Sandos never presented a formal claim or request for payment to the District, nor did LATS or the Sandos ultimately take any legal action against the District, Respondent or the Booster Club for payment.

70. In October 2010, Mrs. Sando complained about this matter to Superintendent Joseph Farley. Mrs. Sando complained about Respondent and several other District employees who had business dealings with Bill Lapes and LATS. Mrs. Sando lodged similar complaints with several other school districts throughout Southern California. Specifically, Mrs. Sando complained to Superintendent Farley that several of the District's athletic coaches, including Respondent, had engaged in a scheme with Bill Lapes to defraud the District, in that Mr. Lapes, through his margin process, had supplied money and goods to District coaches in exchange for purchasing goods for their school teams from LATS.

71. In November 2010, the District commenced an investigation into the Sando complaint by retaining Robert Price of ESI International, Inc., a private investigation firm. Mr. Price obtained documents from the District and Mrs. Sando, as well as other sources. He interviewed several individuals who had dealings with the various coaches subject to the Sando complaint, as well as personnel from the Orange County Sheriff's Department (OCSD). Mrs. Sando completely cooperated with Mr. Price. It does not appear as if Mr. Price had any difficulty obtaining other information. However, Mr. Price did not interview Chad or Adam Lapes, Principal Nye, then Athletic Director Reid or anyone from the Booster Club, including Mr. Pearson. Those were key people who had material information about the events in question. Mr. Price was unable to interview Respondent for legal reasons beyond his control. Mr. Price completed his report on December 29, 2011.

72. Relying heavily on Teresa Sando's version of events, and with an incomplete understanding of what happened due to his failure to interview the key figures mentioned above, Mr. Price reached the conclusion that Respondent had engaged in bribes and kick-backs from Bill Lapes and LATS, had violated the District's open bidding requirements, and engaging in a conspiracy to defraud the District. Mr. Price's conclusions are unpersuasive for the reasons mentioned above, as well as the fact that the evidence presented at the hearing did not bear them out. Moreover, Mr. Price did not appear as a credible witness. He became easily upset and offended on cross-examination when asked fairly routine questions about his investigation, so much so that it did not appear that Mr. Price was a neutral fact-finder.

73. Mr. Price's report was received by Superintendent Farley in either late December 2011 or early January 2012. Superintendent Farley had been hired in 2010, well after the events in question, and when the District was suffering from a financial crisis. He was in crisis mode at that time. Mr. Price had also reported on misconduct committed by several other coaches within the District. Superintendent Farley seemed uninterested in looking at each coach's individual situation. Superintendent Farley did not consider progressive discipline for Respondent. When he decided to fire Respondent, he did not have access to many important facts developed during the hearing. (Mr. Farley left the District in 2015.)

74. Mrs. Sando also lodged a complaint about District coaches, including Respondent, with the OCSD. It is not clear when she did so. OCSD Sergeant Michael Starnes interviewed Mrs. Sando in June 2011. It is clear that Sergeant Starnes does not view Mrs. Sando as a credible witness. Sergeant Starnes also interviewed Superintendent Farley on January 3, 2012. Sergeant Starnes noted in his report of that conversation that Superintendent Farley "conceded that the School District failed to show or advise the coaches of the policies and procedures with the School District regarding the purchasing of equipment and the account from where the funds came from." During the hearing, Sergeant Starnes was adamant that Superintendent Farley had made that statement. In his testimony, Mr. Farley denied making it. His denial was not persuasive. No reason is apparent why Sergeant Starnes would attribute that statement to Superintendent Farley if he had not made it. Sergeant Starnes had no reason to include such a statement in his report if it had not been made; Mr. Farley does have a reason to now deny having made that statement.

75. No criminal complaint was filed against Respondent as a result of the Sando complaint.

76. A. While the instant matter was being litigated, the parties were involved in writ of mandamus proceedings brought by Respondent against the District in the Superior Court of the State of California, County of Orange. The writ was in response to ALJ Amy Yerkey's denial of Respondent's motion to dismiss this case heard on December 4, 2012.

