

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

In the Matter of the Accusation Against:

AMANDA GORI,

Respondent.

OAH No. 2009040760

DECISION

A Commission on Professional Competence heard this matter in Gilroy, California, on October 10 and October 11, 2011. The Commission consisted of Ms. Marilyn Fuller, Ms. Jenay Kiddoo, and Office of Administrative Hearings Administrative Law Judge Perry O. Johnson, who served as chairperson.

Nitasha K. Sawhney, Esq., and Rodrigo E. Guevara, Esq, of GCR, LLP, 313 West Winton Avenue, Suite 372, Hayward, California 94544, represented complainant Dr. Deborah A. Flores, Superintendent, Gilroy Unified School District.

Joseph A. Cisneros, Esq., of The Biegel Law Firm, 2801 Monterey-Salinas Highway, Suite A, Monterey, California 93940, represented respondent Amanda Gori, who was present for the proceeding.

On October 11, 2011, the parties submitted the matter for decision and the record closed.

Issues

Did respondent Amanda Gori's acts and omissions constitute evident unfitness for service as a school teacher by way of: (i) acts of enabling students to cheat on tests; and (ii) acts of dishonesty when dealing with a District administrator?

Did respondent Amanda Gori engage in dishonesty by: (i) knowingly encouraging and assisting students to cheat on tests; (ii) deceitfully lying to a district administrator; and (iii) purposefully misleading a District administrator about her completion of student report cards?

Did respondent Amanda Gori persistently refuse to obey school laws of the State or reasonable regulations prescribed by the District's Governing Board by helping students cheat on tests so as to violate the District's policies regarding student conduct and academic honesty?

Did respondent Amanda Gori's acts and omissions constitute immoral conduct by way of encouraging and assisting students to engage in academic dishonesty and by deceitfully lying to a school administrator?

FACTUAL FINDINGS

1. The Accusation and Statement of Charges against respondent Amanda Gori were brought by complainant Dr. Deborah A. Flores (complainant), in her official capacity as Superintendent, Gilroy Unified School District (the District).

2. Respondent Amanda Gori (respondent) is a permanent certificated employee.

The District employed respondent over the span of six school years. During most of the 2010-2011 school year, respondent served the District and its students in the capacity of a fourth-grade school teacher at Rod Kelley Elementary School. During the preceding school year (2009-2010), respondent taught at the third-grade level at the same school. And during the 2008-2009 school year with the District, she acted as a second-grade teacher. Respondent's first three school years with the District were spent at Antonio Del Buono Elementary School where she taught students in the first grade and second grade.

3. On June 16, 2011, complainant caused an Accusation to be served on respondent. A Statement of Charges and Recommendation of Dismissal and Immediate Suspension Without Pay was served upon respondent on or about May 12, 2011. And on May 4, 2011, complainant caused respondent to be served with a Notice of Proposed Suspension and Dismissal. (Effective May 13, 2011, the District commenced respondent's status of suspension without pay.)

The Accusation and Statement of Charges recommend respondent's dismissal from her employment with the District for the following causes under Education Code¹ sections 44932 and 44939: (1) evident unfitness for service; (2) dishonesty; (3) refusal to obey the school laws of the State or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the Governing Board of the District; and (4) immoral conduct.

4. Respondent submitted a Notice of Defense. On June 6, 2011, respondent filed with the District her Request for Hearing and Notice of Objection to Decision.

5. All pre-hearing jurisdictional requirements have been met by the parties and jurisdiction exists for these proceedings.

¹ All statutory references are to the Education Code, unless otherwise noted.

The District's Evidence

MARGARIDA OLIVEIRA

7. Ms. Margarida Oliveira has been a teacher for 16 years. She has had an assignment as a teacher at the District's Rod Kelley School over the past 12 years. Before the 2010-2011 school year, Ms. Oliveira had never taught as a fourth-grade teacher. For more than a decade she taught first-grade and second-grade students. The current school year (2011-2012) is the second year that Ms. Oliveira has been a fourth-grade teacher.

8. Ms. Oliveira had never been a teacher at the same grade level to which respondent was assigned as a teacher before the 2010-2011 school year. They began teaching at the fourth-grade level during the same school year and they were each part of the same team of fourth-grade teachers at Rod Kelley School

9. Ms. Oliveira is knowledgeable regarding the District's Benchmark examinations for math and reading ELA (English Language Arts). She pointed out that a Benchmark examination was administered in the same manner as a state-prescribed assessment examination in that a teacher reads aloud to students certain instructions and then the students independently take the examination. But Ms. Oliveira noted that students have asked "oftentimes" for "help" during the course of taking Benchmark tests, namely on matters such as "decoding," that is, interpreting words the student cannot read. Ms. Oliveira's approach has been to tell a student to "sound out" the word to the best of the ability of the student. And also on the topic of students who sought her assistance during the administration of a Benchmark examination, Ms. Oliveira has reminded a student of strategies including an act of "going back" to reread a story or to underline a phrase in a story in addressing test questions.

The data gained from Benchmark tests are used in preparing report cards and to "regroup" a student into a different reading class.

10. Regarding the District's Accelerated Reading (AR) program quizzes, Ms. Oliveira learned only after the first two to four weeks into the 2010-2011 school year that open book assistance was disallowed when a student took a computerized AR quiz. Ms. Oliveira learned about the school's policy by way of a memo that was issued from "administration." The means of transmission was believed to have been through an email message. Also at some point in time at the end of January 2011, she read a printed document by the developer of the AR program.

11. Regarding the Accusation's allegation that respondent helped students to cheat, Ms. Oliveira had no personal knowledge regarding respondent's administration of either Benchmark examinations or the AR quizzes. But she recalled

an incident involving a single fourth-grade student, J.Y., and that student taking the weekly reading assessment test. While Ms. Oliveira was administering a general, weekly reading comprehension assessment test and was in the process of distributing the test booklets to the class, the subject student, J.Y., exclaimed spontaneously, “Oh, I’ve taken this test before.” (The student was in Ms. Oliveira’s reading group class, which was to only receive the test from the teacher.) J.Y. had asserted that respondent, in a homeroom setting, supposedly had given the girl the test to study “over the weekend.”

But, Ms. Oliveira’s account regarding J.Y.’s assertions was not reliable due to other matters that undermine the trustworthiness of the child’s claimed statement. In particular the source of the words, namely a child in a classroom setting, was not reliable. It is implausible that the 10-year-old child was accurate with a claim that she had seen the exact test before Ms. Oliveira distributed the test to her “below basic” reading group because the words were spontaneously uttered as the test booklet was distributed and the child had yet to open the book. (And, Ms. Oliveira was not clear as to what measures she took with regard to the test that girl said she had “already taken.” Did she allow J.Y. to take the test notwithstanding the girl’s words? Did she single out J.Y. in the class to prevent the fourth-grade student in taking the test that she had supposedly “already taken”?)

Moreover, Ms. Oliveira acknowledged that she had no knowledge about a teacher-parent conference whereby respondent understood J.Y.’s mother’s concern about the child’s difficulty with reading tests and respondent offered a solution of providing the child with “old” or previously administered reading comprehension tests for the child to prepare.

After hearing J.Y.’s supported report of having previously seen the reading test statement, Ms. Oliveira did not confer with respondent about the comments the teacher believed J.Y. had made. Rather, Ms. Oliveira informed the school’s most veteran fourth-grade teacher, Ms. Mesa, about J.Y.’s remarks. (Ms. Mesa passed the report onto the school principal, and she never talked with respondent about the child’s claimed words.) Also, Ms. Oliveira never talked with the parents of J.Y. about respondent’s act of providing J.Y. with a weekly reading assessment test’s questions to read over various weekends.

12. Ms. Oliveira noted that after respondent was placed on administrative leave in March 2011, 10 students from respondent’s homeroom class were assigned to Ms. Oliveira’s class. At no time after the time that the 10 students joined her class did Ms. Oliveira observe any different behavior in test taking by those students. Those students, who previously had been assigned to respondent’s homeroom, were “a very good group of students” as they “followed the rules very nicely” upon being part of Ms. Oliveira’s classroom through the balance of the school year. In fact, “nothing stands out” regarding the students who had been in respondent’s classroom.

13. Ms. Oliveira acknowledged on cross-examination that she had no personal knowledge regarding any act or omission on respondent's part that indicated respondent helped her assigned students to "cheat" on Benchmark tests.

No student ever informed Ms. Oliveira that respondent had helped a student to cheat on any Benchmark test.

14. Ms. Oliveira recalled respondent as being dedicated and that she exhibited a caring demeanor towards her students. Ms. Oliveira upon reaching the school's grounds at an early morning hour often found respondent's vehicle parked next to the school. And on occasions when Ms. Oliveira left the school grounds after school hours, respondent remained late at the school.

Ms. Oliveira observed that at fourth-grade teacher team meetings, respondent did not ask many questions. Respondent was a reserved and quiet individual.

NANCY MESA

15. Ms. Nancy Mesa has been a fourth-grade teacher for 20 years. She has spent 19 years at Rod Kelley Elementary School.

At the beginning of the 2010-2011 school year, Ms. Mesa summoned a meeting with the new fourth-grade teachers, namely Ms. Oliveira and respondent. The purpose of the meeting was to orient and acquaint the new teachers with "how things were done in the past" and to get to know them. Ms. Mesa and the other experienced fourth-grade teacher, Ms. Mesa, devised "agreements at that point" on topics such as imposition of a discipline system and the designation of student reading groups.

At the beginning of the school year, Ms. Mesa "worked hard" to welcome the new teachers to the fourth-grade level. And she set weekly meetings on Wednesday afternoons to plan lessons, discuss strategies, and review new materials. As the teacher with the most seniority, Ms. Mesa "prided" herself regarding "grade level consistency" for the students from class-to-class.

At some point during the 2010-2011 school year, Ms. Mesa formed an unfavorable opinion that respondent had not subscribed to her plan for the team of fourth-grade teachers at Rod Kelley Elementary School. Ms. Mesa perceived some "disorganization" with lesson planning. Also Ms. Mesa noted that respondent was not fully participatory in the grade-level planning and that as a new teacher, respondent "did not ask any questions." When Ms. Mesa made inquiries of respondent as to whether she had any questions, respondent's reply "was always 'no.'" And Ms. Mesa took issue with the need to seek out respondent to ask that the new teacher "participation in things" because respondent did not volunteer to "take part in things."

