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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CHRISTOPHER ONTIVEROS,

Plaintiff and Appellant,

v.

COMMISSION ON
PROFESSIONAL
COMPETENCE,

Defendant and
Respondent;

ANAHEIM UNION HIGH
SCHOOL DISTRICT,

Real Party in Interest
and Respondent.

B271647

(Los Angeles County
Super. Ct. No. BS147276)

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

Law Offices of Dale M. Fiola and Dale M. Fiola for Plaintiff
and Appellant.

No appearance for Defendant and Respondent.

Artiano Shinoff, Daniel R. Shinoff and Paul V. Carelli IV
for Real Party in Interest and Respondent.

Respondent Anaheim Union High School District (District) dismissed appellant Christopher Ontiveros from his employment as a public high school teacher. After holding an administrative hearing on the matter, which included documentary and oral evidence and spanned a total of 15 days, the Commission on Professional Competence (Commission) sustained the District's dismissal of Ontiveros. Seeking review of the Commission's decision, Ontiveros filed a petition for a writ of administrative mandamus in the trial court. The trial court denied the petition and entered judgment against Ontiveros.

Ontiveros appeals the judgment, claiming the Commission improperly admitted evidence and the Commission's and the trial court's credibility findings were wrong. Under his view of the evidence, Ontiveros argues the judgment must be reversed and his petition granted. As discussed below, however, we conclude that, even in the absence of most of the evidence Ontiveros argues should have been excluded, substantial evidence supports the judgment. Therefore, we affirm.

BACKGROUND

1. Events Preceding the District's Decision to Terminate Ontiveros's Employment

a. Ontiveros and Christine P.

Before his termination, Ontiveros taught history at Oxford Academy, a District school, for approximately nine years, including all times relevant to this appeal. He was a popular teacher and had not been disciplined prior to the proceedings giving rise to this appeal. When the disciplinary proceedings began, he had been married 19 years and had five daughters. The District terminated Ontiveros because it determined Ontiveros had “engaged in immoral or unprofessional conduct, displayed evident unfitness for service, and persistently violated or refused to obey school laws and regulations.” In part, the District’s decision was based on its conclusion Ontiveros had an inappropriate relationship with one of his students, Christine P. Ontiveros steadfastly denies any inappropriate behavior or inappropriate relationship with Christine.

Christine was born in South Korea and moved to the United States when she was five years old. She lived with her parents and two younger siblings. While a student at Oxford, Christine suffered from bulimia. Her illness affected her family, social, and academic life. Christine had difficulty discussing her illness with her parents, who in turn had difficulty understanding and coping with her illness. Christine testified she “didn’t really have friends.”

b. In 2008, at the start of her junior year, Christine began to confide in Ontiveros.

Ontiveros first taught Christine in the fall of 2007, when she was a sophomore in his AP European History class.

Ontiveros taught Christine again a year later in the fall of 2008, when Christine was a junior and she was in his AP United States History class. At that time, Christine's relationship with her parents was very strained and she began to confide in Ontiveros. Ontiveros was very supportive and helpful. He researched and gave Christine advice on eating disorders, helped her with homework and college applications, and allowed her to study in his classroom after school and when he was not there. Ontiveros and Christine also watched movies such as West Side Story and Moulin Rouge while alone in the classroom.

**c. In April 2009, with her mother's consent,
Christine temporarily moved into Ontiveros's
RV.**

In February 2009, when Christine was a junior at Oxford, Ontiveros invited Christine to stay and study for her AP exams in his and his wife's RV, which was parked on their property beside their house. Ontiveros testified his wife suggested the idea and they both discussed it with two other teachers before inviting Christine to stay on their property. Christine said she was not aware that Ontiveros discussed the idea with anyone else first. After repeated requests from Ontiveros, Christine told her mother about the invitation to stay in the RV. Christine's mother discussed the idea with the school principal, who told Christine's mother that Ontiveros and his wife "were good people." However, the principal did not think it was appropriate for Christine to stay with one of her current teachers. The principal met with Ontiveros and his wife and advised against having Christine stay in their RV.