B. In the writ, Respondent argued that the District had violated provisions of the Education Code by basing discipline against Respondent for events that occurred more than four years after the Accusation in this matter was filed (the so-called "four year rule" discussed in more detail below). Respondent argued that ALJ Yerkey was in error for denying his motion to dismiss. The District countered, in part, that equitable doctrines such as estoppel or delayed discovery would allow it to proceed against Respondent based on events occurring beyond the four year period.

C. Superior Court Judge Andrew P. Banks denied Respondent's writ, ruling that it is an issue that should be litigated in this administrative hearing before it would be ripe for adjudication by the Superior Court. It is clear from the transcript of the hearing on the writ that in reaching his decision, Judge Banks interpreted ALJ Yerkey's order denying the motion to dismiss as holding only that: a) the District was permitted to allege events beyond the four year period in the Second Amended Accusation; b) the District was permitted to attempt to prove that application of equitable doctrines, such as delayed discovery, was warranted; and c) whether the equitable doctrines apply is a matter to be first decided in this administrative hearing.

Other Evidence

77. In 2008, Respondent had a little or no understanding that the District had policies in place for purchases made by the District. No training or guidelines were given to District coaches on the purchasing policies. The District had no specific policies or regulations in place at the time regarding purchases made by support clubs or players' parents. Respondent received no specific training on that topic. When Respondent was dealing with LATS in 2008, Principal Nye and Athletic Director Reid were fully aware that the Booster Club or players' parents would be funding soft goods needed to participate in the football program. Neither Principal Nye nor Athletic Director Reid made Respondent aware of his need to follow any particular policy or rule in that regard. As he stated to Sergeant Starnes, Superintendent Farley believed that the District had failed to show or advise coaches of the District's policies and procedures for purchasing equipment.

78. It is undisputed that Respondent has been a competent teacher and football coach while working for the District. He had no prior history of discipline with the District. He received nothing but satisfactory District evaluations. When Respondent resigned from coaching at DHHS in November 2010, former Athletic Director Reid provided him with a positive letter of recommendation. Mr. Reid also testified that Respondent was a good coach

and a positive role model for his student/athletes. Former DHHS Principal Nye similarly testified that Respondent was a good football coach. Mr. Pearson of the Booster Club testified that Respondent was a good football coach. Mr. Pearson, who worked closely with Respondent during the times in question, supports Respondent in this case.

79. Respondent presented three character witnesses, including his brother and father-in-law, who depict Respondent as honest, diligent and passionate about teaching and coaching high school student/athletes. The third character witness was Matt Barkley, a professional football player. Respondent coached Mr. Barkley's sixth grade pee-wee football team. Mr. Barkley sees Respondent as a mentor and role-model. Mr. Barkley testified that of all the people he has come into contact with in his years of football, Respondent is one of the few he trusts. Since Mr. Barkley has been involved in some of the premiere football programs in this country, from high school to college to the NFL, and has played for some of the best coaches in this country, his esteem for Respondent is significant.

80. In the collective bargaining agreement between the District and teachers during the times in question, the District committed to using progressive discipline, including counseling and corrective action. No such measures were used for Respondent.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. In this case, the District has the burden of proving the allegations of the Second Amended Accusation by a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1038-1039.) Preponderance of the evidence means that "the evidence on [the District's] side outweighs, preponderates over, is more than, the evidence on the other side." (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 325.)

Application of the Four Year Rule

2. Respondent had previously moved to dismiss this case based on his argument that the District violated the so-called "four year rule." The motion was denied. Respondent's writ of mandate appealing that denial was similarly denied, with the Superior Court Judge concluding the issue should be decided as part of the administrative hearing.

3. Respondent reiterated his argument at the outset of the hearing through a motion in limine, in which he argued that evidence of events "more than four years from the date of the charges" should be excluded. The District opposed the motion, arguing that the four year rule was not an absolute bar and that various exceptions applied. The ALJ reserved ruling on the motion, finding that because the issue is a mixed question of fact and law, a decision could only be made after the relevant evidence was presented. The parties agreed to present evidence on the issue and for the ALJ to decide the issue in the instant Decision.