16. In late January 2011, after conferring with Ms. Haley Saldana and Ms. Oliveira, Ms. Mesa prepared a memorandum regarding the grade level concerns that revolved around respondent. Without first interacting with respondent, Ms. Mesa delivered the memorandum to the school's principal. The two and one-half page memorandum, dated January 27, 2011, which bore the typed names of three fourth-grade teachers (Ms. Mesa, Ms. Saldana, Ms. Oliveira), set out, in part:

As per our discussion today, here is the documentation that you requested regarding the concerns [the other three teachers for fourth grade classes] have with [respondent]:

1. Not being consistent with the grade-level discipline policy

[§] . . . [§]

2. Returning student assessments from ELA (weekly skills and selection tests)

[§] . . . [§]

3. Keeping up with the pacing schedule and implementation for ELA (including Universal Access), Writing, and Health.

[§] . . . [§]

4. Keeping up with the pacing schedule and implementation for math.

[§] . . . [§]

5. Keeping up with shared fourth grade duties (planning of lessons, running of copies, etc.)

[§] . . . [§]

6. Reporting for yard duty in a timely manner.

[§] . . . [§]

7. Unwilling to ask for help or clarification when needed.

[§] . . . [§]

Most of these concerns have already been addressed with [respondent], however they have not been resolved. If you would like to discuss these issues further, please contact us and we will be happy to meet with you at your convenience.

On February 16, 2011, a meeting occurred among the four fourth-grade teachers, as well as a PAR teacher-Kathleen Taylor, a retired third-grade teacher-Linda Moore, and Principal Luis Carrillo. Following the meeting, Ms. Mesa prepared a memorandum, titled “Fourth Grade, Grade Level Meeting Notes-Grade Level Concerns About [respondent]” The February 2011 memorandum set out three areas of concern under headings captioned: “Students are not receiving equitable education;” “Lack of Communication;” and, “Lack of Professional Courtesy.”

But neither the January 27, 2011, memorandum nor the February 16, 2011, memorandum raised allegations concerning: respondent helping students to cheat on tests; respondent engaging in dishonesty; respondent participating in immoral conduct; respondent persistently violating of policies established by the state or the District’s governing board; or respondent showing a character that was not inclined to remediation.

17. On cross-examination, Ms. Mesa acknowledged that before the February 2011 meeting, which included the school principal and a total of seven participants, the subject most senior Rod Kelley School fourth-grade teacher never met one-on-one with respondent to discuss, in depth as a block of issues, the matters raised in the January 27, 2001, and February 16, 2011, memoranda.

18. In either December 2010 or January 2011, respondent went to Ms. Mesa to confide in that senior fourth grade teacher regarding respondent’s perception that Principal Carrillo was engaged in a pattern of harassment of respondent. Ms. Mesa did not offer respondent any suggested, specific course of action, plan or otherwise aid the newest fourth-grade teach to resolve the conflict with Principal Carrillo.

19. Ms. Mesa had no personal knowledge regarding any act or omission on respondent’s part that indicated respondent helped her assigned students to “cheat” on Benchmark tests.

No student ever informed Ms. Mesa that respondent had helped a student to cheat on any Benchmark test.

HALEY SALDANA

20. Ms. Haley Crammton Saldana has been a fourth-grade teacher at Rod Kelley Elementary School for eight years.

Ms. Saldana established that the cadre of fourth-grade teachers and the administration at Rod Kelley Elementary School grouped students according to the reading ability of each child. For the 2010-2011 school year, Ms. Saldana's group of students, who had scored on a third grade administered test, were designated to come within the "basic" reading group. Ms. Mesa was assigned the "proficient" or "advanced" group of students. And Ms. Oliveira had reading group that had scored at the "far below basic" and "below basic" groups. And Respondent's student were deemed to be the "below basic" group.

21. The Benchmark examinations are District-administered tests, which are administered quarterly to assess student progress. The Benchmark examinations are grounded on prescribed standards in a manner similar to the "state exams," which are also known as the CST. Each teacher, including respondent, was expected to administer the ELA Benchmark examination to her assigned reading group; while fourth-grade students took the Benchmark math examination in their homeroom class.

Ms. Saldana had some of respondent's homeroom students in Ms. Saldana's reading group class. At no time did she notice any different technique for handling testing material or using circles upon questions in testing booklets as between the students from respondent's homeroom class and other students assigned to the reading group taught by Ms. Saldana.

22. Ms. Saldana thoroughly described the AR Program as used at the Rod Kelley Elementary School. As of the date of the hearing, the program was in its third year of implementation. The AR program revolved around a student reading a book and then taking a computer-generated quiz regarding topics or issues raised in the book. For the fourth grade at Rod Kelley Elementary School, the teachers devised a classroom-oriented competition to enhance students' interest in reading by awarding prizes to the classroom that earned the highest aggregate score on the AR computer quizzes for a month's period. During the first year of the AR program, students were permitted to use open books during the AR computer quiz process. But during either September or October 2010, which was the second year for use of the AR program, a prohibition against open-book aid for AR program quizzes was "brought up" at a teachers' staff meeting.

23. The district's policy regarding a prohibition against the use of an "open book" technique by students taking quizzes under the AR program was learned by Ms. Saldana at a grade-level staff meeting in the early part of the 2010-2011 school year. And the prohibition regarding open book use by students for AR program quizzes was expressed in a teacher instructional document published by the AR program creator and distributed in January 2011. A written directive, which prohibited open-book test taking, was also reported in a document titled, "Rod Kelley School Student Guideline for Taking Accelerated Reader Quizzes," dated January 28, 2011.

24. Ms. Saldana was not believable when she asserted that she was aware that respondent personally learned in October 2010 about the District's prohibition for open book usage by students taking AR quizzes. Ms. Saldana alluded to an email message, which was supposed received by her no later than mid-October 2010, that transmitted the school policy on banning open books during AR quizzes; but, that document was never produced at the hearing.

25. Ms. Saldana offered no evidence regarding her personal knowledge with respect to an allegation that respondent prompted students to cheat.

At most with regard to allegations pertaining to respondent engaging in unethical acts of aiding or encouraging student cheating, Ms. Saldana expressed only one instance regarding questionable teaching techniques by respondent. On that one occasion, during a reading class or an ELD class, Ms. Saldana raised with students, who were assigned to respondent's homeroom, topics pertaining to figurative language, that is similes and metaphors, which according to the fourth-grade teachers' plan, were to have been taught during "writing time" in homeroom periods. However on that occasion the students were at a loss when the teacher raised the topics. When Ms. Saldana directed the attention of the students to the writing lessons, students replied "we're not doing that in writing." Rather than interacting with respondent about the students' supposed lack of educational progress, Ms. Saldana brought her concerns to Ms. Mesa regarding her perception of "inequitable" educational experience for students because of respondent's perceived inadequate teaching techniques.

26. After respondent was placed on paid leave in March 2011, the Rod Kelley Elementary School principal tasked Ms. Saldana to prepare memoranda regarding the remaining fourth-grade teachers' impressions of respondent's acts and omissions. As the principal's agent, Ms. Saldana composed two memoranda in May 2011.

a. The first memorandum, titled "Writing Lessons for 'Responding to a Poem' Assignment," pertained to fourth-grade teacher meetings between November 15, 2010, and December 10, 2010. The memorandum, undated, ended with:

As you can see, [teachers] gave instructions, but the writing was done independently by the students. [Teachers] didn't offer help with spelling or editing besides telling the students to refer to the examples from the text and their checklists. When [respondent] came to [teachers'] planning meeting, she wrote down all of the same plans [that the other teachers] wrote down. [Respondent] did not ask any questions for

clarification. The three other members of the team collaborated to create the lesson sequence, and she quietly sat at the meeting and wrote plans in her plan book. [Respondent] didn't mention anything about her handout at any time, nor did she contribute to the planning process. She is responsible for teaching the curriculum and delivering it in an equitable way, especially when the assignment will be graded and used for data collection and reporting to parents (this grade was used for report cards as well.)

The first memoranda by Ms. Saldana did not objectively or reasonably establish respondent's acts of prompting student cheating, respondent's dishonesty or other alleged respondent misconduct that warrants respondent's dismissal from her position as a District fourth-grade teacher.

b. The second, undated and unsigned, memorandum set out:

In November [2010, fourth-grade teachers] worked on a writing piece in class focusing on responding to literature. [The teachers] used the Write Source book to write a response to a *haiku*. As a grade level, [the teachers] decided to create lesson plans following the ideas from the Write Source text for [the teacher's] next writing assignment/assessment. On Monday, November 15, 2010, [the teachers] began the lessons, and [the teachers] continued working on the piece taking the kids through December 10, 2010. This process was to be taught through a guided process, but all writing was to be done by the students. . . .

During [the teachers'] grade level meeting on December 10, 2010, I checked with [respondent] and the other teachers to see how their classes were progressing. [Respondent] said that the lessons were coming along fine. At that point [the fourth-grade teachers] decided that [teachers] would bring the assignments to [the teachers'] next Wednesday meeting, where [the teachers] would have the chance to score them holistically. . . . [Respondent] (and the rest of the fourth grade teachers) brought the writing assessments

the following Wednesday, and we sat down and began scoring them. [The teachers, that is Ms. Saldana and Ms. Mesa] were unsure about how [respondent] was able to complete the assignment in less than a week, when it had taken [the other teachers'] classes so long to complete.

Last Wednesday, May 25, 2011, [which was two months after respondent had been placed on leave and two weeks after respondent was served with Notice of the Proposed Dismissal], [fourth grade teachers] were in room [three] using the classroom for a reader's theatre performance. During that time, [teachers] spotted some of [respondent's] writing assessments sitting on a counter, as well as a sheet that were unfamiliar with. This sheet . . . was a handout of . . . paragraphs that had minimal amounts of spaces for filling in the blanks to be done by students. The directions ask the students to recopy the work on lined paper.

This handout is a concern to [fourth grade teachers], as a grade level, because it wasn't given to all of the students. Therefore, [respondent's] students had extra support to complete this assignment that [teachers] used to give to students [as] a grade for writing. [Teachers] are also concerned, because [respondent] never mentioned this additional support that she was going to provide to her students. [Remaining fourth-grade teachers] feel that this [sheet] should have been disclosed at the grade level meeting, or even the scoring session. Because [respondent] didn't share the fact that she provided this extra support . . ., [teachers] feel that [respondent's students'] scores for that assignment were not an accurate picture of her students' capabilities.

During cross-examination, Ms. Saldana had no recollection of whether students could work on the *haiku* poem at home or whether parents could help the students. But Ms. Oliveira and respondent recalled that students could work on the *haiku* at home. And it was established that there was no prohibition upon students accepting out-of-school assistance with the *haiku* poem. (And Ms. Saldana had no explanation for her disdain for respondent's extra effort with her "below basic"

reading students to respond to the intricate nature of a haiku poem, when Ms. Saldana taught a basic reading class and Ms. Mesa taught a proficient or “above basic” reading class.)

The second memorandum by Ms. Saldana did not objectively or reasonably establish respondent’s acts of prompting student cheating, respondent’s dishonesty or other alleged respondent misconduct that warrants respondent’s dismissal from her position as a District fourth-grade teacher.

