

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

In the Matter of the Accusation Against:

BRANDEE GRIVOIS, Respondent

Case No. 2-336384963

OAH No. 2023030801

PROPOSED DECISION

Marcie Larson, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on October 13, 2023, from Sacramento, California.

Brent O. Jex, Deputy Attorney General, represented complainant Mary Vixie Sandy, Ed.D., Executive Director of the California Commission on Teacher Credentialing (Commission), State of California.

Respondent Brandee Grivois appeared at the hearing and represented herself.

Evidence was received, the record closed, and the matter submitted for decision on October 13, 2023.

FACTUAL FINDINGS

Jurisdictional Matters

1. On or about June 30, 2020, the Commission issued respondent a Clear Multiple Subject Teaching Credential, which will expire on July 1, 2025, unless renewed.

2. On or about June 1, 2018, the Commission issued respondent a Preliminary Multiple Subject Teaching Credential, which expired on July 1, 2023.

3. Respondent previously held an Emergency 30-day Substitute Teaching Permit, issued on November 12, 2015, which expired on December 1, 2018.

4. On January 27, 2023, complainant, acting in her official capacity, signed and thereafter filed the Accusation against respondent. Complainant seeks to revoke all credentials, certificates, and authorizations issued to respondent, based on allegations that she engaged in unprofessional conduct while working as a teacher at Butte Vista Elementary School (Butte Vista). Generally, complainant alleges that respondent refused to provide proof of COVID-19 vaccination or agree to submit to weekly COVID-19 testing.

5. Respondent timely filed a Notice of Defense. The matter was set for an evidentiary hearing before an ALJ of the OAH, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

Respondent's Employment at Butte Vista

6. On August 6, 2021, respondent was hired to teach eighth grade math and science at Butte Vista, which is part of the Yuba City Unified School District (District). Respondent was hired as a probationary certificated employee of the District.

7. On August 11, 2021, the California Department of Health, State Public Health Officer issued a "Vaccine Verification for Workers in School" (Order), which provided the following in relevant part:

I. This Order applies to the following facilities: public and private schools serving students in transitional kindergarten through grade 12, inclusive, except that it does not apply to home schools. Further, it does not apply to child care or to higher education.

II. All schools identified in this Order must verify vaccine status of all workers.

[¶] ... [¶]

C. Workers who are not fully vaccinated, or for whom vaccine status is unknown or documentation is not provided, must be considered unvaccinated.

III. Testing requirements:

A. Asymptomatic unvaccinated or incompletely vaccinated workers are required to undergo diagnostic screening testing.

B. Workers may be tested with either antigen or molecular tests to satisfy this requirement, but unvaccinated or incompletely vaccinated workers must be tested at least once weekly with either PCR testing or antigen testing. Any PCR (molecular) or antigen test used must either have

Emergency Use Authorization by the U.S. Food and Drug Administration or be operating per the Laboratory Developed Test requirements by the U.S. Centers for Medicare and Medicaid Services.

C. Unvaccinated or incompletely vaccinated workers must also observe all other infection control requirements, and are not exempted from the testing requirement even if they have a medical contraindication to vaccination, since they are still potentially able to spread the illness. Previous history of COVID-19 from which the individual recovered more than 90 days earlier, or a previous positive antibody test for COVID-19, do not waive this requirement for testing.

D. Schools with workers required to undergo workplace diagnostic screening testing should have a plan in place for tracking test results and conducting workplace contact tracing, and must report results to local public health departments. There are IT platforms available that can facilitate these processes for schools.

[¶] ... [¶]

8. On October 8, 2021, Michael Reed, Assistant Superintendent of Human Resources for the District, sent a letter to District employees regarding the District's COVID-19 vaccination and testing policy. The letter, in compliance with the Order,

stated those employees who did not provide proof of full vaccination were required to submit to weekly COVID-19 testing. The letter also provided in relevant part that:

Next week, only employees required to weekly test (only those employees who have not yet submitted proof of full vaccination) will receive information about how to register with Covid Clinic. Employees will be asked to register online, fill out insurance and personal-health information, and agree to the terms which allow Covid Clinic to bill the insurer or Health Resources Services Administration (HRSA) for testing.

During registration with Covid Clinic, each employee will be asked to give "consent" or "authorization" in a few areas to prevent the spread of COVID-19. The specifics of which are included in the registration process. In general, the areas of consent and/or authorization to Covid Clinic for employees are to:

- Perform and report results of the COVID-19 test for and on your behalf to the [District].
- Have the lab sample collected by Covid Clinic or MedLab2020.
- Have "Notices of Positive Results" released to applicable public-health authorities.

