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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

DIOKA OKORIE, Plaintiff and Appellant, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Defendant and Respondent.	B293234 (Los Angeles County Super. Ct. No. BS166713)

APPEAL from a judgment of the Superior Court of Los Angeles County. James Chalfant, Judge. Affirmed.

Law Offices of Akudinobi & Ikonte, Chijioke O. Ikonte and Emmanuel C. Akudinobi for Plaintiff and Appellant.

Bergman Dacey Goldsmith, Michele M. Goldsmith, Natasha D. Travis and Jason J. Barbato for Defendant and Respondent.

SUMMARY

The Los Angeles Unified School District terminated the employment of plaintiff Dioka Okorie, an elementary school teacher, after the Commission on Professional Competence found that plaintiff had inappropriately touched a student on three occasions, and had been dishonest in failing to return computer equipment issued to him by the district. The commission found these transgressions constituted cause for his dismissal based on immoral conduct, evident unfitness for service, and dishonesty, among other grounds. (Educ. Code, § 44932, subd. (a)(1), (4), (6) & (8), § 44939, subd. (b).)

Plaintiff sought a writ of mandate directing the commission to set aside its decision. The trial court, exercising its independent judgment, denied the petition.

We affirm the judgment, principally because plaintiff's briefs give a one-sided, incomplete and inaccurate presentation of the evidence presented at the hearing. An appellant forfeits the right to appellate review by misleading the Court of Appeal in this way.

FACTS AND PROCEDURAL HISTORY

The three occasions of inappropriate touching occurred in 2006 and 2007, when the student, D.B., was a 4th and 5th grader, nine and 10 years old. Plaintiff kissed D.B., touched his clothed buttocks and genital area, and placed D.B.'s hand on plaintiff's clothed genital area. D.B. did not reveal these incidents until years later, in late March 2014, when he was a senior at a private high school. He revealed the sexual molestation at a retreat during a session at which students were asked to volunteer discussion of significant challenges they had faced in their lives.

Mary Eileen Young, a teacher who had been present at the retreat, reported D.B.'s statements to law enforcement authorities. When she informed D.B. that the school was referring him to counseling services, D.B. became emotional and asked her not to report the incident, but she reminded him she was a mandated reporter and his parents must be informed.

On April 3, 2014, two officers from the Los Angeles Police Department (LAPD) interviewed D.B. Officer Marine Gevorgyan, who later testified at the commission hearing, took the lead in the interview and prepared an investigative report. Plaintiff had already left school that day when the two officers sought to interview him.

Plaintiff was removed from the classroom and placed on administrative leave the following day.

Another LAPD officer followed up on Officer Gevorgyan's investigation. Officer Vonnie Benjamin-Brown sought a further interview with D.B., but on April 15, 2014, D.B.'s mother told the officer that her son wanted to move on with his life and forget about the incident, and so would not cooperate with the investigation.

On April 22, 2014, Officer Benjamin-Brown spoke to plaintiff, but he had engaged an attorney and refused to provide a statement.

Meanwhile, the district was conducting an administrative investigation. John Metcalf, who had been a detective with the LAPD, was employed as an investigator by the district, assigned to the Student Safety Investigation Team. Detective Metcalf sought to interview plaintiff about the molestation allegations. Plaintiff said "he would not submit to an interview while he was

on leave to bond with his newborn child, after which he would be unavailable on summer vacation."

Detective Metcalf also demanded that plaintiff return the laptop and iPad issued to plaintiff. He planned to have the equipment scanned for child pornography or sexually explicit adult content, as was routine in cases of reported sexual misconduct.

Cynthia Jackson, an operations coordinator for the district, was responsible for recovering the equipment from plaintiff. On April 21, 2014, she spoke to plaintiff. Plaintiff said he did not remember where the equipment was. On April 23, 2014, Ms. Jackson spoke to plaintiff by telephone and sent him an email asking him to return the equipment. Plaintiff responded by email, stating he had answered her question on April 21 "openly and honestly," telling her that "it is somewhere, but I wasn't sure about the location because I have not used it in a while."

On May 6, 2014, Ms. Jackson gave plaintiff a written directive to return the laptop and iPad, warning that failure to follow an administrative direction "may lead to discipline including . . . dismissal from the [district]."

Plaintiff did not comply with the directive, and on May 19, 2014, Ms. Jackson asked the Los Angeles School Police Department (LASPD) to take over the recovery effort. Detective Aaron Gray, who had been employed by LASPD for 19 years, subpoenaed internet service providers, correlated their information with information from tracking software, and eventually obtained a search warrant for plaintiff's residence. Detective Gray and other officers executed the warrant on

October 15, 2014, and found the equipment in plain view in a bedroom.

During his investigation, Detective Metcalf met with plaintiff and his attorney. The attorney told Detective Metcalf that plaintiff declined an interview based on his Fifth Amendment right against self-incrimination. The detective explained that nothing plaintiff said could be used against him in a criminal proceeding, under *Spielbauer v. County of Santa Clara* (2009) 45 Cal.4th 704 (*Spielbauer*). He further explained several times that plaintiff's refusal to speak in an administrative investigation could be grounds for discipline, including termination. Plaintiff followed his attorney's advice and asserted his Fifth Amendment right.