Nonetheless, Ontiveros and his wife met with Christine and her mother to discuss the parameters of the proposed living

arrangement. Christine's mother agreed to the arrangement and signed a liability release as well as a list of expectations for Christine's stay. Christine's mother was grateful and Christine believed the arrangement would help improve her health as well as help her study for exams.

Christine moved into the RV on April 29, 2009. Until the end of May or beginning of June, Christine stayed overnight in the RV three or four times a week and stayed at her home on the weekends. She rode with Ontiveros and his wife, who also taught at Oxford, to and from school, sometimes ate dinner with them in their house, and studied alone with Ontiveros in his living room late at night and into the early morning hours.

Christine testified that, during the time she stayed in the RV, Ontiveros gave her pajamas and a blanket. One day in the RV she found a message written by Ontiveros on a Post-it note on top of those pajamas that said, "i miss you sooo bad u don't even know wear me for warmth for smiles for style forever.'" On another occasion, Christine testified Ontiveros wrote her a romantic note and left it for her with flowers. Christine also testified that, one night while taking a break from studying, Ontiveros showed her some exercises. The next morning at school, Christine found a note from Ontiveros on her desk in his classroom stating, "Yesterday you made me feel hard and horny." Christine understood the note to mean Ontiveros was aroused the night before when she was doing the exercises he had shown her. Christine told Ontiveros the note made her feel uncomfortable and she would no longer stay in the RV. Ontiveros apologized and told Christine it would not happen again. Ontiveros testified he did not send affectionate notes to Christine.

By the beginning of June 2009, Christine had stopped staying in the RV. On behalf of herself and her mother, Christine gave Ontiveros and his wife gifts of gratitude for their help and hospitality.

d. In June 2009, Ontiveros and Christine posed for photographs together.

In June 2009, at the end of her junior year, Christine used her cellular telephone to take photographs of herself and Ontiveros alone in his classroom. In the photographs they are clothed and their faces or other parts of their bodies are either very close together or touching. Some of the photographs show their torsos only. In one, Ontiveros stands behind Christine with his arms around her and his hands on her front hip area and thumbs in her front pants pockets. Another shows Ontiveros in front of Christine with his arms around her and his hands on her buttocks and thumbs in her back pants pockets. Other photographs show only their clothed hip and crotch area, touching side by side, some with Ontiveros's arm around Christine.

Teachers and administrators testified at the administrative hearing with respect to the photographs. Ann Powell Condon had been a District teacher for 30 years before retiring and was one of the founding teachers of Oxford. In her opinion, none of the photographs was inappropriate and she had seen similar photographs of teachers and students on campus. Bruce Stevens taught physics at Oxford. In his opinion, two of the photographs were inappropriate and a few others "could be construed as improper."

The Commission held the photographs "show poses that convey sexuality and intimacy between [Ontiveros and Christine]

that one would generally see in photographs between a husband and wife or a boyfriend and girlfriend. They convey a lack of physical boundary and propriety that should exist between a student and a teacher.” The trial court found them inappropriate as well, stating, “I’ve looked at them, and they are inappropriate.”

e. In the summer of 2009, Ontiveros spent a day with Christine without her parents’ knowledge or permission.

Toward the end of June 2009, Ontiveros spent a day with Christine without her parents’ knowledge or permission. Christine lied to her parents and told them she was going to school that day. Christine testified that Ontiveros did not want to pick her up at her home, so they met at a park. First, Ontiveros took Christine to visit USC, where he had been a student and where Christine was considering attending college. After visiting the university, Christine said Ontiveros drove her to the Los Alamitos racetrack parking lot, where, at his suggestion, Christine drove his car. Christine did not have a driver’s license at the time. After Los Alamitos, Ontiveros took Christine to Oxford, where she worked on a computer in his classroom. No one else was at the school. Christine testified that, as she worked on the computer, Ontiveros began to massage her back and neck. He kissed her ear and neck, and then turned her around and kissed her on her lips. Christine was nervous and “just froze.” Ontiveros left the school before Christine, who continued working, then returned home.