A. The Four Year Rule

4. Education Code section 44944 governs the conduct of dismissal hearings such as this. When this case was initially filed, section 44944 stated, in relevant part, that "no decision relating to the dismissal or suspension of any employee shall be made based on charges or evidence of any nature relating to matters occurring more than four years prior to the filing of the notice." (Ed. Code, § 44944, subd. (a)(5).)

5. Effective January 1, 2015, the portion of Education Code section 44944[4] cited above was amended to read, "no decision relating to the dismissal or suspension of an employee shall be made based on charges or evidence of any nature relating to matters occurring more than four years before the filing of the notice, except allegations of an act described in Section 44010 of this code or Sections 11165.2 to 11165.6, inclusive, of the Penal Code." (Ed. Code, § 44944, subd. (b)(2)(B).) Another provision of section 44944 was amended to read, "No testimony shall be given or evidence introduced relating to matters that occurred more than four years before the date of the filing of the notice, except allegations of an act described in Section 44010 of this code or Sections 11165.2 to 11165.6, inclusive, of the Penal Code." (Ed. Code, § 44944, subd. (b)(2)(A).)

6. A lengthy discussion concerning the retroactive application of the amended version of section 44944 to this matter filed well before the effective date of the amendment is not necessary, since the language of both versions is virtually identical, and there are no allegations in this case concerning the type of conduct encompassed by Education Code section 44010 or Penal Code sections 11165.2 to 11165.6. Thus, the recent version of section 44944 is deemed to apply in this case. In fact, in his motion in limine, Respondent argued the amended version applies. The District apparently agrees.

7. A. The next question is the date from which the four year period begins to run. Section 44944 simply describes that period as four years "before the filing of the notice." Seizing on the word "filing" in that provision, Respondent argues the four year period began four years from the date the initial Accusation was filed in May 2012, meaning discipline in this case cannot be based on events occurring prior to May 2008, barring an exception. Seizing on the word "notice" in that provision, the District points to February 27, 2012, when the Board resolved to give notice to Respondent of its intention to dismiss him; and March 2, 2012, when the District served Respondent with the Notice of Intention to Dismiss (Notice). However, the District argues the four year period "should date back to March 2008," apparently using the date of service of the Notice on Respondent.

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[4] Unless otherwise specified, all further statutory citations are to the Education Code.

B. Education Code section 44944 is not clear on this point. Section 44934, subdivision (b), discusses action a school board can take "[u]pon the filing of written charges," including deciding by majority vote to "give notice" to a permanent certificated employee of its intention to dismiss or suspend that employee. There is nothing in section 44934 discussing the filing of an accusation or similar pleading, so Respondent's argument pointing to the filing of the initial Accusation in May 2012 is unsupported. The District apparently filed with the Board written charges against Respondent no later than February 27, 2012. However, those written charges would not have included any sort of notice to Respondent. On the other hand, Respondent would be served with notice of the charges, but that process would not involve filing any document or pleading.

C. Under these circumstances, the ALJ cannot decipher exactly what the Legislature intended. Since the four year rule is aimed at prohibiting discipline based on stale charges and evidence, it seems more reasonable to link the four year period to when a teacher first becomes aware of the employing school board's decision to initiate disciplinary proceedings. Thus, the four year period should be viewed as reaching back four years from when a teacher is first served with a school board's notice of intention to dismiss or suspend him or her. Such is a fairer view of this statute's application, in that a school district could theoretically file charges with its school board but action on that filing could be delayed to the detriment of the teacher in question.

D. In this case, the limitation period should date back to March 2, 2008, which is four years from when Respondent was served with the Board's Notice. Discipline in this case should not be based on events or conduct occurring before March 2, 2008, unless the District has proven that an exception applies.

B. Exceptions to the Four Year Rule Generally

8. A. In his motion in limine, Respondent pointed out that section 44944 was amended after the writ proceedings to add a specific exception to the four year rule for violations of Education Code section 44010 or Penal Code sections 11165.2 through 11165.6 (which relate to child abuse and sexual offenses). Respondent argues that because the Legislature included no other exceptions to the four year rule in its amendment, no other exceptions apply, including equitable doctrines.

