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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

MICHAEL R. MILLER,

Plaintiff and Appellant,

v.

THE OFFICE OF
ADMINISTRATIVE HEARINGS,

Defendant and Respondent;

LOS ANGELES COMMUNITY
COLLEGE DISTRICT,

Real Party in Interest and
Respondent.

No. B278659

(Los Angeles County
Super. Ct. BS147014)

APPEAL from a judgment of the Superior Court of Los Angeles County. Amy D. Houge, Judge. Affirmed.

Lawrence Rosenzweig for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

Yaskinski & Jones, Lester L. Jones and Julianna Y.

Edwards for Real Party in Interest and Respondent.

Michael Miller (appellant) appeals from the trial court's denial of his petition for writ of mandate. Through the writ of mandate, appellant sought to set aside the Los Angeles Community College District's (LACCD) termination of his employment. Appellant argues that the termination is invalid because LACCD failed to comply with certain statutory requirements. Further, he argues that the termination lacks evidentiary support. If the termination is not reversed, appellant contends that he is entitled to backpay for the interim period between the issuance of a prior writ of mandamus by the superior court and issuance of an amended decision by the Office of Administrative Hearings (OAH).

We find no error and therefore affirm the judgment of the trial court.

FACTUAL BACKGROUND

Appellant was a tenured physical education instructor at Los Angeles Community College (LACC), a part of LACCD. He began his employment with LACCD as a physical education instructor in 1992. In addition, he was the head men's basketball coach from the 1992-1993 season through the 2007-2008 season. In the summer of 2003, appellant was assigned the position of Athletic Director (AD) of LACC by the then-President of the college. As AD, appellant reported to Allison Jones (Jones), the Dean of Academic Affairs/Athletics. Jones, in turn, reported to Jamillah Moore (Moore), President of LACC.

Jones was relieved of her duties overseeing athletics in 2008. At that time Bruce Baron (Baron) became appellant's superior. Baron was the Vice President of Administrative Services for LACC. Baron reported to Moore.

In connection with its athletic program, LACC was required to complete a number of forms for each of its student athletes. Form 1 provides residency and prior educational

information about the student, and was used to determine eligibility to play a sport at a community college in the District. When completed, each of the original Form 1's were retained in the LACC Athletic Department office.

In April 2009, the United States Department of Education, Office of the Solicitor General, launched an investigation of possible financial aid fraud involving 25 students at LACC who were coached by appellant while appellant was also serving as AD. LACCD's internal auditors also commenced an internal review of possible residency fraud involving the 2008-2009 men's basketball team as well as other teams that appellant coached and oversaw as AD. Both investigations involved the proper preparation and retention of Form 1's.

On April 21, 2009, the director of the internal audit requested that Baron provide copies of Form 1's for all sports for the three prior seasons: 2006-2007; 2007-2008; and 2008-2009. Baron sent appellant an email the same day advising him of the request. Starting on April 22 or April 23, 2009, appellant directed the shredding of documents in the Athletic Department office. This included the shredding of Form 1's. Form 1's pertinent to both the internal and Federal investigations, could not be located after appellant's shredding.

On April 24, 2009, the LACCD IT department received a call from appellant requesting assistance in logging onto his District-issued computer. The responding technician discovered that appellant's computer had a reformatted hard drive with a loss of all prior data and applications. The computer's hard drive had been completely erased. Appellant initially lied to the IT director, saying he had allowed a student the chance to try to fix his computer because it was running slowly. Appellant eventually admitted to Baron that he had his computer taken off campus and the computer hard drive had been erased.

The factfinder at the administrative level rejected appellant's insistence that his actions were innocent and he had no knowledge of the federal investigation. The administrative law judge (ALJ) found that appellant's assertion that he "innocently felt compelled to begin shredding old Form 1s in the Athletic Department office . . . strained credulity." The ALJ further found that the "timing of the shredding of documents and the erasure of the hard drive most strongly suggested that [appellant] was attempting to make some information unavailable to an investigation."

On May 21, 2009, appellant was placed on paid administrative leave. An administrative investigation into the shredding and hard drive erasure began shortly thereafter.