27. Ms. Saldana recalled respondent being a reserved individual. At weekly meetings of the four teachers of fourth-grade students at Rod Kelley Elementary School, respondent neither posed many questions nor engaged actively fellow teachers in the meetings.

28. Ms. Saldana credibly expressed at the hearing of this matter that respondent worked hard and cared about her students. In her view, respondent “gave up a lot of free time” to work with students after regular school hours, at lunch-time breaks and during the recess periods.

29. Ms. Saldana acknowledged on cross-examination that she had no personal knowledge regarding any act or omission on respondent’s part that indicated respondent helped her assigned students to “cheat” on Benchmark examinations.

No student ever informed Ms. Saldana that respondent had helped a student to cheat on any benchmark test.

PATTIE JOHANSEN

30. Over approximately the past five or six school years, Ms. Patricia Johansen has been a third grade teacher at Rod Kelley Elementary School. She has been employed by the District since 1984.

During the 2009-2010 school year, Ms. Johansen and respondent worked together as part of the team of third-grade teachers. Ms. Johansen and respondent enjoyed a good relationship during the only year respondent served as a third-grade teacher. (Ms. Johansen knew that during the preceding school year (2008-2009) respondent had been assigned as a second-grade teacher at the subject school.)

31. During the 2009-2010 school year, Ms. Johansen and respondent administered the District’s Benchmark tests in reading and math. On one occasion during that past year, Ms. Johansen engaged respondent in a “casual conversation” regarding the then approaching Benchmark examination. Ms. Johansen heard respondent assert that she “really wanted to help these kids” with the Benchmark examination.

Further Ms. Johansen noticed that students in her homeroom class received test scores from examinations in respondent's class that seemed "alot higher" than she had expected the students to have attained. But Ms. Johansen never conferred with respondent regarding the observations.

32. During the year that they worked as third-grade teachers, Ms. Johansen observed that respondent cared about her students. According to Ms. Johansen's view respondent worked hard at meeting the educational objectives of being a teacher.

33. Before becoming a third-grade teacher, Ms. Johansen served as a fourth-grade teacher and she was part of the team with Ms. Mesa and Ms. Saldana. Ms. Johansen asked to be transferred from the fourth-grade team because of a personality clash which developed between her and another teacher on the fourth-grade team.

34. Ms. Johansen never observed, or otherwise gained knowledge, that respondent provided students with answers for any Benchmark examination or California Standards Test (CST) assessment.

Ms. Johansen possessed no personal knowledge regarding any act or omission on respondent's part that indicated respondent helped her assigned students to "cheat" on Benchmark examinations.

No student ever informed Ms. Johansen that respondent had helped a student to cheat on any benchmark test.

THREE STUDENTS FORMERLY ASSIGNED TO RESPONDENT'S CLASSES

35. The District called three students to provide testimonial evidence at the hearing of this matter. But the testimony from those young children was not supportive of allegations that respondent prompted children to cheat on Benchmark tests or AR quizzes.

A.L.

36. A.L. is a 10-year-old girl. She is now a fifth grade student during the 2011-2012 school year. Last year, when she was a fourth grade student at Rod Kelley Elementary School, respondent acted as A.L.'s teacher in homeroom, math, and history class settings. Also during the past school year, Ms. Saldana was A.L.'s reading teacher and ELD (English Language Development) teacher.

A.L. understood the district's Benchmark examinations for math and reading to have occurred "in the middle of the year." She took the Benchmark tests in respondent's class as well as in Ms. Saldana's class. Upon taking a Benchmark test in Ms. Saldana's classroom, the teacher would collect the test. In respondent's

classroom, A.L. had a supposed recollection that respondent circled numerals that preceded a question for which a wrong answer had been provided by the student. By the circled question, A.L. understood that she should closely reread the question so as to then mark the correct answer among the remaining other three printed multiple choice answers. But A.L. had no recollection that respondent looked to the second selection made by her on the Benchmark examination. And A.L. noted that there were occasions when she personally circled numerals that preceded questions in the benchmark test booklet.

A.L. offered non-compelling testimony regarding respondent's administration of the computer-generated AR quiz. The AR quiz entailed competitions among the fourth grade classes so that the students' classroom with the highest AR score earned a trophy and banner that should be displayed in a window to broadcast the joint accomplishment of the students. During an unspecified time frame, respondent allowed the students in her classroom to use an open-book method to locate answers for "really hard questions" on the AR quiz. A.L. recalled, however, at an unspecified time that Ms. Saldana required the students to place reading books upon the top of the computers so that the books could not be accessed while student took the quiz.

And A.L. recalled that during recess periods, fellow students were allowed by respondent to help other students on AR quizzes to search through text books in order to complete the AR quiz. But in Ms. Saldana's class when A.L. did not know the answer to questions while taking the AR quiz, she and other students would "just guess."

On cross-examination, A.L. affirmed that respondent did not administer any reading test to her during the student's fourth-grade school year. During all times, however, respondent was a "nice teacher," who showed that she wanted A.L. to do her best in her school work.

During the Benchmark examination, respondent stood next to the desk of A.L. when she circled numerals preceding questions for which an incorrect answer initially had been made by the student.

A.L. established that in those instances during recess periods when a student acted as a "helper" for another student on an AR quiz, respondent had established a rule that the helper could only go to the page "where the answer might be" located. The helper, however, could neither identify the answer on the page nor tell the correct answer to the AR quiz taker

Regarding the Benchmark math examinations as given her in the fourth grade, respondent told A.L. to "go over" and "check" the test answers on the student's completion of the entire examination as to those questions that the student was uncertain for which an initial correct response had been selected. And A.L. recalled

that respondent instructed her to “show [her] work” by setting out on a scratch paper or the test booklet the actual multiplication calculation.

At the hearing of this matter, A.L. never stated that she personally cheated on any examination or test. A.L. did not express at the hearing that she ever suffered any adverse consequence of a breach of District policy that proscribes a violation of the code of student conduct in so far as academic dishonesty of her part.

K.Q.

37. K.Q. is a 10-year-old girl who is currently a fifth grade student in a District elementary school. During the 2010-2011 school year, while attending the Rod Kelley Elementary School, K.Q. was a fourth-grade student who had two teachers, namely Ms. Oliveira and respondent. Ms. Oliveira acted as the home-room teacher for K.Q., while respondent functioned as the student’s reading teacher.

K.Q. was familiar with the Benchmark examinations in reading and mathematics that were administered to her as a fourth-grade student. But she did not recall the number of occasions on which the tests were given to her.

K.Q. had a recollection of the different approaches taken by her teachers for the tests. She recalled that respondent would allow the students to “check back” on tests questions and the teacher would allow the test takers to change “their answers” so as to allow the student to “get the right answers.” But in the classroom of Ms. Oliveira when student “were done,” that teacher would collect the testing sheets and then direct the test takers to read in their own books.

K.Q. was not persuasive at the hearing when she asserted that in a Grade Four ELA Benchmark 2 test on January 19, 2011, after she completed the test, respondent circled numerals preceding certain test questions for which K.Q. had made an incorrect selection among four possible answers on that multiple choice test sheet. According to K.Q., respondent returned to the student the test questions and answer sheet and that the student was expected by her teacher to reread the marked test questions and to select from the remaining three possible responses for the marked questions the correct answers. K. Q. was not certain as to what other pupils did with the test; but she did reread the circled questions and exerted herself to determine for herself the correct answer.

Since the time that she took the January 2011 test as a 10-year-old child, K.Q. has been a student in the school as administered by Principal Carrillo. The nature of the child’s testimony suggests that she may have been influenced by suggestions imparted to her by adults as to respondent’s role in her taking a Benchmark exam.

K.Q. understood the AR quiz programs during her fourth-grade school year. She recalled that classroom competition existed among the fourth-grade classrooms

and that prizes were awarded to the classroom with the best scoring students on the AR quizzes. When she took an AR quiz in respondent's class, and during an unspecified period of time, K.Q. was allowed to use an open book to search for the correct answers to quiz questions. In Ms. Oliveira's classroom, however, the AR quiz takers had to place books on top of computers so that the students could not look for answers to quiz questions.

Even though respondent was the teacher in her third-grade homeroom, K.Q. had no recollection that respondent ever helped her on any tests during that school year.

On cross-examination, K.Q. acknowledged that respondent was a "nice" teacher, who wanted the students to do well in their educational endeavors.

Also, on cross-examination, respondent demonstrated that regarding the Benchmark examination taken by K.Q. on January 19, 2011, there were several circled numerals that preceding test questions; however incorrect final responses were made by K.Q. And according to K.Q., respondent had circled the numerals so as to indicate the student had an incorrect answer; yet, in some instances the faint remainder of an erasure exists at the correct answer while an erroneous answer is provided as the final response. And for another question where an incorrect original answer exists on K.Q.'s benchmark test, there is no circle around the numeral for the test question.

Further, on cross-examination, K. Q. credibly asserted, "I never did," when queried regarding whether she had ever asked respondent to help her on AR quizzes. And when the subject student-witness took Benchmark examinations, K.Q. never asked respondent for help with the questions.

And to an inquiry made by a commission member, K.Q. understood that the computerized AR quiz points were sent to her homeroom teacher, Ms. Oliveira, rather than respondent.

At the hearing of this matter, K.Q. never stated that she personally cheated on any examination or test. K.Q. did not express at the hearing that she ever suffered any adverse consequence of a breach of District policy that proscribes a violation of the code of student conduct in so far as academic dishonesty of her part.

H V.

38. H.V. is a fifth-grade student, who is now 11 years old. During her fourth-grade school year, H.V. had three teachers, namely Ms. Saldana, Ms. Oliveira and respondent. Ms. Saldana was her homeroom teacher from the middle until the end of the school year, while respondent was H.V.'s homeroom teacher at the

beginning of the fourth-grade school year. Ms. Oliveira was the teacher in H.V.'s reading classroom.

H.V. recalled taking the District's Benchmark test for reading and mathematics during her fourth grade school year on one or two occasions. She understood the benchmark tests to be a "big deal." In respondent's classroom, H.V. took both the reading and math Benchmark examination.

On cross-examination, H.V. asserted that respondent had been her second-grade teacher. H.V. had recollection that Ms. Gori was a nice teacher. While H.V. took the CST test, respondent instructed her to do her best.

During her fourth grade year, Ms. Oliveria gave H.V. the reading benchmark test. Respondent administered the math benchmark test to H.V.

39. H.V. was not wholly believable while providing testimony. Before the hearing date, H.V. recalled meeting with the school principal, Mr. Carillo, on matters pertaining to her anticipated testimony in this matter. And the record shows that before the matter of the allegations regarding respondent's supposed unethical aid to students on taking examinations, H.V.'s mother made a demand that H.V. be reassigned out of the homeroom where respondent was the teacher. Further, during the course of the hearing, H.V. grew emotionally upset and tearful so that a recess was necessary for the proceeding. The child appeared to be conflicted or influenced by matters beyond her personal recollection of respondent's acts in the administration of tests to the young student more than one year ago. Hence, by the matter of her demeanor and her attitude towards the proceeding while giving testimony in the presence of her current school principal and her mother, H.V. was neither credible nor persuasive witness regarding matter for which complainant seeks to dismiss respondent.