- Consent to the understanding that there is a possibility of error in all lab testing.
- Authorize and release applicable health information related to the intended Purpose of the testing.
- Authorize the employee's health insurance company to pay Covid Clinic and/or MedLab2020 directly and to release necessary information for claims processing.

[¶] ... [¶]

9. On September 29, 2021, Mr. Reed sent respondent a letter notifying her that she was required to submit to weekly COVID-19 testing. The letter explained that her first testing session would occur on October 5 or 6, 2021. Respondent did not submit to testing and did not provide proof of her COVID-19 vaccination status.

10. By letter dated October 20, 2021, respondent was informed she was placed on unpaid leave status because she refused to comply with the COVID-19 testing requirements. The letter explains in part that:

On Friday, October 15, 2021, you were notified by your site supervisor of the need to schedule a testing time prior to the end-of-day, Wednesday, October 20, 2021. You did not respond to this request and instead forwarded an email from your direct supervisor to an [s/c] Personnel Specialist. You added a statement to the email which read, "I do not consent to this discriminatory testing." We have determined

this email to be a refusal to comply with the District's testing requirements. Therefore, you are not qualified to serve in your position with the District and you are hereby placed on unpaid leave. Your last date in paid status was Tuesday, October 19, 2021. If you fail to submit to weekly COVID-19 testing and continue to be insubordinate, the District will move forward with disciplinary action, up to and including termination.

11. Respondent did not respond to the October 20, 2021 notice. By letter dated October 21, 2021, respondent was sent a Notice of Unpaid Status. The letter states in part that:

Since October 20 you have not communicated efforts to comply with the District's directive and State Mandate. Unless you submit to COVID 19 testing on or before Tuesday, October 26 (either by requesting a time to be tested here at the District Office or submitting proof testing, on or prior to this date) the District will move forward with disciplinary action up to and including termination.

12. Mr. Reed testified at hearing that on October 22, 2021, while respondent was clearing out her classroom, he spoke to respondent and gave her another opportunity to undergo COVID-19 testing. Respondent did not agree to undergo testing.

13. By letter dated November 3, 2021, respondent was notified that Mr. Reed was recommending she be terminated from her position with the District. Enclosed with the letter was a "Statement of Reasons" outlining the recommendation for termination. The grounds for termination were "Persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the state board or by the governing board of the school district employing him or her."

14. On or about December 16, 2021, respondent signed a Settlement Agreement with the District, whereby she agreed to resign her position with the District. In doing so, the District paid respondent \$5,297.60. All documents related to respondent's proposed termination were removed from her personal file. Neither respondent nor the District admitted to any wrongdoing. The District's Board approved the Settlement Agreement effective January 11, 2022.

15. On or about February 10, 2022, pursuant Title 5, California Code of Regulations, section 80303, the District notified the Commission of respondent's resignation in lieu of termination.

16. Mr. Reed testified at hearing that when a teacher leaves the District, it is disruptive for the students. He provided no examples of how respondent's unpaid leave and subsequent departure from the District caused any disruption or harm to the students, public or District.

Respondent's Evidence

17. Respondent explained that when she was hired by the District, she was not informed of any requirements that she be vaccinated or undergo weekly COVID-19 testing. Nor did she agree to be vaccinated or submit to testing. It was not until

several months after she began working for the District that she was informed of the vaccine and testing requirements. Respondent explained that she immediately voiced her opposition to the requirements. Due to her religious beliefs, she would not agree to be vaccinated. Additionally, submitting to COVID-19 testing required her to agree to release her medical information and DNA to a lab to disseminate, which she believes is an invasion of her privacy. Respondent believed she was exercising her constitutional rights.

18. Respondent explained that she tried to work with the District to find a solution that would allow her to continue to teach, including teaching remotely. However, the District would not agree to provide her any type of accommodation. Respondent ultimately decided to resign her position. She immediately found work with Proximity Learning, a fully remote virtual school. She worked for Proximity Learning for two years as an elementary school teacher. She received a positive evaluation from Proximity Learning.

19. In January 2023, respondent's husband, who is in the military, was transferred to Oklahoma. Respondent obtained her Oklahoma teaching credential. Since that time, she has worked as a kindergarten teacher for Altus Early Childhood Center, for the Altus Public Schools in Oklahoma. Respondent enjoys her position and has received a positive evaluation.