PROCEDURAL HISTORY

The charges

A statement of charges against appellant was prepared and provided to appellant on January 15, 2010. Charge 1 alleged that appellant shredded documents without authorization, including Form 1's, which were student records required to be retained. Charge 2 alleged that appellant violated LACCD policy by having his hard drive erased and a new operating system installed. Appellant's actions in causing a LACCD computer to be removed from campus to have its hard drive erased and an operating system reinstalled by unauthorized parties violated District Administrative Regulations. Charge 3 alleged that appellant allowed the selection and hiring of an assistant baseball coach on the basis of race.¹ The charging document stated that the

¹ The ALJ found that LACCD failed to establish that appellant engaged in discriminatory acts or preferential treatment in the hiring of the coach in question, therefore charge 3 was ultimately dismissed. Appellant's termination was based on the first two charges.

charges alleged, both individually and collectively, constituted sufficient grounds for termination. The document included a recommendation that appellant be notified of the Board of Trustee's intention to dismiss him at the expiration of 30 days. The statement of charges was signed by Adriana Barrera, Deputy Chancellor of LACCD and Tyree Wieder, Chancellor of LACCD.

President Moore did not make a recommendation to the Board of Trustees. In addition, no evaluations were presented to the Board. Appellant timely objected to his proposed dismissal.

The first administrative proceeding

On February 15, 2011, LACCD filed its notice of filing statement of charges with the OAH. A hearing was conducted by an ALJ on March 14, 15, 16, 17, 21, and June 3, 2011. On December 16, 2013, the ALJ issued a decision upholding appellant's dismissal for dishonesty and persistent violation of rules.

The ALJ determined that appellant's shredding of documents and his secret destruction of his District-issued computer hard drive violated LACCD's policies and constituted sufficient grounds to support the District's decision to terminate appellant's employment under Education Code section 87732, subdivisions (a), (b), and (f).²

² All further statutory references are to the Education Code unless otherwise noted. Section 87732 provides that, "No regular employee or academic employee shall be dismissed except for one or more of the following causes: [¶] (a) Immoral or unprofessional conduct. [¶] (b) Dishonesty. [¶] . . . [¶] (f) Persistent violation of, or refusal to obey, the school laws of the state or reasonable regulations prescribed for the government of the community colleges by the board of governors or by the governing board of the community college district employing him or her."

The petition for writ of mandate

On February 3, 2014, appellant filed a petition for writ of mandate pursuant to Code of Civil Procedure section 1094.5, seeking to set aside the OAH's decision.

On September 2, 2015, a hearing was held on appellant's writ petition. On October 26, 2015, the trial court issued a minute order granting the writ in part. The court explained that a writ of mandate would issue compelling the OAH to set aside its legal conclusion 9, in which it determined that appellant was subject to discipline under section 87732, subdivision (f), and remanding the matter to the OAH to consider whether its findings and conclusions not subject to the court's writ, required imposition of a different penalty.

Section 87732, subdivision (f), permits the dismissal of an employee for "[p]ersistent violation of, or refusal to obey, the school laws of the state or reasonable regulations." Appellant argued that his actions occurred in close temporal proximity and therefore could not constitute "persistent" violations. The trial court agreed, finding that appellant's malfeasance took place mainly over the course of two days -- April 23 and April 24, 2009. The trial court concluded that this did not constitute "persistent" conduct under the law.

The matter was remanded to OAH to consider what penalty was appropriate in light of the court's determination that appellant was not guilty of persistent misconduct under Education Code section 87732, subdivision (f).

Amended Decision

After the parties briefed their positions to the OAH, the OAH issued a comprehensive amended decision. The OAH reissued its findings and conclusions in light of the trial court's determination and upheld appellant's dismissal on the grounds of dishonesty. The OAH found:

“The circumstances of the document shredding and the erasure of the hard drive on [appellant’s] LACC-issued computer evidenced an intent to destroy evidence, and then [appellant] lied . . . about what happened to his computer. Where a party destroys evidence, the contents of the destroyed documents may be presumed to have been detrimental to that party. . . . Such circumstances demonstrate dishonesty.”

“Pursuant to Education Code section 87732, subdivision (b), legal cause exists to terminate . . . [appellant] based upon his dishonest acts in shredding, and justifying the shredding, of documents, in erasing, and justifying the erasure, of the hard drive on his LACC-issued computer, and in lying . . . about the reasons for his computer problems.”

In sum, the OAH confirmed that even without a violation of section 87732, subdivision (f), LACCD established legal cause to terminate appellant’s employment.

Writ return and appeal

The OAH issued a return to the writ on January 25, 2016, affirming appellant’s termination.

The parties briefed their positions in the trial court, and on August 31, 2016, the parties orally argued their positions.

On September 23, 2016, the trial court issued an order upholding LACCD’s dismissal of appellant from employment. Specifically, the trial court found that the amended decision set forth sufficient findings to support the conclusions reached, and the OAH did not abuse its discretion in upholding the dismissal. Further, the trial court rejected appellant’s argument that he was entitled to backpay. Final judgment in favor of LACCD was entered on September 26, 2016.