Ontiveros denied inappropriate conduct with Christine in his classroom. He testified he did not discuss the USC trip in advance with Christine’s parents because he believed that, by signing the paperwork allowing Christine to stay in the RV,

Christine's mother consented to the USC trip. He also claimed he did not tell Christine's mother about the USC trip because he thought she knew about it.

- f. Christine testified that, in the fall of 2009, at the start of her senior year, she and Ontiveros became sexually intimate.**

At the start of her senior year, Christine was assigned to Ontiveros's "cluster," which was like a homeroom. They began to eat lunch together and talk more. Christine testified that, in September and October 2009, Ontiveros took her to off-campus locations, including Downtown Disney, a mall, Seal Beach, and the Queen Mary. On some of those trips, Ontiveros told Christine he loved her. And, on most of those trips, Ontiveros and Christine engaged in sexual activity. Ontiveros denied taking Christine to any of those off-campus locations.

During the same time period, Christine testified she and Ontiveros engaged in sexual activity, including oral sex in his classroom almost every day after school. She said Ontiveros locked the classroom door during those times and no one outside could see inside the room. Ontiveros denied ever touching Christine in a sexual manner.

- g. In October 2009, Christine's mother discovered Christine's relationship with Ontiveros and reported it to the school. Ontiveros was placed on administrative leave and later arrested.**

One day in October 2009, Christine's mother was looking for Christine at school. She checked Ontiveros's classroom but was unable to open the door. At the time, Christine testified she and Ontiveros were inside the classroom kissing and Ontiveros was touching Christine under her panties. When the door finally

opened, Christine's mother testified she saw Christine and Ontiveros were alone in the classroom, Ontiveros looked "very surprised," and Christine looked "anxious."

After that incident, Christine's mother became very worried and afraid and decided to check the text messages on Christine's phone. Christine's mother found "many, many texts" from Ontiveros on Christine's phone, some of which included the word "'panty.'" Because Christine's mother did not understand all the words in the text messages from Ontiveros, she showed the phone to Christine's younger sister, who was in ninth grade. After reading the text messages, Christine's sister stated, "'This teacher must be crazy, out of his mind and he must be a pervert.'" Ontiveros denied sending any inappropriate text messages to Christine.

On October 12, 2009, after discovering the text messages from Ontiveros, Christine's mother reported what she found to the District and then in person to the principal at Oxford. While Christine's mother was still in the principal's office, the principal called Christine to her office and asked her to turn over her phone, which Christine did. However, because Christine sensed her relationship with Ontiveros had been discovered, just before turning in her phone to the principal, she deleted all text messages she had sent from her phone and most, but not all, of the text messages she had received from Ontiveros. Although she was scared and wanted to protect Ontiveros, Christine thought it would be worse to erase all the text messages on her phone because she believed the school knew Ontiveros had sent her text messages.

That afternoon, the principal and a school counselor transcribed approximately 150 text messages found on

Christine's phone that were from Ontiveros. Many of them were explicitly sexual in nature. The principal confirmed that the messages were sent from Ontiveros's personal cell phone.

The next day, the principal and assistant superintendent reported the matter to local police. The District placed Ontiveros on paid administrative leave. One week later, Ontiveros was arrested and turned his cell phone over to the police. Ontiveros stated he did not delete anything from his phone before surrendering it to police.¹

The text messages found on Christine's phone were not found on Ontiveros's phone. Ontiveros said Christine had

¹ In June 2011, Ontiveros stood trial on the following criminal charges: three counts of sexual penetration by a foreign object on a victim under 18 years old, oral copulation of a person under 18 years old, luring a child with the intent to commit specified crimes, and touching the intimate part of another person. The jury acquitted Ontiveros of all criminal charges. In its decision sustaining the District's decision to dismiss Ontiveros (discussed below), the Commission noted that, although it considered Ontiveros's acquittal, it gave the acquittal "nominal weight." The Commission explained: "The criminal matter is a separate venue with different allegations and a significantly different standard of proof. Saliently, [the Commission] need not assess the evidence in the record beyond a reasonable doubt. This Commission is not asked to determine whether [Ontiveros] committed sexual acts on [Christine], for example. Instead, this Commission is asked to determine whether [Ontiveros] engaged in immoral conduct, unprofessional conduct, is evidently unfit for service, and whether he persistently violated or refused to obey school laws, regulations, or Board rules, and to assess the evidence by a preponderance of the evidence. These distinctions make the criminal matter and the jury's decision of little value in the disposition of the instant matter." (Fn. omitted.)