B. In 2007, and well before the amendment to section 44944, the California Supreme Court in *Atwater Elementary School Dist. v. California Dept. Of General Services* (2007) 41 Cal.4th 227, 235, held that the four year rule of section 44944 is not absolute and that equitable exceptions, such as equitable estoppel, may apply.

C. In construing a statutory amendment, one must ascertain the Legislature's intent so as to effectuate the purpose of the law. (*In re Kinnamon* (2005) 133 Cal.App.4th 316.) The language of a statute should not be given a literal meaning if doing so would result in absurd consequences that the Legislature did not intend; intent prevails over the letter of the law and the letter will be read in accordance with the spirit of the enactment. (*Id.*) Courts

should not change the clear words of a statute to accomplish a purpose that does not appear on the face of the statute or from its legislative history. (*People v. Mobil Oil Corp.* (1983) 143 Cal.App.3d 261, 270.) When a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it. (*Stavropoulos v. Superior Court* (2006) 141 Cal.App.4th 190, 196.)

D. Since the Legislature is presumed to have known of the *Atwater* decision when it amended section 44944, and there is nothing in the amendments expressing the Legislature's intent to abrogate *Atwater*, it is presumed the Legislature still approves of the notion that the four year rule is not absolute and that equitable doctrines may apply. Moreover, it appears that the intention of the Legislature in amending section 44944 was to expand circumstances in which discipline can be based on conduct occurring beyond the four year period, specifically allegations of child abuse or sexual offenses. Nothing in the amendment suggests that the equitable doctrines are no longer applicable. Construing the amendments as Respondent suggests would tend to contract situations in which discipline could be based on events occurring beyond the four year period, which would not seem to effectuate the purpose of the law. Thus, in this case, the amendment to section 44944 does not seem to have abrogated or reduced application of the *Atwater* decision.

C. Does Equitable Estoppel Apply?

9. As mentioned above, the Court in *Atwater Elementary School Dist., supra*, 41 Cal.4th 227, 235, held that the doctrine of equitable estoppel may be applied as an exception to the four year rule if the elements are established. In that case, the Court recognized that the doctrine of equitable estoppel is founded on the principle that no person may profit from his own wrongdoing. Although the case law is far from clear, once equitable estoppel is established, the applicable time limitation is no longer applicable. There is no tolling of the time period; the limitation is no longer considered. (*Atwater Elementary School Dist., supra*, 41 Cal.4th 227, 232; *Lentz v. McMahon* (1989) 49 Cal.3d 393, 398-399.)

10. Generally, the party asserting application of a statute of limitations must prove the facts necessary to enjoy the benefit of it. (*Samuels v. Mix* (1999) 22 Cal.4th 1, 10.) The existence of an estoppel is a question of fact and the settled rule as to the proof of equitable estoppel is that the burden rests upon the party asserting it to prove all the elements. (*Jones v. Sunset Oil Co.* (1953) 118 Cal.App.2d 668, 673.) The same rules should apply to the other equitable doctrines. Thus, while Respondent has the burden of establishing the benefits of the four year rule, the District has the burden of establishing an exception to it.

11. A. A valid claim for equitable estoppel requires: (a) a representation or concealment of material facts; (b) made with knowledge, actual or virtual, of the facts; (c) to a party ignorant, actually and permissibly, of the truth; (d) with the intention, actual or virtual, that the ignorant party act on it; and (e) that party was induced to act on it. (*Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 584.)

B. Here, a key element in proving equitable estoppel is missing, i.e., the District relied on Respondent's misrepresentation or concealment. Although there was evidence that Respondent failed to disclose details of his transactions with LATS or Bill Lapes, the evidence did not establish that Respondent actively concealed his conduct. When Mrs. Sando initially submitted invoices to Respondent for payment in early 2009, Principal Nye was fully aware of the transactions and Mrs. Sando's contention that Respondent, DHHS and/or the District were responsible for paying for such items. The record fell well short of evidence showing that Respondent intentionally misrepresented or concealed material facts to the District. Thus, the District failed to show that equitable estoppel applies. This was the ruling reached by ALJ Yerkey in denying Respondent's motion to dismiss and there was no evidence adduced at the hearing demonstrating that her ruling was in error.