H.V.'s testimony is further rendered doubtful regarding her recollection of respondent's supposed assistance to the subject student during tests. H.V. asserted, during cross-examination, that as a second-grade student when she asked for help on a test question respondent "just pointed to the answer." Yet, H.V. asserted that during the fourth-grade year, she never asked for help on any fourth-grade benchmark tests.

Complainant did not extract from H.V. an acknowledgement that the young child personally engaged in acts of cheating on any examination that had been administered by respondent.

DOREN KOENE

40. Ms. Doren Koene is a District Assessment Paraprofessional.

Among the duties, responsibilities and functions of Ms. Koene is her work to analyze, compile and record test scores by students on various standardized tests including the District approved Benchmark examinations in math and reading ELA areas.

In her role, Ms. Koene gathered and compiled data regarding students' scores on the Benchmark examinations. During the course of examining the fourth-grade test scores for students in respondent's classroom, Ms. Koene made findings that the answer sheets reflected an inordinate number of erasure marks. And she noted that many test books from respondent's students showed circles around numerals to questions. Ms. Koene made a comparison between the answer sheet erasure marks and the circled test questions. Ms. Koene determined that some form of irregular or unacceptable activity was associated with the Benchmark examinations given to students in respondent's classroom

However, Ms. Koene's findings and determinations do not establish that respondent engaged in prompting students to cheat on Benchmark examination, or that respondent exhibited dishonesty in performing duties as a teacher.

LUIS CARRILLO

41. Mr. Luis Carrillo (Principal Carrillo) has been the Rod Kelley Elementary School principal for 16 years. He has been a District employee for over 30 years.

Rod Kelley Elementary School is a kindergarten through fifth-grade school, which has a total enrollment of 762 students.

42. Principal Carrillo functioned as respondent's immediate supervisor during the nearly three-year period during which respondent worked at Rod Kelley Elementary School.

43. Principal Carrillo presented at the hearing the District's Governing Board's policy regarding student conduct as contained in Board Policy NO. 5131 as supplemented by Board Policy NO. 5131.9.

Under the titles "Students" and "Conduct," the preamble states, "The Governing Board believes that all students have the right to be educated in a positive learning environment free from disruptions. Students shall be expected to exhibit appropriate conduct that does not infringe upon the rights of others" The second paragraph further states, "Conduct is considered appropriate when students are diligent in study" The third paragraph under "Conduct" regarding students sets out, "Prohibited student conduct includes" Then under that sentence, 11 numbered proscribed activities follow, including number 7, which reads, "Plagiarism

or dishonesty in school work or on tests.” Number 7 under the prohibits acts of conduct makes reference to Board Policy NO. 5131.9-Academic Honesty; NO. 6162.54-Test Integrity/Test Preparation; and NO. 61.62.6-Use of Copyrighted Materials.

Following the list of 11 prohibited forms of student conduct, Board Policy NO. 5131 sets out,

Employees are expected to provide appropriate supervision to enforce standards of conduct and, if [employees] observe or receive a report of a violation of these standard, to immediately intervene or call for assistance. If an employee believes a matter had not been resolved, he/she shall refer the matter to his/her supervisor or administrator for further investigation.

Mr. Carrillo also produced Board Policy NO. 5131.9. That policy directive states, “The Governing Board believes that academic honesty and personal integrity are fundamental components of a student’s education and character development. The Board expects that students will not cheat, lie, plagiarize or commit other acts of academic dishonesty.”

Also, Board Policy NO. 5131.0 sets out, “Students, parents/guardians, staff and administrators shall be responsible for creating and maintaining a positive school climate that encourages honesty. Students found to have committed an act of academic dishonesty shall be subject to district and school-site discipline rules.”

44. Complainant offered no evidence regarding a determination of cheating by students. No admission was uttered at the hearing by a student as an acknowledged by a pupil regarding such individual’s act of cheating. And no disciplinary action was leveled upon a student for violation of the District’s student code insofar as violating the prohibition against academic dishonesty.

Allegations regarding Respondent’s Role in Student Cheating

45. Principal Carrillo had no personal knowledge pertaining to any observation by him that respondent engaged in prompting, assisting or directing fourth-grade students to cheat on any form of test.

46. Principal Carrillo made certain notes regarding information purportedly told to him by fourth-grade students regarding circles, erasure marks and techniques used during the course of the administration of Benchmark tests. However, the notes made by Principal Carrillo regarding the out-of-hearing statements by students are neither reliable nor trustworthy. The notes do not fall with any recognizable

exception to the hearsay rule; hence, use of such notes violates respondent's right of cross-examine the students. Principal Carrillo's notes were not made at or near the time of the students' examination taking. (The reading benchmark test ended on each of the two-day examination process no later than 10:55 a.m. However, his earliest note with pupil H.V., (who only took the Benchmark math test with respondent), was made at 1:40 p.m. on January 20, 2011. And Principal Carrillo's notes regarding his interview of students, who took the ELA reading Benchmark examination, occurred on some time during the afternoon of January 21, 2011.)

And Principle Carrillo's notes regarding the supposed recorded comments from fourth-grade students are internally inconsistent² and are not sufficiently exact to establish respondent's wrongdoing.

47. Complainant's theory of the prosecutorial case against respondent has as its foundation the notion that respondent encouraged fourth-grade student cheating by her placement of circles around numerals to Benchmark examination questions that the subject teacher perceived that a student had initially and independently gotten wrong. That theory proceeds to the idea that the student, having received impermissible assistance from respondent, then had an opportunity, which other fourth-grade teachers' students did not have, to take a second chance at getting a correct answer. However, the inexact notes by Principal Carrillo reflect the student made very different reports regarding respondent's alleged acts during the administration of Benchmark examinations.

48. On cross-examination, Principal Carrillo acknowledged that a review of Benchmark examination booklets showed that many numerals were circled for questions where had changed an initially correct response to a wrong answer.

Respondent further demonstrated that one student, who was in respondent's reading class, had submitted a reading ELA Benchmark test booklet that showed no circles around numerals preceding test questions. That student-A.M.-only filled in 14 responses out of 35 questions on the test (bubble) answer sheet. And student A.M.

² As to the inconsistencies among the principal's notes of supposed statements by 10-year old children, one student-H.V.-was recorded as saying: "[Respondent] went to [the girl's] desk [and] told her which was wrong, and [H.V.] had to correct it" as well as on that "10 problems –were wrong. [*Respondent*]told her to circle number (sic) that were wrong." Another student-A.L.-was recorded by Principal Carrillo as saying: "[respondent] told her, she is checking them and [respondent] circled the answers for her. There were a lot that were wrong. Told her to go back [and] check them again." And as a further example, another student was supposedly recorded on January 21, 2011, to have said to Principal Carrillo, [respondent] "starts to solve the problems with him. She helped with about [three] questions. She told him to circle some of the problems because they were wrong." (Emphasis added.)

got only four correct answers for a score of 11.4 percent on the reading benchmark test.

49. Principal Carrillo acknowledged at the hearing of this matter that no award was bestowed upon any student who performed well on Benchmark examinations. And Principal Carrillo noted that no bonus, prize or special recognition was given to a teacher whose students performed well on the Benchmark tests.

Further Principal Carrillo could not cite any motivation or incentive for respondent to permit, assist or encourage her students to “cheat” on the Benchmark examinations.

50. Regarding Board Policy No. 5131 that pertains to student conduct insofar as student dishonesty in school work and consequence for cheating by a student, Principal Carrillo offered no evidence that any student ever made an admission of being involved in cheating, and no discipline was ever personally directed against a student for alleged cheating.

Late Report Cards and Respondent’s False Denials

51. Principal Carrillo offered extensive testimonial evidence regarding respondent’s neglect to timely issue report cards to her fourth-grade students during early February 2011. Principal Carrillo offered credible testimony regarding respondent’s false denials to inquiries made by the administrator. But the evidence from Principal Carrillo did not establish respondent as having a character for dishonesty so as to warrant dismissal.

52. On August 19, 2010, the Rod Kelley Elementary School’s ELD/Literacy and Intervention Facilitator sent to all teachers a document titled “Formative Assessment and Parent Reporting Schedule.” That document prescribed February 2, 2011, as the date for issuing report cards to students in the first through fifth grades.

On February 3, 2011, Principal Carrillo learned that some students in respondent’s class had not received second-quarter report cards. On that date, Principal Carrillo dispatched respondent an email reading, “Did each of your students receive and take their report cards home yesterday? I heard that some students had not received them yet? Please explain.”

On February 4, 2011, respondent sent Principal Carrillo an email response stating, “Yes, they did. Sorry you misheard.” Respondent’s email reply was a false denial³ and not true.

³ “ ‘Falsely denying’ refers to a separate moral category, which involves both lying and non-lying deception that occurs in the context of a person’s falsely denying

On February 4, 2011, after receiving the email from respondent, Principal Carrillo interviewed students in respondent's class and he concluded that only three students had received report cards by February 2, 2011. He also calculated that seven students had received report cards by February 3, 2011, and that three students received report cards on February 4, 2011. Principal Carrillo determined that 11 students had not received report cards by the time of respondent's email reply and the commencement of his inquiry about the report cards.

On February 7, 2011, Principal Carrillo asked respondent to produce the report cards. Respondent delivered to the administrator 13 report cards, and she conveyed to Mr. Carrillo that the balance of the report cards "were at home." Mr. Carrillo understood respondent to say that every student in her charge had received report cards by February 3, 2011.

53. At the hearing of this matter, the district offered no corroborating documentary evidence or independent evidence of a credible, competent nature to refute respondent's pronounced declaration at the hearing that by February 7 or February 8, 2011, all report cards were issued by her to students, except for students whose parents she sought to engage in a teacher-parent conference regarding the students' progress.

54. Although on February 10, 2011, Principal Carrillo learned from about seven students that each had not received a report card in hand, complainant offered no evidence that the seven students were not those students whose parents were scheduled to engage in a parent-teacher conference with respondent.

55. On February 10, 2011, Principal Carrillo met with respondent regarding her failure to timely dispatch report cards. Respondent made an admission during the meeting that all students assigned to her class had not timely received report cards by February 2, 2011.

But Respondent noted that she wished to conduct parent-teacher conferences with parents of some of the students who had not timely received report cards. Although Mr. Carrillo later telephoned some of the parents who relayed that they had not heard from respondent regarding the scheduling of a conference, the administrator did not offer testimonial evidence regarding his understanding of respondent's scheduling plan or the proportion of parents who stated that they had received calls

some prior accusation of wrongdoing." (Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements* (November 2001) 53 Hastings L. J. 157, 170)

from respondent. And no evidence was produced that established that respondent did not conduct parent-teacher conference's with parents of children who were not timely issued report cards in early February 2011.