“‘spoofed’ ” the text messages. In other words, Ontiveros claimed Christine had used an Internet service to create messages that appeared to originate from his phone when in fact Christine created the messages on a different device. Ontiveros’s computer forensics expert testified spoofing could not be ruled out. Christine’s computer forensics expert opined the messages came from Ontiveros’s phone. Christine’s expert used the “dynamic dictionary” on Ontiveros’s phone to access words that had been typed into the phone. In reviewing the dynamic dictionary, the expert saw many of the same words that were used in the texts found on Christine’s phone and opined the text messages had been sent from Ontiveros’s phone. Christine’s expert testified the words from a spoofed message would not show up in the dynamic dictionary.

As part of the investigation into Ontiveros’s conduct, e-mail messages between him and Christine were also discovered. The two had sent e-mails to each other during Christine’s junior and senior years at Oxford. To a certain extent, the e-mails were typical e-mails between a teacher and student. Ontiveros testified that none of the e-mails was inappropriate. However, the Commission found “[m]any of the emails contained flirtatious comments and intimate and inappropriate symbols and wording drafted by each and sent to each other.”

2. Administrative and Trial Court Proceedings

a. December 2013: The Commission sustained the District’s decision to dismiss Ontiveros.

In September 2011, the governing board of the District voted to terminate Ontiveros’s employment based on immoral conduct, unprofessional conduct, evident unfitness for service, and persistent violation or refusal to obey school laws and

regulations. (Ed. Code, § 44932, subd. (a)(1), (2), (6) & (8) (section 44932).) Ontiveros requested an administrative hearing and, over the course of 15 days in late-2012 and mid-2013, a three-member panel of the Commission held a hearing on the matter. The Commission heard testimony and received evidence.

In support of its decision to dismiss Ontiveros, the District argued Ontiveros “sexually communicated, interacted, and touched a minor female student in a sexual manner, sent her sexually explicit and otherwise inappropriate text messages and electronic mail (email) messages, and posed in inappropriate photographs with the student.” Christine, her mother, school administrators and a computer forensics expert testified at the hearing on behalf of the District.

Ontiveros denied the District’s allegations. He said he never sent inappropriate text messages to Christine and that she had “ ‘spoofed’ “ the messages. He also requested that the Commission conduct a *Kelly/Frye* evidentiary hearing² with respect to the use of the dynamic dictionary and exclude the District’s expert testimony relating to the dynamic dictionary and text messages from his phone altogether. Additionally, Ontiveros argued the Commission should exclude the text messages found on Christine’s phone under the spoliation of evidence doctrine. Because Christine admitted she deleted text messages from her phone, Ontiveros urged the Commission to exclude all text messages from her phone as a sanction against the District. Finally, Ontiveros argued the Commission should have excluded his cell phone records and history because their disclosure

² *People v. Kelly* (1976) 17 Cal.3d 24, 30; *Frye v. United States* (D.C. Cir. 1923) 293 Fed. 1013, 1014.

violated federal and state laws. Ontiveros testified on his own behalf. Teachers and a computer forensics expert also testified on his behalf.

In September 2013, the Commission issued a 32-page order sustaining the District's decision to dismiss Ontiveros. Although the Commission noted Ontiveros was "well liked by many," it ultimately found Ontiveros "dishonest at hearing and severely lacking in credibility. His arguments were unbelievable and, in several instances, they bordered on the ludicrous." The Commission found Ontiveros's position untenable and held his "conduct adversely affected [Christine] and all students and teachers who blindly supported" him. On the other hand, the Commission found Christine and her mother to be credible witnesses. The Commission noted that Christine had been emotionally and physically vulnerable and impressionable. The Commission held Ontiveros's "actions pursuing [Christine] and his sexual contact with her were shocking to the conscience and severely violated the trust that [Christine] and her mother placed in [Ontiveros] as her teacher."