12. A. In addition, case law indicates that equitable estoppel is not applicable if the party asserting it was apprised of the requisite facts before the applicable limitation expires. For example, in *Lobrovich v. Georgison* (1956) 144 Cal.App.2d 567, 573-574, it was held that where there was still ample time to institute an action within the statutory period after circumstances inducing delay had ceased to operate, the party cannot claim an estoppel.

B. In its discussion concerning the application of equitable estoppel, the Supreme Court in the *Atwater* case relied on its prior decision in the case of *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363. In *Lantzy*, the Court held that equitable estoppel "comes into play only after the limitations period has run and addresses . . . the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period. (*Lantzy*, *supra*, 31 Cal.4th 363, 383.) The Court in *Lantzy* rejected a claim of equitable estoppel during the pleading stage of a construction defect suit, and upheld the dismissal of the case after demurrer, in part, because the party asserting equitable estoppel had knowledge of the alleged misconduct in question before the expiration of the applicable ten year statute of limitations. (*Id.* at p. 385.)

13. In this case, the District was aware of Respondent's conduct in October 2010, including the dates of his transactions with LATS in February 2008. The District had over one year to timely initiate charges against Respondent based on the events of February 2008. When the District received Mr. Price's investigative report concerning Respondent in either late December 2010 or early January 2011, it still had time to initiate charges against Respondent based on events in February 2008. Since the District was aware of the requisite facts before the four year period applicable to those events expired, it may not assert equitable estoppel as an exception to the four year rule. (Factual Findings 1-11; 64-74.)

D. Does Delayed Discovery Apply?

14. The District argues that delayed discovery also applies. The Court in *Atwater* did not specifically address equitable doctrines other than equitable estoppel because the parties in that matter had not adequately set forth the factual basis on which other equitable principles would rest. In addition, "consideration of the individual doctrines is unnecessary"

because "[a] conclusion that any one applies resolves whether the four-year time limitation is absolute." (*Atwater Elementary School Dist., supra*, 41 Cal.4th 227, 232.) There is no indication in *Atwater* that equitable estoppel is the only equitable relief that may apply as an exception to the four year rule. Respondent presented no argument why equitable estoppel should be available but not the related equitable doctrine of delayed discovery. In fact, and as explained below, delayed discovery simply tolls the applicable time period until the party in question had reasonable notice of the underlying facts. Such is a less drastic relief than equitable estoppel, where the time limitation in question vanishes if estoppel is proven. If the more drastic remedy of equitable estoppel is applicable to section 44944, it begs the question why the less drastic relief from the delayed discovery doctrine would not be. Accordingly, the equitable doctrine of delayed discovery is viewed as also available in such cases.

15. A. "The most important exception to that general rule regarding accrual of a cause of action is the 'discovery rule,' under which accrual is postponed until the plaintiff 'discovers, or has reason to discover, the cause of action.' Discovery of the cause of action occurs when the plaintiff 'has reason . . . to suspect a factual basis' for the action. 'The policy reason behind the discovery rule is to ameliorate a harsh rule that would allow the limitations period for filing suit to expire before a plaintiff has or should have learned of the latent injury and its cause.'" (*Pooshs v. Philip Morris USA, Inc.* (2011) 51 Cal.4th 788, 797 [citations omitted].)

B. Under the delayed discovery doctrine, the accrual date of a cause of action is delayed until the plaintiff is aware of his or her injury and its cause. The plaintiff is charged with this awareness as of the date he or she suspects or should suspect that the injury was caused by someone's wrongful act. The period of limitations, therefore, will begin to run when the plaintiff has a "suspicion of wrongdoing"; in other words, when he or she has notice of information of circumstances to put a reasonable person on inquiry. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109–1111.)