Detective Metcalf concluded his investigation, since he had no other leads, and both D.B. and plaintiff refused to speak with him. Then, in October 2014, Detective Gray informed him of recovery of the laptop and iPad. Detective Metcalf promptly had the equipment scanned, but no child pornography or sexually explicit adult content was found.

On January 13, 2016, the district notified plaintiff of its intention to dismiss him for the causes identified above. Plaintiff requested a hearing. An accusation was filed and amended in March 2016. Plaintiff denied the allegations.

A week before the hearing, the district filed a *Seering* motion to exclude plaintiff from the hearing during D.B.'s testimony. (*Seering v. Department of Social Services* (1987) 194 Cal.App.3d 298, 303-306 (*Seering*) [exclusion from hearing room during testimony of minor victim about claims of sexual abuse did not deny the plaintiffs their statutory and due process rights to confrontation of a witness].) The district's motion included

declarations from D.B. and from the district's director of school mental health services about the further trauma plaintiff's presence during D.B.'s testimony would cause.

On the first day of the five-day hearing, plaintiff's counsel told the administrative law judge, "We didn't oppose the *Seering* motion." The judge then discussed with the district's counsel the arrangements for D.B.'s testimony – the equipment setup, the courtroom where plaintiff would watch and listen, the ability of plaintiff's counsel to take breaks after the direct examination and during his cross-examination to confer with his client, and so on – all without objection by plaintiff.

Seventeen witnesses testified at the hearing. In addition to facts already related, there was testimony from colleagues and parents that plaintiff was an exceptional teacher and good role model, known for his ability to help students that other teachers "had given up on" to become good students and see their own potential.

The commission ordered plaintiff's termination based on immoral conduct; evident unfitness for service; dishonesty; persistent violation of, or refusal to obey, laws or regulations governing public schools; and willful refusal to perform regular assignments without reasonable cause.

Plaintiff filed a petition for an administrative writ of mandate (Code Civ. Proc., § 1094.5), seeking to set aside the order on the ground the commission's findings and conclusions were not supported by evidence adduced at the hearing.

The trial court denied plaintiff's petition in a 23-page decision, with two principal conclusions.

First, the court found that the charge of dishonesty (the computer equipment charge) was supported by the weight of the

evidence. The court concluded plaintiff's argument that he did not know where the equipment was when he was questioned about it in April and May 2014 was "unsupportable," and the commission "reasonably concluded that [plaintiff's] answers were deceptive, dishonest, and possibly given for the purpose of deleting evidence from his electronic devices." The court further agreed, as the commission found, that plaintiff falsely testified that in August 2014 he had offered to return the equipment.

Second, the court addressed the molestation charge, finding the weight of the evidence supported that charge. After a thorough explication of various inconsistencies in D.B.'s testimony, the court stated the case "presents a true 'he said, he said' situation," and concluded "D.B.'s version of molestation must be credited." The court observed that plaintiff "could have cast considerable doubt on D.B.'s version of events if his own version were credible," but "[t]he problem is that it was not." Plaintiff "did not testify to, or provide explanations for, any incidents that could be misinterpreted by D.B.," and did not testify "to his relationship with D.B. or any possible motivation for D.B. to falsely accuse him, such as a personality conflict, bad grade, or other issue." The court found D.B. "relatively consistently told the same version of events," obtained no benefit from revealing the molestation, and provided credible detail of the events. "In comparison, [plaintiff's] bare denial was not credible."

Judgment was entered and plaintiff filed a timely appeal.

DISCUSSION

In its review of the commission's findings, the trial court was required to exercise its independent judgment on the evidence. (*Melkonians v. Los Angeles County Civil Service*

Commission (2009) 174 Cal.App.4th 1159, 1167.) In doing so, the trial court "must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817.) We review the trial court's findings using the substantial evidence test. (*Id.* at p. 824.)

1. Plaintiff has forfeited our review of his claim the trial court's findings are not supported by substantial evidence.

Plaintiff has forfeited our review of this claim because, "rather than presenting a summary of *all* of the evidence presented at the hearing below most favorably to the judgment" (*Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 52), plaintiff has omitted from his recitation significant facts supporting the judgment. We cite only two examples, though there are others.

First, plaintiff's description of the facts concerning the "[r]eturn of district issued electronic equipment" consists of a statement that the district requested return of the laptop and iPad in May 2014; he responded that he was unsure of the exact location of the equipment; he took paternity leave until August 2014; the district executed a search warrant in October 2014; and "nothing was found" when the equipment was scanned. Plaintiff fails to describe the district's repeated oral and written demands for return of the equipment, and describes its directive to return the laptop on pain of discipline only as a "written request" that he did not comply with because he was busy caring for his wife and new baby.