Based on its factual findings and our Supreme Court's guidance in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, the Commission held dismissal was warranted. The Commission stated, "Cause exists to terminate [Ontiveros's] employment, pursuant to Education Code section 44932, subdivisions (a)(1), (a)(5), and (a)(7), for immoral and unprofessional conduct, evident unfitness for service, and the persistent violation of school policy."³

³ Section 44932, subdivision (a)(1) has since been divided into subdivision (a)(1), immoral conduct, and subdivision (a)(2), unprofessional conduct, and subdivision (a)(5) and (7) have since

b. March 2016: The trial court denied Ontiveros's petition for a writ of mandate. Ontiveros appealed.

In February 2014, Ontiveros filed a petition for a writ of administrative mandamus in the trial court, seeking review of the Commission's decision. Ontiveros made many of the same arguments he made at the administrative hearing. He argued the Commission erred in admitting into evidence (i) the text messages he allegedly sent to Christine that were recovered from his cell phone using the dynamic dictionary forensic tool, (ii) the text messages he allegedly sent to Christine that were found on Christine's phone, and (iii) his cell phone records and history. He also disagreed with the Commission's credibility findings. According to Ontiveros, Christine and her mother were not credible witnesses, but he and the teachers who testified on his behalf were. The trial court issued a 15-page tentative decision, denying the petition.

On March 8, 2016, the trial court held a hearing on the petition. At the hearing, counsel for Ontiveros agreed that, if Ontiveros had a sexual relationship with Christine, it would have been appropriate for the District to terminate his employment. Ontiveros took the position, however, that he did nothing sexual or otherwise inappropriate with Christine. He relied on his own testimony as well as that of the two teachers who testified on his behalf at the administrative hearing. According to Ontiveros, most of the evidence against him was either inadmissible (e.g., text messages and phone records) or not credible (e.g., Christine's

been renumbered as subdivision (a)(6), evident unfitness for service, and subdivision (a)(8), persistent violations or refusal to obey.

testimony). Ontiveros claimed the only properly admitted documents were the e-mails between Christine and Ontiveros and the photographs of Christine and Ontiveros together in his classroom. But, relying on his witnesses' testimony, Ontiveros claimed the photographs simply were not inappropriate. And, according to Ontiveros, there was nothing inappropriate about the e-mails.

At the close of the hearing, the trial court adopted as its final ruling the tentative decision denying the petition. The court stated, "[Y]ou could call it overwhelming that he is guilty of this." Counsel for the District prepared a proposed judgment, which stated the trial court had "confirmed its Tentative Decision" and "Petitioner's Writ of Mandate is DENIED for the reasons set forth [in] the Court's Tentative Decision." Before filing the judgment, however, the trial court amended the proposed judgment by deleting the words "for the reasons set forth [in] the Court's Tentative Decision." Thus, the final judgment read, "Petitioner's Writ of Mandate is DENIED." On March 30, 2016, the trial court signed and filed the judgment as amended.

On April 18, 2016, Ontiveros appealed the judgment.

DISCUSSION

1. Standard of Review

Because this case involves a fundamental vested right, namely, the termination of a public employee's employment, the trial court properly conducted an independent review of the administrative record. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 143; *San Diego Unified School Dist. v. Commission on Professional Competence* (2013) 214 Cal.App.4th 1120, 1140 (*Jespersion*).) "In exercising its independent judgment, a 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 (*Fukuda*).)