16. The District was informed of Respondent's conduct in fall 2010, when Mrs. Sando presented her complaint. This was when the District first learned of the particulars of the transactions between Respondent and Bill Lapes, including Mr. Lapes' margin process and the account credits allocated to the DHHS special 9 account. It was not established that the District had any reason to believe prior to Mrs. Sando's complaint that Respondent had participated in Bill Lapes' margin process. The District immediately launched its investigation in November 2010. After the conclusion of the investigation in December 2011, the District filed charges against Respondent with the Board in late February 2012. After the Board decided to terminate Respondent, the District promptly served Respondent with notice that he was being terminated in early March 2012. It must be remembered that applying the delayed discovery rule here means simply allowing charges and evidence of events only one month beyond the actual four year rule period, i.e., from March 2008 to February 2008. Nor is this a situation where the District waited the full four years after its discovery of the facts to seek discipline. Thus, the equities here weigh in favor of applying the delayed discovery doctrine, meaning discipline in this matter can be based on the events dating to February 2008 without violating the four year rule of section 44944. (Factual Findings 1-11; 64-74.)

Can Respondent Be Disciplined For Events Not Alleged in the Operative Pleading?

17. A. As discussed above, the Second Amended Accusation alleges many of the events in question, including the various orders placed by Respondent on or about February 18, 2008, which generated the sales amounts that created the credits placed into the DHHS special 9 account. The Second Amended Accusation also pleads the order on or about February 29, 2008, in which it is alleged that Respondent used some of the credit from the special 9 account for coaches' t-shirts and shorts.

B. However, there was evidence presented concerning a number of transactions not specifically alleged in the operative pleading, including two quotes from Bill Lapes for team helmets and pads, one football, a number of orders made directly by the Booster Club, and two orders for hats, visors and hooded sweatshirts placed on or about February 29, 2008, in which the District contends Respondent used credits from the special 9 account to obtain those items.

18. Administrative pleading is not bound by the strict rules applicable to pleadings in civil court proceedings. Fair notice to the respondent is more important than compliance with technical pleading rules. (*Stearns v. Fair Employment Practice Com.* (1971) 6 Cal.3d 205, 213.) In the absence of a statute or regulation, due process requires only that the respondent be informed of the charges and afforded the basic, appropriate elements of procedural due process in the hearing. (*Goss v. Lopez* (1975) 419 U.S. 565.) A pleading is sufficient and comports with due process when it provides the respondent with enough notice of the charge to enable him or her to prepare a defense. (*Dyment v. Board of Medical Examiners of State of Cal.* (1922) 57 Cal.App. 260, 265.) No prejudice will be found if it appears from the record that the respondent was in fact able to prepare a defense. (*Jaramillo v. State Bd. for Geologists and Geophysicists* (2006) 136 Cal.App.4th 880.)

19. In this case, the Second Amended Accusation gave Respondent fair notice that his immediate suspension and dismissal were being sought as a result of his various transactions with Bill Lapes and LATS in February 2008 and thereafter. Though the operative pleading alleges some, but not all, of those transactions, it is clear that Respondent had been able to prepare his defense to all of the transactions, as he presented a spirited and vigorous defense to all of the evidence presented by the District, including the transactions not specifically alleged. Since all of the orders in question directly relate to each other, the evidence presented concerning the events not alleged also tends to explain or supplement understanding of the events actually alleged. Under these circumstances, due process will not be denied if all of the transactions occurring in 2008, alleged or not, are considered for purposes of determining if good cause exists to suspend or terminate Respondent's employment with the District.

Cause for Immediate Suspension and/or Termination

20. A. The governing board of a school district may dismiss a permanent certificated employee if one or more of the causes enumerated in section 44932, subdivision (a),[5] are established. In this case, the District seeks Respondent's dismissal based on subdivisions (a)(1) [immoral conduct], (a)(6) [evident unfitness for service], and (a)(8) [persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the state board or by the governing board of the school district employing him or her].

B. In addition, a governing board may immediately suspend a certificated employee without pay pursuant to section 44939 upon the filing of a statement of charges alleging specified acts of misconduct, including immoral conduct. In this case, the cause for discipline based on Respondent's alleged immoral conduct would support such an immediate suspension if proven. However, the other two stated causes for discipline alleged in the Second Amended Accusation are not included in section 44939 as grounds for an immediate suspension without pay.