20. Respondent explained that she became a teacher because she loves teaching and making a difference in children's lives. Respondent feels she can reach children on a level that she did not experience as a child. Respondent spent 15 years working on her education career, including obtaining her associate and bachelor's degrees in early childhood education. She then completed a California specific credentialing program to earn her multiple subjects teaching credential. It took her

two years to obtain her clear credential. Respondent has been employed as an elementary school teacher for many years, teaching kindergarten, fourth, fifth and eighth grades. She has never had any performance related issues or been disciplined.

21. Respondent explained that the action taken by complainant against her credential is upsetting. She tried to explain to the Commission for several years that her decision to not get vaccinated or submit to testing was a deeply personal decision which is based on the belief that she has a constitutional right to not agree to take an experimental vaccine or release personal medical information. She believes the Supreme Court supports her belief by finding that vaccine and testing mandates were unconstitutional. Respondent would like to move past this issue. She plans to return to school to obtain her master's degree in child psychology so she can help children who struggle with difficult family lives.

CHARACTER EVIDENCE AND PERFORMANCE EVALUATIONS

22. Respondent submitted a letter from Patricia Fortna, a teacher and colleague who taught with respondent at Butte Vista. She describes respondent as a "competent, caring, and knowledgeable teacher." She supports respondent's decision to maintain her medical privacy.

23. Respondent also submitted her performance evaluation from Proximity Learning, which rated her as "Advanced" and "Proficient" in all evaluation areas. Her evaluation from Altus Early Childhood Center rated her as "effective" in all evaluation areas and described as an "excellent addition to Altus Public Schools."

Analysis

24. In *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, the California Supreme Court concluded that a teaching credential cannot be disciplined for unprofessional conduct, "unless that conduct indicates that the [educator] is unfit to teach." (*Id.* at p. 229.) The Court outlined factors to consider when determining whether an educator's conduct demonstrates unfitness to teach, which have been codified in California Code of Regulations, title 5, section 80302, subdivision (a). The factors are:

- (1) the likelihood that the conduct may have adversely affected students or fellow teachers, and the degree of such adversity anticipated;
- (2) the proximity or remoteness in time of the conduct;
- (3) the types of credentials held or sought by the person involved;
- (4) any extenuating or aggravating circumstances surrounding the conduct;
- (5) the praiseworthiness or blameworthiness of the motives resulting in the conduct;
- (6) the likelihood of recurrence of the questioned conduct;
- (7) the extent to which disciplinary action may have an adverse impact or chilling effect upon the constitutional rights of the person involved, or other teachers; and

(8) the publicity or notoriety given to the conduct.

LIKELIHOOD OF ADVERSE EFFECTS ON STUDENTS OR FELLOW TEACHERS

25. Complainant failed to demonstrate that respondent's decision to not obtain a COVID-19 vaccine or submit to weekly testing had any adverse effect on students or fellow teachers at Butte Vista. Mr. Reed explained that when a teacher leaves the District it is "disruptive" but provided no specific examples of how respondent's decisions were "disruptive" or caused any specific adverse effect.

PROXIMITY OR REMOTENESS IN TIME

26. Respondent's conduct is remote in time. The District's vaccine and testing mandate was issued in August 2021. By October 2021, respondent was placed on leave, and she resigned from the District in December 2021. It has been almost two years since the events which gave rise to her resignation. Since that time respondent has continued to work as a teacher.

TYPE OF CREDENTIAL HELD

27. Respondent holds a Clear Multiple Subject Teaching Credential, which requires teaching competence.

EXTENUATING OR AGGRAVATING CIRCUMSTANCES

28. Neither the Education Code nor the applicable regulations specify what constitutes "extenuating circumstances." However, California Code of Regulations, title 5, section 80300, subdivision (m), defines "mitigating factor" as "an event or circumstance which demonstrates that the public, school children and the profession would be adequately protected by a more lenient degree of adverse action or no

adverse action whatsoever.” Respondent presented mitigating evidence regarding her belief that she had the right to assert her constitutional rights when deciding to not obtain the vaccine or submit to weekly testing. She attempted to work with the District to find a solution that would allow her to continue to teach at the District, such as working remotely, but the District denied her request.

Respondent’s beliefs were further supported by the January 2022 Supreme Court’s decision that the Occupational Safety and Health Administration (OSHA), a regulatory agency of the United States Department of Labor, did not have the authority to mandate that large businesses require their employees to either be vaccinated or be tested once a week for COVID-19. (See *National Federation Of Independent Business, Et Al., v. Dept. Of Labor, Occupational Safety And Health Admin., et al.* (2022) 142 S.Ct. 661.)