Our review of the trial court’s judgment is limited. (*Jespersion, supra*, 214 Cal.App.4th at p. 1141.) “‘We must sustain the trial court’s findings if they are supported by substantial evidence.’” (*Ibid.*; *Fukuda, supra*, 20 Cal.4th at p. 824.) “‘In reviewing the evidence, we resolve all conflicts in favor of the party prevailing at the trial court level and must give that party the benefit of every reasonable inference in support of the judgment.’” (*Jespersion*, at pp. 1141–1142.) We cannot substitute our deductions for those of the trial court. (*Id.* at p. 1142.) “‘Substantial evidence’ is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. [Citation.] It is sufficient ‘if any reasonable trier of fact could have considered it reasonable, credible and of solid value.’” [Citation.] [¶] ‘If there is substantial evidence, the judgment must be affirmed. [Citation.] We do not reweigh the evidence. Our inquiry “begins and ends with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact.” ’” (*Ibid.*) Under the substantial evidence standard of review, “‘we have no power to judge the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom.’” (*Leff v. Gunter* (1983) 33 Cal.3d 508, 518 (*Leff*).)⁴

⁴ The District argues the doctrine of implied findings applies here because Ontiveros did not request and the trial court

We review pure questions of law de novo. (*Riveros v. City of Los Angeles* (1996) 41 Cal.App.4th 1342, 1350.)

2. Ontiveros’s opening brief is manifestly deficient and, as a result, he has waived his substantial evidence arguments on appeal.

The District argues Ontiveros waived arguments on appeal because he failed to include in his statement of facts all facts material to his appeal. We agree.

As stated above, we review the trial court’s factual findings under the substantial evidence standard of review. Accordingly, this court’s “power ‘begins and ends with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact.’ ”

(*Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819, 842; *Jespersion, supra*, 214 Cal.App.4th at p. 1142.)

“Furthermore, this court will presume the record contains

did not issue a statement of decision. The doctrine of implied findings “requires that in the absence of a statement of decision, an appellate court will presume that the trial court made all factual findings necessary to support the judgment for which substantial evidence exists in the record. In other words, the necessary findings of ultimate facts will be implied and the only issue on appeal is whether the implied findings are supported by substantial evidence.” (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 267.) Ontiveros argues to the contrary, stating the trial court clearly incorporated its tentative ruling into its final ruling. In any event, the doctrine of implied findings does not impact the resolution of this appeal because the parties do not dispute what the trial court found. Rather, they dispute whether substantial evidence in the record supports those findings.

sufficient evidence to support the finding of fact.” (*Van de Kamp*, at p. 842.)

When questioning the sufficiency of the evidence, an appellant must include in the opening brief a fair and complete statement of all facts supporting the judgment or order on appeal. It is “an elemental principle of appellate practice . . . that a party challenging the sufficiency of the evidence to support a factual determination made by the trier of fact is *required* to set out *all* evidence pertinent to that determination, on penalty of forfeiting review.” (*Schellinger Brothers v. Cotter* (2016) 2 Cal.App.5th 984, 998 (*Schellinger Brothers*).) “A party who challenges the sufficiency of the evidence to support a finding must set forth, discuss, and analyze all the evidence on that point, both favorable and unfavorable.” (*Doe v. Roman Catholic Archbishop of Cashel & Emly* (2009) 177 Cal.App.4th 209, 218 (*Cashel & Emly*).)

If an appellant fails to carry this burden, the reviewing court may deem the substantial evidence issue waived. (*Cashel & Emly, supra*, 177 Cal.App.4th at p. 218.) An appellant may not rely on a highly selective statement of facts. “Such briefing is manifestly deficient.” (*In re Marriage of Fink* (1979) 25 Cal.3d 877, 887.) “ ‘ ‘ ‘A claim of insufficiency of the evidence . . . consisting of mere assertion without a fair statement of the evidence, is entitled to no consideration when it is apparent . . . that a substantial amount of evidence was received on behalf of the respondents.’ ” ’ ” (*Schellinger Brothers, supra*, 2 Cal.App.5th at p. 998; *Kanner v. Globe Bottling Co.* (1969) 273 Cal.App.2d 559, 564 (*Kanner*).)