21. A. It was not established by a preponderance of the evidence that Respondent engaged in immoral conduct within the meaning of sections 44932, subdivision (a)(1), and 44939. (Factual Findings 12-80.)

B. The term "immoral conduct" has been defined to include conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, dissoluteness; or as 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 Ed. of San Francisco Unified School Dist. v. Weiland* (1960) 179 Cal.App.2d 808, 811.)

C. In this case, the evidence did not demonstrate that Respondent engaged in any immoral conduct. The Second Amended Accusation made charges of bribery, fraud and kick-backs based largely on the credits made to the special 9 account for the DHHS football program and Respondent's few purchases of football clothing that were paid from that account. Respondent did not steal District funds or conspire with Bill Lapes to steal District funds. He did not misappropriate or embezzle any District monies or accept bribes or kick-backs to continue ordering from LATS. Respondent did not purchase any goods or items for his personal benefit. Rather, the items ordered on a few occasions from the special 9 account were used only for football program equipment and activities. The evidence indicates it is not unusual for high school coaches' apparel to be funded by booster or support groups, as opposed to out-of-pocket expenses by the coaches themselves. Respondent's conduct did not connote any immoral intent to benefit himself or to harm the District, DHHS, or its students.

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[5] Section 44932 was also amended effective January 1, 2015. While there were no substantive changes to any of the subdivisions relied upon by the District for discipline, many of the subdivisions were renumbered and thus vary from the operative pleading.

22. A. It was not established by a preponderance of the evidence that Respondent is evidently unfit for service as a teacher, pursuant to section 44932, subdivision (a)(6). (Factual Findings 12-80.)

B. "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.*)

C. In this case, it was not established that Respondent has any sort of fixed character trait rendering him unfit for service as a teacher. If anything, Respondent is a good teacher and a good football coach. Other than this case, he has had an unblemished record as an educator since he became credentialed in 1991. The events upon which the District seeks discipline were isolated to essentially a two month period in 2008. Respondent's orders with Bill Lapes were placed in February 2008 just a few weeks after he had been hired as the head football coach at DHHS. Respondent had little to no training on District purchasing policies and was up against hard deadlines to order practice and season clothing and equipment for the DHHS football program. The orders and transactions ultimately consummated were not subject to District purchasing policies because they involved the Booster Club and players' parents. The margin process suggested by Bill Lapes was not unusual in the athletic community. The concept that coaching staff apparel would be funded by a booster or support club was not foreign to Respondent either. Thus, while Respondent failed to be completely candid with the Booster Club in disclosing the full parameters of the margin process suggested by Mr. Lapes, it cannot be concluded that his failure to do so, on one occasion, demonstrated any negative character trait. Nor did the few orders funded from the credits generated from the initial spirit pack orders that were used to provide apparel to Respondent and his coaching staff.

D. In addition, it was not established that Respondent's conduct was not remediable upon receipt of notice from the District that his conduct failed to meet the District's expectations. As discussed above, Respondent's conduct in failing to disclose the full parameters of Bill Lapes' margin process to the Booster Club and/or the players' parents did violate the Board's Code of Ethics set forth in Board Policy 4119.21. However, there is absolutely no question that if the District had advised Respondent of such, he would have never again become involved in any transaction involving a margin or anything remotely similar to what happened with Bill Lapes or LATS.

23. A. It was not established by a preponderance of the evidence that Respondent persistently violated or refused 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 Board of the District, within the meaning of section 44932, subdivision (a)(8). (Factual Findings 12-80.)

B. Cause for discipline here may be based on the violation of school rules or district policies. (*San Dieguito Union High School Dist. v. Commission on Professional Competence* (1985) 174 Cal.App.3d 1176, 1180-1181.) However, there must be a "showing of intentional and continual refusal to cooperate." (*Id.* at p. 1196.) The violation must be persistent or "motivated by an attitude of continuous insubordination." (*Governing Board of the Governing Board of the Oakdale Union School Dist. v. Seaman* (1972) 28 Cal.App.3d 77, 81-82.) Isolated events or incidents involving an issue unresolved over a period of time are generally not considered persistent. (*Bourland v. Commission on Professional Competence* (1985) 174 Cal.App.3d 317.)