56. The District did not establish that an objective assessment of the circumstances revolving around respondent from January 2011 through early February 2011 would have determined respondent's emotional condition not to have reached being "overwhelmed" so as to affect the subject teacher's delay in timely preparing and issuing report cards. By the time of issuing report cards (February 2, 2011), respondent's relationship with the team of fourth-grade teachers had been strained by a surprise confrontation in a meeting with three co-workers, who expressed that she showed a lack of full-engagement in the directives set by the senior fourth-grade teacher. And that she sensed that pressure was being exerted by Principal Carrillo with regard to her various job functions.

57. Under the circumstances, respondent's false denial regarding her neglect in timely issuing report cards, and her other uncourageous behavior in meeting the scrutiny of the principal, do not show that she had a defect in character that evidences a lack of integrity or a disposition for dishonesty.

Respondent's Case-in-Chief

SCOTT WHITE

58. Mr. Scott White offered credible and persuasive evidence on behalf of respondent.

Mr. White was the owner of Sylvan Learning Center in Salinas, California from 2000 until 2009. During his ownership of that company, Mr. White employed respondent from 2004 until approximately 2008.

Mr. White was believable when he asserted at the hearing that respondent was very good instructor at Sylvan Learning Center. In the view of Mr. White, respondent demonstrated that she was a person of integrity in performing services as an educator, who was employed by that profit-oriented educational company. And Mr. White observed that respondent's teaching skills were not only of a high standard, but students very much liked her as a person.

Mr. White noted that although a Sylvan Learning Center teacher may have an opportunity to create inflated, fabricated or distorted assessment test of students, but Mr. White found respondent's dedication to the teaching profession did not lend to her engaging in acts to encourage or assist students to cheat on tests.

The evidence offered by Mr. White was not refuted as no cross-examination was pursued by complainant.

RESPONDENT AMANDA GORI

59. Respondent spent her youth in Moorpark, California.

In 1999, respondent earned a bachelor's degree from California State University, Northridge. In 2002, Pepperdine University awarded a Master's Degree to respondent.

The Commission on Teacher Credentials has issued respondent as Multiple Subject Teaching Credential-Professional Clear as well as a Supplement Authorization in Science.

Respondent's first teaching position for a public school district was with the Newhall School District during the 2001-2002 school year. She worked for two other Southern California school districts. In the 2004-2005 school year, respondent worked for the Salinas Unified School District.

When the Gilroy Unified School District hired respondent for the 2005-2006 school year, she began teaching a "first/second-grades combo" class at Antonio Del Buono Elementary School. For the three years that she worked at Antonio Del Buono Elementary School, respondent taught no grade higher than the second grade.

For the 2008-2009 school year, the District reassigned respondent to teach at Rod Kelley Elementary where she taught second-grade students. During the next year, Principal Carrillo assigned respondent to teach third-grade classes, which was a transition that she found difficult. Then for the 2010-2011 school year, Principal Carrillo tasked respondent into the fourth-grade classes, which was again a transition of teaching that she found very challenging.

60. Respondent was persuasive regarding the strained and awkward relationship that she has experienced with Principal Carrillo from, at least, her second year at Rod Kelley Elementary School. (Principal Carrillo acknowledged at the hearing that there was a point in time when respondent showed that "she was nervous around" him.)

First she perceived that the principal neglected to hear her concerns at the end of the 2009-2010 school year when respondent questioned her prospective assignment change in two years, namely from the second grade to the third grade, and then from the third grade to the fourth grade.

At the time of respondent's reassignment from a third-grade teaching assignment to a fourth-grade teaching assignment, the principal made disparaging comments regarding respondent's slowness in cleaning out her personally purchased supplies and equipment from the third-grade class. And at the time, in referring to the

preceding year when she changed from a second grade class to a third grade class, the principal told respondent that she had “a history” of procrastinating classroom preparation for the beginning of the school year.

There was another occurrence in mid-June 2009 that respondent was offended by the principal confronting her with regard to a parent’s objection to respondent’s clothing. Respondent took issue with the male principal approaching her in the school’s cafeteria to engage in any form of discussion regarding her breast dimensions and that her nipples were too conspicuous or evident through her blouse. During that experience, respondent felt cornered and upset. Thereafter, she sought to avoid being alone in the presence of Principal Carrillo.

On another occasion, the principal confronted respondent in a newly assigned fourth-grade classroom with an allegation that she had “stolen” supplies from a previously assigned third-grade school room. Respondent was shocked and aghast that the principal accused her of stealing items including books, staplers, a tape dispenser and clipboards. And his angry demeanor at the time was frightening and upsetting to respondent.

On a date in December 2010, the principal yelled at respondent in a voice what she perceived to be an “irate voice” regarding a field trip by various students. In the presence of children, the principal angrily berated respondent about a lunch event she had scheduled with other teachers and he repeatedly declared that respondent’s event had not been scheduled.

In February 2011, respondent filed a complaint that focused upon Principal Carrillo on allegations of harassment that created a hostile work environment for her.

61. Near the beginning of the 2010-2011 school year, respondent sustained injuries in an automobile collision. Her treating physician determined her to be unable to work and respondent was placed on medical leave from September 15, 2010, until Monday, October 4, 2010. (Despite her physical impairment, respondent attended a fourth-grade teachers’ meeting on September 30, 2010, in order to demonstrate her support for the teaching team.) On her return to the school on October 4, 2010, respondent was disappointed with the apparent lack of sympathy from the fellow fourth-grade teachers regarding her injuries and emotional trauma she experienced in the freeway collision that “totaled” her automobile and left her with physical pain.

62. Respondent’s account was credible and persuasive regarding her involvement with the administration of Benchmark tests to fourth-grade students during the 2010-2011 school year.

MATH BENCHMARK TESTS

- a. Respondent administered the math Benchmark tests to her homeroom students on two dates during the subject school year.
- b. As to the math Benchmark examination, which was given on December 15, 2010, respondent established that the average scores for her homeroom students did not exceed the scores of students assigned to the homeroom classes for the other three fourth-grade teachers.
- c. Respondent was persuasive at the hearing through her testimony that compellingly countered the District's evidence regarding the extent of erasure marks made by her students. Respondent showed that a review of answer sheets by her students for the math Benchmark exam reflected a greater proportion of erasure marks as compared to the answer sheets to the multiple-choice questions on math Benchmark examinations for students with other fourth-grade teachers. From the commencement of the school year, respondent had instructed her students that for any examination that a test taker could recalculate or reread a question, and then change a response found to be in error. She had further instructed students that changing a response believed to be in error was an acceptable test-taking technique before the student submitted the examination answer document. Respondent recalled having observed certain students actually erase nearly all-initial responses on an answer sheet during the course of a Benchmark examination.
- d. Respondent's homeroom students did not generate extraordinarily high scores⁴ on the math Benchmark test that was given on December 15, 2010. While respondent's students generated an average score of 62.5 percent, the scores for the other teachers' students averaged: 65.8 percent for Ms. Mesa's class, 68.7 percent for Ms. Oliveira's class; and 70.8 percent for Ms Saldana's class.

⁴ On the Math Benchmark test, dated December 15, 2010, among students in respondent's homeroom class, there were three students with a high score of 89.3 percent. One student in respondent's homeroom class has a low score of 17.9 percent. And other students had low scores of 53.6 percent, 35.7 percent, 26.6 percent, 28.6 percent, 32.1 percent, and other low scores. Yet, in the homeroom of Ms. Nancy Mesa, two students had high scores of 92.9 percent, and the lowest score was 21.4 percent. Ms. Oliveira had two students with high scores of 96.4 percent, and the student with the lowest score for a student was at 28.6 percent. Ms. Saldana had one student with a high score of 96.4 percent and several students with scores in the mid-80 to low-90 percent range. No student in Ms. Saldana's homeroom class scored less than 42.9 percent.

e. Complainant called three child witnesses to the proceeding. Two witnesses-A.L. and H.V.-had been in respondent's fourth-grade homeroom and they would have been given the math Benchmark test by respondent. On the December 15, 2010, Benchmark test, A.L. earned a score of 67.9 percent, while H.V. had a score of 71.4 percent. Respondent noted at the hearing that a score of 85 percent was proficient.

f. At the hearing of this matter, by her demeanor while testifying, her attitude toward the proceeding, and the manner of her unswerving, adamant responses regarding her innocence to allegations that she assisted or encouraged student cheating, respondent was credible⁵ that in asserting that she never assisted, or otherwise promoted, cheating by fourth-grade student on the District's math benchmark test.

g. During the course of the time for students to take the math Benchmark test, respondent did not circle numerals for questions on test sheets.

READING BENCHMARK TESTS

h. Respondent was compelling and credible when she asserted at the hearing of this matter that her objective to fulfill her obligations as a teacher was to assure that students in the fourth-grade ELA reading group actively sought to strive. Respondent sought to assure that students performed well on tests and that they learned lessons given to them.

i. During a parent-teacher conference when a parent of a child named "A." informed respondent that the child did not seem to be progressing, respondent agreed to work with the child during after-school hours to personally tutor the child. In time other parents sought out respondent to provide the tutoring sessions. Also by March 2011 when she last worked for the District, respondent had up to 15 students in her after-hours tutoring program. Furthermore an aspect of the after-regular hours tutoring program involved giving students strategies or techniques regarding taking standardized examinations. And on a daily basis, respondent provided students in her "below basic" ELA-reading group with test taking strategies.

j. Regarding the reading ELA Benchmark examination, respondent offered persuasive testimony. When the Benchmark test was to be given, respondent emphasized to students that they should employ the strategies that she had sought to instill in the students. Those strategies included a student circling a numeral to questions that the student was not confident with the available multiple-choice answer. Respondent had conveyed to students to reread the previously circled question, and to eliminate the obviously erroneous answer and to proceed from the approach to reach a correct answer.

⁷ Government Code section 11425.50, subdivision (b), third sentence.

k. The reading ELA Benchmark test, which consisted of 35 reading passages with questions and multiple-choice responses, was administered by respondent to her fourth-grade students over two days during 45 minute-periods.

l. On the first day of the Benchmark examination, no adult other than respondent who acted as the test proctor was present.

After the first day of the test, respondent collected the test bubble (answer) sheets and booklets and stored those items in her teacher's desk drawers. Between the end of the first day's test administration and the second day's test, respondent neither examined particular student test responses nor tampered with the test responses given by students.