Plaintiff states in his brief that when he returned from paternity leave in August 2014, "he discussed returning the computer with his new supervisor Galedary," and "[t]here was no request to return the computer." Plaintiff does not tell us the trial court found plaintiff's testimony that he discussed returning the equipment with Mr. Galedary to be "false." As the trial court explained, Mr. Galedary had been involved in the request for return of the computer equipment "from the beginning and would have known its significance to the investigation," so there was "no logical reason why Galedary would refuse an August 2014 offer from [plaintiff] to return the equipment. The conclusion must be that it simply did not happen."

As another example, plaintiff purports to describe the testimony of Janice Davis, the administrator who conducted plaintiff's *Skelly* hearing and recommended his dismissal. Plaintiff tells us Ms. Davis testified there was nothing in plaintiff's computer to support the allegations against plaintiff. What plaintiff does not tell us is that she further testified that she "still recommended that he be dismissed," because "it took us six months to get those computers. He lied to us saying he didn't know where those computers were." Similarly, plaintiff does not tell us that, as the commission found, "Ms. Davis's recommendation was based primarily on her concern that molestation had occurred," and "[o]ther misconduct was contributory."

2. Plaintiff's exclusion from the hearing room during D.B.'s testimony did not violate his rights and was not prejudicial.

Plaintiff presents no reasoned argument why his exclusion from the hearing room during D.B.'s testimony violated his right

to confront his accuser or was prejudicial. He only argues that D.B. was not a minor when he testified, unlike the case in *Seering* where the victim was a young child when she testified. We see no reason why the principle established in *Seering* should not be applied here, where the motion to exclude plaintiff included declarations explaining the further trauma plaintiff's presence would cause, and where fair procedures were employed to permit consultation between plaintiff and his counsel during the testimony. Moreover, and tellingly, plaintiff did not oppose this procedure, either before or at the hearing, and it is too late to do so now; he has forfeited the claim.

3. Plaintiff has not shown prejudice by admission of evidence he asserted his Fifth Amendment right.

The police report indicates that plaintiff "stated he had an attorney and refused to provide a statement," and that Detective Metcalf had told Officer Benjamin-Brown that plaintiff "wasn't cooperating with the investigation and had retained an attorney." Plaintiff contends evidence he asserted his Fifth Amendment right against self-incrimination when he was interviewed by the LAPD was prejudicial.

Again, plaintiff presents no reasoned argument in the three brief paragraphs he devotes to this point. His only citation is to *Spielbauer, supra,* 45 Cal.4th at page 714. *Spielbauer* tells us that the Fifth Amendment "privileges a person not to answer official questions in any other proceeding, 'civil or criminal, formal or informal,' where he or she reasonably believes the answers might incriminate him or her in a criminal case." (*Ibid.*) But under *Spielbauer*, as the trial court pointed out, the Fifth Amendment does not forbid a fact finder in a public employee administrative proceeding from drawing an adverse inference

from a party's refusal to answer questions where those answers cannot be used in a criminal case. (*Spielbauer,* at pp. 727, 729-730.) Detective Metcalf so informed plaintiff, repeatedly.

In his reply brief, plaintiff tells us the *Spielbauer* principle is not the issue. The issue, he says, is whether it was prejudicial to admit the evidence that he refused to talk to the LAPD during their criminal investigation. But he does not tell us how he was prejudiced. He merely cites *Griffin v. California* (1965) 380 U.S. 609, 615, a criminal case where the court held the Fifth Amendment forbids comment by the prosecution on the accused's silence. This is not a criminal case and, as the trial court pointed out, neither the district's prosecutor, nor the administrative law judge, nor the commission commented on plaintiff's assertion of the Fifth Amendment.

4. We deny plaintiff's improper request for judicial notice.

Plaintiff asks that we grant judicial notice of "newly acquired evidence" and remand the case to the trial court to consider the new evidence. The "newly acquired evidence" is a proposed decision of an administrative law judge in a proceeding before the California Commission on Teacher Credentialing, a proposed decision that has since been rejected by the commission.

We deny the motion for judicial notice. An appellate court normally considers only matters that were part of the record when the judgment was entered. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.) Plaintiff has shown no exceptional circumstances that would justify deviating from that rule.

5. The *Morrison* factors demonstrated plaintiff's unfitness to teach.

Plaintiff's final contention is that the factors that are applied to determine whether a teacher's conduct indicates unfitness to teach (*Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229; Cal. Code Regs., tit. 5, § 80302) do not support his termination. His principal point seems to be that the molestation did not occur, so the first factor – adverse effects on students, fellow teachers or the educational community – is not relevant. That contention is obviously wrong.

Further, in contending there "was no persistent failure to return district issued equipment," plaintiff tells us that "[a]s stated by the ALJ[,] matters related to the computer and other allegations are not sufficient ground for dismissal." The ALJ said no such thing, instead saying (italics added): "Matters that were the subjects of directives to [plaintiff], *other than* those relating to his touching D.B. and *his failure to return computer equipment,* are not grounds for dismissal."

In short, plaintiff has shown no error in the trial court's conclusion that the *Morrison* factors demonstrated plaintiff's unfitness to teach and that plaintiff was properly terminated.

DISPOSITION

The judgment is affirmed. The district shall recover its costs on appeal.

GRIMES, Acting P. J.

WE CONCUR:

STRATTON, J. WILEY, J.