C. In this case, it was not established that Respondent engaged in the sort of insubordinate behavior typically associated with this statute. While he did violate the Board's Code of Ethics by participating in Bill Lapes' margin process without disclosing the full parameters of it to the Booster Club or its board, it was not established that Respondent's violation of that policy was knowing, intentional or persistent. It was not established that Respondent violated any other Board policies or District regulations, and it is not even clear that he knew the Board's Code of Ethics existed. Respondent received little to no training on District purchasing policies and even Superintendent Farley admitted to Sergeant Starnes that the District failed to show or advise coaches of the District's policies and procedures for purchasing equipment. Respondent's actions occurred when he was new to his position as head football coach and was thrown into the process of ordering athletic equipment under very tight deadlines. The concept of coaching apparel being funded by booster or support clubs was not unusual to Respondent, so the fact that some of the credits developed from the margin process were used in that way would not automatically signal that the transactions violated the Code of Ethics. This is not a case where it was established that Respondent knew the Code of Ethics, understood the LATS transactions violated the code, and yet he intentionally and persistently chose to engage in that activity.

24. The Board's decision to immediately suspend Respondent can only be supported by his engaging in immoral conduct. As discussed above, it was not established that Respondent did so. Therefore, it was not established by a preponderance of the evidence that cause existed to immediately suspend Respondent without pay pursuant section 44939. (Legal Conclusions 20-21, Factual Findings 1-80.)

Analysis of the Morrison Factors

25. In deciding whether cause for dismissal exists for immoral conduct or evident unfitness for service, it also must be established that a teacher's misconduct relates to his fitness to teach, within the meaning of *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 227-230). In this case, since it was not established that Respondent's conduct demonstrated either immorality or evident unfitness for service, examination of the *Morrison* factors is unnecessary.[6]

[6] Nonetheless, it is doubtful that the *Morrison* factors would support cause for discipline if applied. For example, there was little showing that Respondent's conduct

Disposition

26. "The Commission has broad discretion in determining what constitutes unfitness to teach . . ., and whether dismissal or suspension is the appropriate sanction." (*California Teachers Ass'n v. State of California* (1999) 20 Cal.4th 327, 343-344.) Thus, even where cause for dismissal has been established, the Commission still has broad discretion to determine whether such discipline is actually warranted. (*Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208, 222.)

27. In this case, the District failed to establish that cause exists to immediately suspend or dismiss Respondent's employment. This is not to say that Respondent did nothing improper. His lack of complete candor to the Booster Club and his players' parents regarding the margin process was an exercise of poor judgment and it violated the Board's Code of Ethics, notwithstanding the mitigating circumstances. In that sense, his conduct is better viewed as unprofessional and/or unsatisfactory. Yet even assuming that conduct would have supported legal cause for discipline, it is highly unlikely that the circumstances here would have warranted either an immediate suspension or dismissal. Respondent served as the head football coach at will. Once the activity was discovered, Superintendent Farley or Principal Nye would have been justified in firing Respondent as the head football coach. They would have also been justified in directing that Respondent receive counseling and/or a stern letter of reprimand. Perhaps even a short suspension would have been justified. Such actions would have been entirely consistent with the principles of progressive discipline stated in the collective bargaining agreement that was in effect at the times in question. However, any discipline greater than that would have been highly problematic and unsupported for all of the reasons discussed above.

ORDER

The Second Amended Accusation is dismissed. The immediate suspension without pay of Respondent Brent Melbon is reversed. The dismissal of Respondent Brent Melbon from employment with the Capistrano Unified School District is reversed.

DATED: July 9, 2015

ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings

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adversely affected students or the District; if there was any adversity, it was minimal; the events in question happened in 2008, more than seven years ago and were remote in time; a number of mitigating facts were established, but nothing aggravating; and it is highly unlikely that Respondent would repeat such conduct in the future.