On the second day of the Benchmark exam, respondent was surprised to observe Principal Carrillo walk into her classroom on three or four separate occasions. And she was disconcerted and distressed when at the end of the second date for the reading Benchmark exam, Principal Carrillo collected the test sheets, which was contrary to expected practice.

m. Complainant called only one student, who had been in respondent's reading class, to offer testimony at the hearing of this matter. That student was K.Q. At the hearing of this matter, respondent offered a persuasive account of K.Q.'s participation with the reading ELA Benchmark exam. During the course of that test, K.Q. specifically stated that she was "not sure" about particular answers she had set out on the test page. In response, respondent bestowed the same advice she had given to other students, namely that K.Q. should reread a question, eliminate the obviously incorrect possible responses and provide the student's best answer.

n. Some time after Principal Carrillo collected the reading Benchmark exam from respondent's classroom, he confronted respondent. To his questions regarding whether she had assisted students with the reading Benchmark test, respondent absolutely denied the implication that she had enabled cheating on the test.

o. At the hearing of this matter, by her demeanor while testifying and her attitude toward the proceeding, respondent was credible that she never assisted, or otherwise prompted cheating, by fourth-grade student on the District's reading ELA Benchmark examination. During the administration of the reading Benchmark exams, respondent did not provide any student with a correct answer to a test question.

Respondent's Past Interaction with Student H.V.

63. Respondent offered credible testimony regarding her experiences with student H.V. on the matter of testing. During the 2007-2008 school year, respondent was the second-grade teacher for H.V. Although H.V. attempted to “give her best,” the child was a struggling student in reading subjects. Respondent provided H.V. with “extra support” by devoting recess time and after-school time in tutoring the child outside the regular classroom hours.

On reading tests that respondent administered to H.V. from September 2007 until June 1, 2008, the student scored “below basic.” Respondent has a vivid recollection of H.V. taking the California Standards ELA on May 1, 2008. On that date, the test was given with two students sitting together at a table. During the course of the test, respondent observed H.V. repeatedly looking onto the answer sheet of the neighboring student, who was known to be a highly capable student. When respondent observed H.V. making erasures onto her sheet after she had looked onto the other student’s examination, respondent moved H.V. to another table to sit alone during the remaining time of the examination. H.V. received a score of “advanced” on the California Standards ELA test.

Accelerated Reading Quizzes

64. Respondent was persuasive regarding an account of her students taking Accelerated Reading program quizzes. During the 2010-2011 school year, the AR program was in its second year of use by teachers at school.

a. As a third-grade teacher, her students read stories and then went into the school’s computer lab to take quizzes under the AR program. There was an occasion when respondent sought clarification from Principal Carrillo regarding the AR program when a student asked if he could take the quiz at home. Respondent heard the principal state that the AR program was designed to “motivate” students and that an open-book approach to taking the quizzes was acceptable.

b. In December 2010 or early January 2011, while students in her class took the AR program quiz, Principal Carrillo came into the classroom to speak with a student. After the principal exited the room, respondent queried the student on the matter upon which the principal had approached the student. The student told respondent that the principal had uttered to the child that she was not to take the AR program quiz with an open book. Because respondent was surprised by the student’s comments, respondent sent an email message to the entire fourth-grade team of teachers. Only Ms. Saldana replied and conveyed to respondent, in essence, that probably during the period of respondent’s temporary disability absence a policy change had been made whereby the AR program quizzes could not be taken by students by way of the “open book” method.

Other Matters

65. Respondent exerted efforts beyond the services expected of a school teacher. Because the Rod Kelley School's library lacked certain books, respondent used her personal library card to check out from the public library several books at a given time for use by her students. (After her summary placement on administrative leave, respondent was unable to collect from students three or four books, which remain recorded by the public library as a borrowing obligation of respondent.)

66. Respondent offered a credible explanation regarding her provision of a weekly reading test to J. Y., who was a student in respondent's fourth grade class.

Respondent compellingly asserted at the hearing that during a parent-teacher meeting, J.Y.'s mother tearfully approached respondent to lament that her daughter was struggling with taking reading tests. Respondent "reached out" to the mother and offered to provide extracurricular study work. Over a period of time, respondent gave the girl copies of past weekly reading passages and corresponding tests. Respondent's practice was to provide J.Y. with previously administered tests.

At some point in time, respondent learned that J.Y.'s reading teacher, Ms. Oliveira was alarmed that the student had proclaimed in a classroom that she had previously seen the test that the reading teacher was distributing in the classroom. Although Ms. Oliveira did not personally bring to respondent's attention the spontaneous assertion by the student, respondent did not intend to provide her homeroom student with a test that the reading teacher had not previously administered. A reasonable inference may be drawn that respondent had no motivation to gain any tangible reward by unethically giving J.Y. the weekly reading test. Respondent's account of making the mistake of placing the new reading test into J.Y.'s hands amounted to a degree of a lack of due care; but, it is found that respondent's act did not constitute any form of aiding the student to cheat.

67. At the hearing of this matter, respondent made an admission that on the question of issuing a single set of report cards in early February 2011, she was not truthful. But her conduct in February was understandable, though inappropriate. And although she uttered false denials, which may be viewed as lying to Principal Carrillo, her conduct did not constitute dishonesty of such an egregious extent so as to warrant employment termination.

Respondent did, in fact, send Principal Carrillo a false response to the principal's email, dated February 3, 2011, that asked whether "each" of her assigned students been issued report cards. And she again, over a five to seven day period expressed that the report cards either had been passed out to students for delivery to their respective residence or that respondent had attempted to make telephonic contact with parents for a teacher-parent conference before transmission of report cards.

On February 10, 2010, which was one week after the initial inquiry by Principal Carrillo about report cards, respondent told the principal that she had not completed the report cards because she had been “overwhelmed.” At the hearing of this matter, respondent compellingly described that in late January 2011 her three fellow fourth-grade teachers had surprised her, in a meeting with the school principal and others, with a list of topics that suggested that she had not performed all the functions expected of her as the most junior fourth grade teacher. (The topics ranged from respondent not spending adequate time monitoring all students during recesses to respondent’s neglect in making duplicate copies of teaching materials). Also in January 2011 respondent perceived that Principal Carrillo had her singled out for scrutiny on an array of matters to such a degree that she deemed the principal’s acts to be harassment. And by early February 2011, respondent had become gravely unsettled by Principal Carrillo’s unannounced entry into her classroom, his surreptitious questioning of students in respondent’s classroom and the principal “taking notes” while in her classroom. Also during the period of being a fourth-grade teacher through January 2011, respondent could not recall that the school principal had extended to her any “positive re-enforcement” for the good work that she had volunteered to perform on behalf of her students. And by February 4, 2011, when she had been obligated to issue reports cards, respondent had received the charge by Principal Carrillo that she had wrongfully assisting students with Benchmark the examinations.

Over the three-year period at Rod Kelly Elementary School before February 2011, respondent had never failed to timely issue report cards.

Ultimate Factual Findings

I. FIRST CAUSE FOR TERMINATION: ALLEGATION REGARDING EVIDENT UNFITNESS TO TEACH

A. ALLEGATIONS OF CHEATING

68. During the District’s Benchmark examination in January 2011, respondent did not assist or encourage students in her class to cheat on the examination.

69. Respondent did not engage in acts so as to aid students to cheat on the first District Benchmark examination administered in October 2010. Nor did she engage in conduct that constituted assisting or encouraging students to cheat on other examination during the school year.

70. During the 2010-2011 school year, respondent did not allow students to cheat on Accelerated Reading quizzes. Although respondent allowed students to use the open-book method to take those quizzes, her acts arose out of negligence, that is a breach of a standard of due care expected of a fourth grade teacher. Respondent had

not gained knowledge of the District policy against open book use for AR quizzes before a written publisher's guideline was issued on January 26, 2011.

71. Respondent did not deliberately give a student, J.Y, advance access to a weekly reading test so that the child could cheat. Respondent's acts arose out of negligence or inattentiveness, rather than out of a disposition for dishonesty.

B. ALLEGATION OF DISHONESTY

72. Respondent did not engage in dishonesty with regard to her consistent denials of accusations made by Principal Carrillo that respondent aided or encouraged her classes of students so that those students could cheat on various examinations and quizzes.

73. Respondent acknowledges that she was not truthful when she told Principal Carrillo over span of one week that she had presented her students with reports cards. Her false denials to Principal Carrillo over the period between February 3, and February 10, 2011, however, did not constitute dishonesty so as to warrant dismissal.

II. SECOND CAUSE FOR TERMINATION: ALLEGATION REGARDING DISHONESTY

74. Respondent did not engage in dishonesty regarding her work as a proctor for Benchmark examinations. She did not knowingly encourage or assist students in her class to cheat on assessment tests.

75. Respondent's conduct did not manifest dishonesty when she uttered to Principal Carrillo false denials, which may be viewed as lies, regarding her neglect to timely dispatch report cards to students.

III. Third Cause for Termination: Allegation regarding Refusal to Obey District Regulations

76. Because she did not assist or encourage students to cheat on examinations or quizzes, respondent did not demonstrate persistent and willful refusal to obey reasonable regulations prescribed by the Governing Board. Respondent's acts did not cause any person to violate Board Policy number 5131 (Prohibition regarding Student Plagiarism or Dishonesty on Tests) or Board Policy number 5131.9 (Academic Honesty)

IV. FOURTH CAUSE FOR TERMINATION: ALLEGATION REGARDING IMMORAL CONDUCT

77. With regard to the matters developed at the hearing of this matter, Respondent's acts and omissions did not manifest immoral conduct.

Dispositive Finding

78. It would not be in the public interest to terminate respondent Amanda Gori's employment as a certificated teacher of the Gilroy Unified School District.

CONCLUSIONS OF LAW AND DISCUSSION

1. The Commission has jurisdiction to proceed in this matter, pursuant to Education Code section 44944 and Factual Findings 1 through 5.

Burden and Standard of Proof

2. The District has the burden of proof in this matter because it is seeking to dismiss respondent from employment as a certificated employee. The standard of proof is preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1038-1040.) A party required to prove a matter by a preponderance of the evidence need prove only that it is more likely to be true than not true. Also a preponderance of the evidence means that the evidence on one side outweighs, preponderates over, is more than, the evidence on the other side, not necessarily in the number of witnesses or quantity, but in the effect of the evidence on those to whom it is addressed. In other words, the term refers to "evidence that has more convincing force than that opposed to it." (*People ex rel. Brown v. Tri-Union Seafood, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

Due Process under the Education Code in the Matter of Teacher Dismissal Actions

3. A permanent employee may be dismissed for cause only after an administrative adjudication hearing. (Ed. Code, §§ 44932, 44934, and 44944.)