29. California Code of Regulations, title 5, section 80300, subdivision (b), lists aggravating factors, the presence of which indicate a greater degree of discipline is necessary to protect students and the teaching profession. These factors include, in pertinent part, whether: (1) the misconduct in question involved multiple wrongful acts; and (2) the misconduct significantly harmed the educational system. Respondent did not engage in multiple wrongful acts and complainant failed to establish that her conduct significantly harmed the educational system.

PRAISEWORTHINESS OR BLAMEWORTHINESS OF MOTIVES RESULTING IN THE MISCONDUCT

30. Respondent’s motives for her conduct was to assert what she believed were her constitutional rights, including the right to privacy. Her beliefs are clearly not

unfounded, since the Supreme Court recognized that employer mandates have constitutional limits. Her motives are more praiseworthy than blameworthy.

LIKELIHOOD OF RECURRENCE

31. The COVID-19 pandemic was unprecedented, as was the global response. Given that respondent has no history of performance related issues, there is scant likelihood of recurrence of the same or similar issues.

ADVERSE IMPACT OR CHILLING EFFECT

32. Respondent has the right to work for an employer who supports her beliefs and values. She ultimately elected to resign her position with the District. She immediately found employment as a teacher with a company that did not have vaccine or testing requirements. Discipline of respondent's credential would likely adversely impact or chill respondent or other teachers' decisions to exercise their constitutional rights.

PUBLICITY OR NOTORIETY OF MISCONDUCT

33. No evidence was presented that respondent's conduct was either publicized or notorious.

CONCLUSION

34. For the reasons stated above, and considering all the *Morrison* factors, complainant failed to establish by clear and convincing evidence that cause exists to discipline respondent.

LEGAL CONCLUSIONS

Burden of Proof

1. Complainant has the burden of proving the allegations in the Accusation by clear and convincing evidence to a reasonable certainty. (*Gardner v. Comm. on Professional Competence* (1985) 164 Cal.App.3d 1035.) Clear and convincing evidence requires proof that is so clear as to leave no substantial doubt and that is sufficiently strong to command the unhesitating assent of every reasonable mind. (*In re Marriage of Brooks* (2008) 169 Cal.App.4th 176, 190.)

Applicable Law

2. Pursuant to the Education Code, commencing with section 44000, and California Code of Regulations, title 5, commencing with section 80000, the Commission is responsible for credentialing teachers in public schools in California, including issuing credentials and taking adverse action against applicants and credential holders.

3. Education Code section 44421 provides in part:

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

4. California Code of Regulations, title 5, section 80300 states in part that:

(a) "Adverse action" is a denial, a private admonition, public reproof, suspension or a revocation of one or more credentials.

(b) "Aggravating factor" is an event or circumstance which demonstrates that a greater degree of adverse action for an act of professional misconduct is needed to adequately protect the public, schoolchildren or the profession.

Aggravating factors may include, but are not limited to, the following:

[¶] ... [¶]

(4) that the misconduct significantly harmed a child entrusted to the care of a credential holder or applicant, significantly harmed the public or the educational system;

[¶] ... [¶]

5. California Code of Regulations, title 5, 80302, subdivision (a), provides the factors to consider to "determine the relationship between the alleged misconduct and the applicant's or holder's fitness, competence, or ability to effectively perform the duties authorized by the credential."

6. "Unprofessional conduct" includes "that which violates the rules of ethical code of a profession or such conduct which is unbecoming a member of a profession in good standing." (*Bd. of Education of the City of Los Angeles v. Swan* (1953) 41 Cal.2d 546, 553; quoting, 66 Corpus Juris, p. 55.)

Cause for Discipline

7. As set forth in the Factual Findings as a whole, complainant failed to establish by clear and convincing evidence that respondent committed acts of unprofessional conduct. No cause exists to discipline respondent's credential pursuant to Education Code section 44421.

Conclusion

8. When all the evidence is considered, complainant failed to prove that respondent engaged in unprofessional conduct. As a result, the Accusation must be dismissed.

ORDER

The Accusation filed against Brandee Grivois is DISMISSED.

DATE: October 25, 2023

Marcie Larson
Marcie Larson (Oct 25, 2023 16:06 PDT)
MARCIE LARSON
Administrative Law Judge
Office of Administrative Hearings