Here, despite his claims to the contrary, Ontiveros did not fairly summarize the facts and it appears he misunderstands his

burden on appeal. For example, Ontiveros incorrectly asserts he is not required to include all material facts in his opening brief on appeal. And his opening brief includes almost exclusively those facts supporting his position. He did not include evidence supporting the District's position, including for example, Christine's testimony that Ontiveros and she had an intimate and sexual relationship. Although Ontiveros clearly disagrees with Christine's testimony, as well as other evidence offered below, he cannot ignore evidence when it is material to the issues on appeal. Ontiveros has failed to show the evidence most favorable to the trial court's findings is insufficient to support those findings. Because Ontiveros failed to satisfy his burden, we deem the substantial evidence issues waived. (*Cashel & Emly, supra*, 177 Cal.App.4th at p. 218.)

3. Substantial evidence supports the judgment.

Even if Ontiveros had not waived his substantial evidence arguments, however, we would conclude the judgment is supported by substantial evidence.

The District may properly terminate a teacher's employment when the teacher demonstrates immoral conduct, unprofessional conduct or evident unfitness for service, or persistently violates or refuses to obey school laws or regulations. (§ 44932, subd. (a)(1), (2), (6) & (8).) In *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229, our Supreme Court explained that, in this context, immoral or unprofessional conduct must indicate that the teacher "is unfit to teach." The *Morrison* court identified the following factors relevant to determining whether a teacher is unfit to teach: "[i] the likelihood that the conduct may have adversely affected students or fellow teachers, [ii] the degree of such adversity anticipated,

[iii] the proximity or remoteness in time of the conduct, [iv] the type of teaching certificate held by the party involved, [v] the extenuating or aggravating circumstances, if any, surrounding the conduct, [vi] the praiseworthiness or blameworthiness of the motives resulting in the conduct, [vii] the likelihood of the recurrence of the questioned conduct, and [viii] the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers.” (*Ibid.*, fns. omitted.)

Here, the Commission found the evidence supported the District’s decision to dismiss Ontiveros under section 44932. Finding Christine and her mother credible, and Ontiveros not credible, the Commission determined Ontiveros’s conduct with Christine “constituted immoral conduct and unprofessional conduct” and that Ontiveros persistently violated District policy. Consequently, the Commission determined Ontiveros was “evidently unfit for service as a teacher” with the District. Exercising its independent judgment, the trial court similarly concluded cause existed for the District to dismiss Ontiveros.

As he did below, Ontiveros argues on appeal that the trial court and the Commission erred by, among other things, admitting into evidence his cellular phone records as well as the text messages found on his phone. However, even assuming Ontiveros is correct and his phone records and the text messages on his phone should not have been admitted, the record contains ample other evidence substantially supporting the judgment.⁵

⁵ Because we conclude that, apart from Ontiveros’s phone records and text messages found on his phone, substantial evidence supports the judgment, we need not and do not address his arguments with respect to those two evidentiary issues. Trial

Notably, Christine testified not only that Ontiveros took her to places without her parents' permission and let her drive his car when she did not have a driver's license, but also that she and Ontiveros carried on a sexually intimate relationship for months. In addition, Christine's mother testified she found many inappropriate text messages from Ontiveros on Christine's phone as well as discovered Christine and Ontiveros alone in his classroom one afternoon, with the door locked and looking surprised and anxious. Additionally, the Oxford school principal and school counselor transcribed numerous sexually explicit text messages from Ontiveros found on Christine's phone. Christine's phone also contained inappropriate photographs of her posing with Ontiveros. There were also inappropriate Post-it notes from Ontiveros to Christine and e-mails between Ontiveros and Christine.

Thus, even without evidence of Ontiveros's phone records or text messages found on his phone, we conclude substantial evidence supports the trial court's judgment.