Hearings to determine if permanent public school teachers should be dismissed are held before a Commission on Professional Competence (Commission) - a three-member administrative tribunal consisting of one credentialed teacher chosen by the school board, a second credentialed teacher chosen by the teacher facing dismissal, and an administrative law judge of the Office of Administrative Hearings who serves as chairperson and a voting member of the commission and who is responsible for assuring that the legal rights of the parties are protected at the hearing under Education Code section 44944, subdivision (b). The Commission's decision is deemed to be the final decision of the district's governing board under Education

Code section 44944, subdivision (c). (*California Teachers Ass’n v. State of California* (1999) 20 Cal.4th 327, 331.) The Commission has broad discretion to determine the issues before it, and whether dismissal⁶ is the appropriate sanction.

When a school board recommends dismissal for cause, the Commission may only vote for or against it. The Commission may not dispose of a charge seeking dismissal by imposing probation or an alternative sanction. (Ed. Code, § 44944, subds. (c)(1)-(3); and, (*California Teachers Ass’n v. State of California supra* 20 Cal.4th at p. 343.))

Statutory Grounds for Dismissal

4. Complainant’s Accusation in this matter specifies four grounds for respondent’s dismissal as a District certificated employee. Those grounds are expressed at Education Code section 44932, which provides in pertinent part:

(a) No permanent employee shall be dismissed except

⁶ The Commission had considered that respondent’s acts and omissions may have justified suspension due to the false denials that she told to the principal regarding the timely issuance of report cards. But, suspension without pay for a specific, but limited, period of time is not available in this matter. Education Code section 44933, subdivision (c), does set out that “the decision of the Commission on Professional Competence shall be made by a majority vote, and the commission shall prepare a written decision, containing . . . a disposition which shall be solely: (1) That the employee should be dismissed; (2) *That the employee should be suspended for a specific period of time without pay*; (3) That the employee should not be dismissed or suspend.” But two paragraphs after the foregoing the same Code section states, “The imposition of *suspension* pursuant to paragraph (2) *shall be available only* in a suspension proceeding authorized pursuant to subdivision (b) of Section 44932 or Section 44933.” Subdivision (b) of Code section 44932, sets out, in pertinent part: “The governing board of a school district may suspend without pay for a specific period of time *on grounds of unprofessional conduct* a permanent certificated employee” And Code section 44934 states, in part: “Suspension proceedings may be initiated . . . only if the governing board has not adopted a collective bargaining agreement” (Emphasis added.)

In addition, Education Code section 44038 establishes that “a governing board of a school district *shall not* act upon any charges of unprofessional conduct unless at least 45 calendar days prior to the date of the filing” the affected teacher is given written notice of *alleged unprofessional conduct* and the teacher had an “opportunity to correct his or her faults and overcome the grounds for the charge.” And before a board may issue charges on allegations of “*unsatisfactory performance*,” the targeted teacher must be given 90 calendar days as “an opportunity to correct his or her faults and overcome the grounds for the charge.”

for one or more of the following causes:

(1) Immoral or unprofessional conduct.

[¶] . . . [¶]

(3) Dishonesty.

[¶] . . . [¶]

(5) Evident unfitness for service. . . .

[¶] . . . [¶]

(7) Persistent violation or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him or her.

Credibility Matters

5. A witness may be contradicted by the facts he states as completely as by direct adverse testimony, and there may be so many omissions in his account of a particular transaction or of his own conduct as to discredit his whole story. (*La Jolla Casa de Manana v. Hopkins* (1950) 98 Cal.App.2d 339, 346; *Bassett Unified School Dist. v. Commission On Professional Competence* (1988) 201 Cal.App.3d 1444, 1451.)

It is settled that the trier of fact may “accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted.” (*Stevens v. Parke Davis & Co.* (1973) 9 Cal.3d 51, 67.) The trier of fact may also “reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material.” (*Id.*, at 67-68, quoting from *Neverov v. Caldwell* (1958) 161 Cal.App.2d 762, 767.) Further, the fact finder may reject the testimony of a witness, even an expert, although not contradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.) And, the testimony of “one credible witness may constitute substantial evidence,” including a single expert witness. (*Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040 at 1052.)

The rejection of testimony does not create evidence contrary to that which is deemed untrustworthy. That is, disbelief does not create affirmative evidence to the

contrary of that which is discarded. That the trier of fact may disbelieve the testimony of a witness who testifies to the negative of an issue does not of itself furnish any evidence in support of the affirmative of that issue, and does not warrant a finding in the affirmative thereof unless there is other evidence in the case to support such affirmative. (*Hutchinson v. Contractors' State License Bd.* (1956) 143 Cal.App.2d 628, 632-633, quoting *Marovich v. Central California Traction Co.* 191 Cal. 295, 304.)

This is a controversy where the aforecited principles regarding the resolution of credulity questions are of critical importance.

Evidence of a Hearsay Nature

6. Complainant's prosecution of this matter turns upon several statements gathered by Principal Carrillo. Most of those statements were purportedly made by fourth-grade students who were not called to provide testimony and thus they were not subject to cross-examination. And there were handwritten notes made by Principal Carrillo regarding the recordation of supposed statements given by those mostly 10-year old students, the District seeks to use the principal's hand written notes, which supposedly recorded statements by students, in support of the case against respondent.

Government Code section 11513, subdivision (c), addresses the admissibility of evidence generally in administrative hearings. It states: "The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions." And Government Code section 11513, subdivision (d), sets forth, "*Hearsay evidence* may be used for the purpose of supplementing or explaining other evidence but *shall not be sufficient in itself to support a finding* unless it would be admissible over objection in civil actions." (Emphasis added.)

Hearsay evidence is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200.) Exceptions to the hearsay rule are permitted because, through the course of practical application, an out-of-court statement is deemed not to be inadmissible at hearing by reason of a hearsay exception because the circumstances or manner of the making the excepted assertion have been shown to be trustworthy and reliable.

Evidence Code section 1280 makes admissible a writing that records an act, condition, or event if: "[t]he writing was made by and within the scope of duty of a public employee; [¶] (b) [t]he writing was made at or near the time of the act,

condition, or event; and [¶] (c) [t]he sources of information and method and time of preparation were such as to indicate its trustworthiness.”

In this matter, the source of much of the offered hearsay statements, that is information regarding supposed acts of respondent’s aiding student cheating, comes from purported statements by 10-year-old children. And the method of preparation of a record of the statements entailed a school principal, who cannot necessarily be deemed to have been an objective, unbiased observer. The principal did not have a duty, such as a police officer, to accurately record statements by witnesses to an incident under investigation. By his appearance at the hearing and his account of his tenure as a principle, Principal Carrillo exudes an authoritarian aura. A reasonable inference may be drawn that the principal’s confrontation of students at the time of the children’s stress in taking a standardized test was not met with a forthright account of what the students knew to be true regarding respondent’s testing techniques and instruction on strategies to take examinations. There is no evidence regarding whether the principal asked neutral, open-ended questions or whether his questions suggested a closed-end, accusatorial tone. And the time of preparation relative to when words were spoken by the students is unknown. Complainant could not show that Principal Carrillo’s handwritten notes were prepared in such a manner as to assure the trustworthiness of the notes containing statements of 10-year old, fourth grade students. Hence the notes by Principal Carrillo regarding the statements of the students who took the reading ELA Benchmark examination on January 21, 2011, cannot be deemed to meet the requirement for trustworthiness and reliable. Thus those notes of supposed students’ statements must be viewed as inadmissible hearsay. And no factual finding may be made with regard to those handwritten notes.

Evident Unfitness for Service - First Cause for Dismissal

7. “Evident unfitness for service,” within the meaning of section 44932, subdivision (a)(5), means not fit or suitable for teaching, ordinarily by reason of a temperamental defect or inadequacy. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444-1445.) Evident unfitness for services requires that unfitness be attributable to a defect in temperament that “connotes a fixed character trait, presumably not remedial upon receipt of notice that one’s conduct fails to meet the expectations of the employing school district.” (*Id.* at 1444.)

FITNESS TO TEACH-THE NEXUS REQUIREMENT: The applicable standard or determinative test in teacher discharge cases is whether the person is fit to teach. “Fitness to teach” is a question of ultimate fact. (*Board of Education v. Commission on Professional Competence* (1980) 102 Cal. App.3d 555, 560-561.)

Morrison v. State Board of Education (1969) 1 Cal.3d 214, held that where certain charges are raised in teacher discharge cases, the applicable standard is whether the person is fit to teach. Terms such as “evident unfitness to teach” have

been held to be too vague, standing alone, and must be applied to a specific occupation and given context by reference to fitness for the performance of the occupation. The California Supreme Court delineated the following factors that should be considered in determining fitness: (1) Likelihood of recurrence of the questioned conduct; (2) the extenuating or aggravating circumstances, if any; (3) the effect of notoriety and publicity; (4) impairment of teacher-student relationships; (5) disruption of educational process; (6) motive; (7) proximity or remoteness in time of conduct. (*Bassett Unified School Dist. v. Commission On Professional Competence* (1988) 201 Cal.App.3d 1444, 1453 .) The *Morrison* factors must be applied in cases involving allegations of evident unfitness to teach (*Woodland Joint Unified School District v. Commission on Professional Competence supra* 2 Cal.App.4th 1429, 1445), and in cases involving allegations of dishonesty. (*Bassett Unified School Dist. v. Commission On Professional Competence* (1988) 201 Cal.App.3d 1444, 1453.)

The Accusation in this controversy alleges that respondent's supposed evident unfitness to teach arises out of two areas, namely "cheating on student tests" and "dishonesty when dealing with administrators."

A. CHEATING ON STUDENT TESTS

The crime of obtaining property by false pretenses was unknown in the early common law so that particular offense was restricted to the offense of "common law cheating." The offence of cheating arose out of a fraud perpetrated by means of a false token or symbol, such as selling goods by false weights or measures, or other like act or thing of a character calculated to deceive and defraud the individual or the public to their pecuniary injury and against which ordinary prudence could not guard. (18A Cal. Juris. 3d., Criminal Law-Crimes Against Property, Theft by False Pretenses, *Cheating*, § 165)

The modern use of the wrongful conduct of "cheating" has come to include immoral acts of a student's deceit, subterfuge or illicit gamesmanship to generate an ill-gotten higher score on an examination than the student could not earn without cheating. Student cheating in a school setting is universally seen as a serious act of dishonesty and immorality. But cheating as known with regard to misconduct continues to turn upon an individual's act in committing "fraud" for personal gain. And student cheating when detected by school authorities generally results in serious consequences upon the student cheater.

In this matter no evidence showed that any of the students who were identified as cheating on Benchmark examinations or reading assessment quizzes suffered any form of disciplinary action by way of suspension, exclusion, receiving a failing grade on a report card, or sending a report of the cheating to a student's parents. And no evidence showed that respondent fostered in the mind of any student a belief that the student should commit a fraud or deceitful act, that is cheating, when taking the District's Benchmark examination or the AR quizzes.

Accordingly, if the District made no determination for the imposition of a sanction upon a cheating student, the record is weak relative to the District's theory that respondent assisted or encouraged student cheating.

B. LYING TO ADMINISTRATORS AS DISHONESTY SO AS TO SHOW
EVIDENT UNFITNESS TO TEACH

The Accusation seeks respondent's dismissal on grounds of evident unfitness to teach by reason of alleged lying to the school principal on the matter of the untimely issuing of report cards to students.

As set out in Factual Findings 51 and 52, respondent's words to Principal Carrillo constituted acts of "falsely denying." That concept is best illustrated with the following:

Most people would agree that it is a virtue to accept responsibility for one's wrongdoing. We teach our children that it is better to admit to a wrongful act than to cover it up by lying; indeed, one of our great national myths is that of George Washington and the cherry tree. . . .

[But, the] fact is that people often do fail to accept responsibility for their wrongful acts. Sometimes they do so by remaining silent. Other times they do so by falsely denying the accusations that are made against them or by engaging in acts of deception to avoid detection. Imagine that B asks A about some wrongdoing in which A has engaged, and A responds with a false denial. How should we judge A's conduct? The answer is not likely to be simple: it will depend on a wide range of complex factors, including the circumstances of A's wrongdoing, the nature of the relationship between A and B, the form of A's denial, the consequences of his denial, and, perhaps, the basis for B's suspicion.

[¶] . . . [¶]

The basis for this moral sentiment is an implicit recognition of the right to self-preservation--a right not to cooperate with those who would seek to bring adverse consequences against oneself. [One legal scholar] has referred to [false denial] as 'a basic right to avoid very destructive consequences to [one's self] even if submission would serve the welfare of others.' Although often associated with a narrow constitutional right 'of silence,' the right of self-preservation is better understood as

linked to a broader right against self-incrimination. That the right to self-preservation might include a right to falsely deny seems particularly plausible in cases in which remaining silent in the face of accusatory questioning would be tantamount to admitting guilt. . . .

[Hence certain legal scholars] tend to view the false denial of accusations as morally distinct from other kinds of unjustified deception, and to offer an account of why that might be. (Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements* (November 2001) 53 Hastings L. J. 157, 171-172)

Under the circumstances as set out in the factual findings, respondent's false denials to Principal Carrillo did not constitute dishonesty.

Cause does not exist to dismiss respondent for evident unfitness for service, pursuant to section 44932, subdivision (a)(5), for the reasons set forth in Factual Findings 68 through 73.

Dishonesty as a Cause of Dismissal of a Certificated Employee-School Teacher

8. "Dishonesty" may very well be something less than criminality. The term dishonesty seems to be incapable of exact definition or precise limitation because, among other things, of the infinite variety of circumstances which affect the relations and affairs of mankind in our society. (*Wayne v. Bureau of Private Investigators and Adjusters* (1962) 201 Cal.App.2d 427, 436.)

" 'Dishonest' is defined in *Webster's New International Dictionary*, Second Edition, as "characterized by fraud; indicating a lack of probity; knavish; fraudulent; unjust' or 'disposed to cheat or defraud.' In *Black's Law Dictionary*, Fourth Edition, the word 'fraud' is described as consisting 'of some deceitful practice or willful device, resorted to with intent to deprive another of his right or in some manner to do him an injury' or, more generically, as 'embracing all multifarious means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated.' Although perhaps not synonymous terms, 'fraud' and 'dishonest', as generally used, have similar meanings. Implicit in each is the concept of 'bad faith' or an intent to accomplish some wrongdoing. The district court specifically instructed the jury that if the acts or omissions which the

appellant claimed were dishonest or fraudulent were the result of 'good faith' transactions, the appellant had not sustained its burden of proof. We feel that the instructions given sufficiently apprised the jury of the state of mind necessary to characterize an act as dishonest or fraudulent, as distinguished from a mere exercise of poor judgment or negligence, and can see no way in which appellant could have been prejudiced by them. (*Sherwood & Roberts-Kennewick, Inc. v. St. Paul Fire & Marine Ins. Co.* (C.A. Wash., 1963) 322 F.2d 70, 74 -75)

Within the teacher dismissal context, the California Supreme Court observed that, "Dishonest conduct may range from the smallest fib to the most flagrant lie. Not every impropriety will constitute immoral or unprofessional conduct, and not every falsehood will constitute 'dishonesty' as a ground for discipline." (*Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208, 220, at footnote 12.)

And all lies⁷ do not constitute dishonesty. Here respondent's lies or false denying were not shown to come within a grave pattern so as to reflect a character defect on her part.

Cause does not exist for to dismiss respondent's employment termination because of dishonesty, pursuant to Code sections 44932, subdivision (3), by reason of the matters set forth in Factual Findings 74 and 75.

Refusal to Obey School Rules

9. Under section 44932, subdivision (a)(7), the violation of school rules must be persistent or "motivated by an attitude of continuous insubordination." (*Governing Board of the Oakdale Union School Dist. v. Seaman* (1972) 28

⁷ "There is even a taxonomy for types of lies. The venal lie is a serious misrepresentation without any redeeming properties (I have never had sex with that woman). The white/social lie is a relatively innocuous misrepresentation without serious implication where the liar views truth as potentially disadvantageous to the hearer (We couldn't make it because we couldn't find a baby sitter). The fib is a non-serious, small but selfishly motivated misrepresentation (We have never had any flooding in the basement). The compassionate lie is a misrepresentation of a serious state of affairs to spare the hearer. (Even though you have a serious illness, there is a good chance for a high quality of life for quite a while). The justified lie involves a situation where consequences of telling the truth are serious and most people would agree that the goal justifies the deception (Let the hostages go and you will be treated well)." (Fraser, *The Neutral as Lie Detector: You Can't Judge Participants by Their Demeanor*, (2004) 4 *Pepperdine Disp. Resol. L. J.*, 259, 260.)

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.) Cause for discipline may be based on the violation of school rules as well as district-wide policies. (*San Dieguito Union High School Dist. v. Commission on Professional Competence* (1985) 174 Cal.App.3d 1176, 1180-1181.)

Cause does not exist to dismiss respondent for persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing her, pursuant to section 44932, subdivision (a)(7), for the reasons set forth in Factual Finding 76.

Immoral conduct - Fourth Cause for Dismissal

10. “Immoral conduct,” according to Code sections 44932, subdivision (a)(1), and 449398, has been defined to mean that which is hostile to the welfare of the general public and contrary to good morals. It includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, and dissoluteness. Or, it can be conduct that is willful, flagrant, or shameless, conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare. (*Board of Education of the San Francisco Unified School District v. Weiland* (1960) 179 Cal.App.2d 808, 811; *Orloff v. Los Angeles Turf Club, Inc.* (1951) 36 Cal.2d 734, 740.)

Immoral conduct cannot be the basis for removal of a teacher unless that conduct indicates that the teacher is unfit to teach under the criteria established by the California Supreme Court in *Morrison v. State Board of Education* *supra* 1 Cal.3d 214.

The published California Court of Appeal and California Supreme Court decisions that sustain a charge of “immoral conduct” in the context of a teacher dismissal or credential revocation action, show that the cases fall into three categories.

⁸ Education Code section 44939 provides, in part;

Upon the filing of written charges. . . or upon a written statement of charges formulated by the governing board, charging a permanent employee of the district with immoral conduct . . . the governing board may, if it deems such action necessary, immediately suspend the employee from his duties and give notice to him of his suspension, and that 30 days after service of the notice, he will be dismissed, unless he demands a hearing.

Those categories may be defined as: (i) sexual harassment or public sexual⁹ activity by a teacher at or near school grounds or involving students; (ii) teacher drug¹⁰ use or possession; or (iii) theft¹¹ of property or taking compensation through false pretenses by a teacher, especially where a school district is involved.

The evidence at the hearing of this matter did not show that respondent's alleged conduct, which was the focus of the proceeding, fell within any of the three areas where appellate court decisions have found immoral conduct.

Also of importance, the allegations against respondent were not shown to rise to the level of "moral turpitude." Moral turpitude has been held to "substantially overlap" the meaning of immoral conduct. (*Morrison v. Board of Education* *supra* 1 Cal.3d 214, 221.) For an offensive act or crime to involve moral turpitude, the wrongdoer's actions must demonstrate "a readiness to do evil" or "the intent to corrupt others." (*People v. Castro* (1985) 38 Cal.3d 301, 314-317.)

It was not established that respondent's conduct constituted immoral conduct within the meaning of the Education Code. While her conduct is not condoned by the Commission, given all the evidence, it cannot be found that her conduct was immoral; her actions cannot be determined to be depraved or indecent, especially given the context in which they occurred.

Cause does not exist to dismiss respondent for immoral conduct, pursuant to sections 44932, subdivision (a)(1), and 44939, by reasons of the matters set forth in Factual Finding 77.

⁹ Appellate court decisions that upheld teacher dismissal because of immoral conduct due to sexual harassment or sexual activity by a teacher include: *Palo Verde Unified School District v. Hensey* (1970) 9 Cal.App.3d 967; *Compton Junior College District v. Stubblefield* (1971) 16 Cal.App.3d 820; *Moser v. State Board of Education* (1972) 22 Cal.App.3d 988; *El Monte School District v. Calderon* (1974) 35 Cal.App.3d 490.

¹⁰ Appellate court decisions that upheld teacher dismissal because of immoral conduct due to drug use or drug possession by a teacher include: *Comings v. State Board of Education* (1972) 23 Cal.App.3d 94; *Nicasic School District v. Brennan* (1971) 18 Cal.App.3d 396; *West Valley Mission Community College District v. Concepcion* (1993) 16 Cal.App.4th 1766.

¹¹ Appellate court decisions that upheld teacher dismissal because of immoral conduct due to the context of theft or taking compensation through false pretense include: *San Francisco Unified School District v. Weiland* (1960) 179 Cal.App.2d 803; *Pittsburg Unified School District v. Commission on Professional Competence* (1983) 143 Cal.App.3d 964.)

Ultimate Determinations

9. By way of close study of the allegations, the evidence, and the controlling principles of law, the Commission has determined that the most egregious charges against respondent were not proven. In the opinion of the Commission, certain facts may have amounted to a deficiency in best practices for a certificated school teacher that might constitute unsatisfactory performance or even unprofessional conduct; but, despite those proven facts respondent's acts and omissions did not amount to cause for dismissal under the grounds set out in complainant's Accusation.

ORDER

1. The Accusation against respondent Amanda Gori is dismissed.
2. Respondent Amanda Gori may not be terminated from her employment as a permanent certificated employee of the Gilroy Unified School District.

DATED: November____, 2011

MARILYN FULLER, Member
Commission on Professional Competence

DATED: November ____, 2011

JENAY KIDDOO, Member
Commission on Professional Competence

DATED: November 14, 2011

PERRY O. JOHNSON
Administrative Law Judge and Member
Commission on Professional Competence