Ontiveros argues Christine and her mother were not credible. In an attempt to discredit Christine's testimony, Ontiveros notes, often without record citation, that Christine violated the school dress code and no smoking policy, cheated on some school exams, and lied on Internet publications. Ontiveros

court error does not require automatic reversal of the appealed judgment. We reverse only for prejudicial error. (Cal. Const., art. VI, § 13; *Nazari v. Ayrapetyan* (2009) 171 Cal.App.4th 690, 697 ["improperly admitted evidence only requires reversal or modification when it is reasonably probable a result more favorable to the complaining party would have been reached absent the error"].)

also attempts to discredit Christine's mother's testimony by claiming, again without citation to the record, that she protected Christine's father from child abuse allegations. On the other hand, Ontiveros states he was a credible witness and his testimony deserved greater weight. Christine's testimony and her mother's testimony certainly conflict with Ontiveros's testimony. However, it is not our role as the reviewing court to reweigh the testimony or other evidence. Rather, as stated above, we resolve all evidentiary conflicts in favor of respondent and determine only "whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact." (Jespersion, *supra*, 214 Cal.App.4th at p. 1142; Kanner, *supra*, 273 Cal.App.2d at p. 564 ["where the evidence is in conflict, an appellate court will not disturb the findings of the trial court"].) Other than his disagreement with how the Commission and the trial court weighed Christine's testimony and her mother's testimony against his own testimony and that of his witnesses, Ontiveros has not provided a sound reason why we should reverse the trial court's credibility findings.

Ontiveros also challenges the trial court's consideration of and findings with respect to the text messages and photographs found on Christine's phone as well as the Post-it notes from him to Christine. With respect to the text messages found on Christine's phone, Ontiveros argues it was error to consider those messages because the doctrine of spoliation of evidence precluded their admission. Ontiveros is incorrect. Although a court may sanction a party who destroys evidence (e.g., *Williams v. Russ* (2008) 167 Cal.App.4th 1215, 1223), Ontiveros has cited no authority for his position that a court may sanction a party for a nonparty's destruction of evidence before a lawsuit or other

proceeding had begun. Here, it is undisputed Christine is not a party to this action and she (not the District) deleted text messages from her phone before any proceedings against Ontiveros had begun. Ontiveros provides no authority for sanctioning the District in these circumstances. In fact, when Christine turned her phone in to the Oxford principal, the principal and school counselor transcribed and, therefore, preserved the text messages that remained on Christine's phone. The spoliation of evidence doctrine simply does not apply here.

With respect to the photographs of Christine and Ontiveros, Ontiveros argues they are not inappropriate. Ontiveros notes two of his witnesses testified most of the photographs were not inappropriate, Oxford students often took photographs with their teachers on the last day of school, and Christine both took and asked Ontiveros to pose for the photographs. We are not persuaded. While Ontiveros's witnesses believed most of the photographs were innocent, Bruce Stevens testified some were in fact inappropriate and others could be construed as inappropriate. It was certainly reasonable for the trial court to determine at least some of the photographs were inappropriate. Moreover, it is immaterial whether Christine took and orchestrated the poses for the photographs. The material point is that Ontiveros agreed to and posed for them. Again, it is not our role to reweigh the evidence or to substitute our own view of the evidence for that of the trial court. (*Leff, supra*, 33 Cal.3d at p. 518; *Jespersion, supra*, 214 Cal.App.4th at p. 1142.) Substantial evidence supports the trial court's finding that the photographs were inappropriate.

Finally, with respect to the Post-it notes, Ontiveros argues the trial court erred in believing they were meant for Christine,

when he testified he wrote those notes for his wife. Again, Christine and Ontiveros gave conflicting testimony with respect to the Post-it notes. We will not reweigh that testimony here. (*Leff, supra*, 33 Cal.3d at p. 518; *Jespersion, supra*, 214 Cal.App.4th at p. 1142.) Substantial evidence supports the trial court’s finding that Ontiveros wrote inappropriate messages to Christine on Post-it notes.

In sum, this case involves conflicting testimony and evidence and, as Ontiveros himself repeatedly has stated, boils down to “a classic case of ‘he said, she said.’” Under the applicable substantial evidence standard of review, we conclude substantial evidence supports the judgment.

DISPOSITION

The judgment is affirmed. The Anaheim Union High School District is entitled to its costs on appeal.

NOT TO BE PUBLISHED.

LUI, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.