On October 28, 2016, appellant appealed from the judgment.

DISCUSSION

I. Standard of review

An appellate court reviewing a superior court’s administrative mandamus decision applies a substantial evidence standard on issues of fact. (*Ogundare v. Dept. of Industrial Relations* (2013) 214 Cal.App.4th 822, 828.) Under this standard, we will uphold the judgment if there is any substantial evidence supporting it. (*Young v. Gannon* (2002) 97 Cal.App.4th 209; *Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 334.) To the extent that the matter involves questions of law, we engage in de novo review of the trial court’s determination. (*LT-WR, L.L.C. v. California Coastal Com.* (2007) 152 Cal.App.4th 770, 780.)

Our review of the penalty imposed by an administrative agency is limited to a determination of whether the agency abused its discretion. (*Antelope Valley Press v. Poizner* (2008) 162 Cal.App.4th 839, 851.) “Neither an appellate court nor a trial court is free to substitute its discretion for that of the administrative agency concerning the degree of punishment imposed. [Citation.]’ [Citation.]” (*Schmitt v. City of Rialto* (1985) 164 Cal.App.3d 494, 500.)

II. Compliance with statutory requirements

Appellant argues that the trial court committed reversible error by ignoring statutory requirements for the dismissal of a tenured college instructor. Specifically, appellant alleges that LACCD violated sections 87663, subdivision (a) and 87671.

Section 87663, subdivision (a), requires that regular employees be evaluated “at least once in every three academic years.”³

Section 87671 provides:

“A contract or regular employee may be dismissed or penalized if one or more of the grounds set forth in Section 87732 are present and the following are satisfied:

“(a) The employee has been evaluated in accordance with standards and procedures established in accordance with the provisions of this article.

“(b) The district governing board has received all statements of evaluation which considered the events for which dismissal or penalties may be imposed.

“(c) The district governing board has received recommendations of the superintendent of the district and, if the employee is working for a community college, the recommendations of the president of that community college.

“(d) The district governing board has considered the statements of evaluation and the recommendations in a lawful meeting of the board.”

Appellant argues that LACCD failed to evaluate appellant every three years as a regular physical education instructor, the only position in which he had tenure, in violation of section 87663, subdivision (a).

³ Pursuant to section 87661, subdivision (d), a “regular employee” means a tenured employee.

Appellant further argues that LACCD failed to present any evaluations to the Governing Board of the District for consideration at a lawful meeting, in violation of section 87671, subdivision (b).

Finally, appellant argues that the President of LACCD, Moore, did not make a recommendation, in violation of section 87671, subdivision (c).

A. Section 87663, subdivision (a)

1. Substantial compliance

The OAH found that LACCD did not evaluate appellant every three years as a physical education instructor. Appellant's last evaluation as an instructor prior to receiving the statement of charges was 1998.

Appellant had however, been evaluated as AD. Jones evaluated appellant in his position as AD in the 2004-2005, 2005-2006, and 2006-2007 academic years. Baron evaluated appellant as AD in the 2008-2009 academic year. The OAH found no evidence that appellant was required to be evaluated as both AD and as an instructor. Appellant does not challenge these factual findings.

The doctrine of substantial compliance may be applied to instructor evaluation requirements. (*Miller v. Chico Unified Sch. Dist. Bd. of Educ.* (1979) 24 Cal.3d 703, 717 (*Miller*) [rejecting an "overly restrictive" interpretation of similar evaluation requirements in the Education Code].) The yearly evaluations of appellant in his position as AD constitute substantial compliance with the requirements of section 87663, subdivision (a). He was a tenured employee, and he was evaluated yearly. Appellant points to no law suggesting multiple evaluations were required where a regular employee held multiple positions.

2. Appellant's competence as an instructor was not relevant to the charges

Further, even if there were a technical violation of the instructor evaluation requirements, such a violation does not prohibit LACCD from pursuing appellant's dismissal on grounds other than instructor incompetence. (*Tarquin v. Commission on Professional Competence* (1978) 84 Cal.App.3d 251, 260 (*Tarquin*).) In *Tarquin*, a teacher with the Los Angeles City Unified School District was charged with incompetency, evident unfitness for service, and persistent violation of, or refusal to obey, the school rules. (*Id.* at p. 255.) Thereafter, an accusation was served and filed recommending termination of the teacher. (*Ibid.*) The teacher objected in part because the District had not complied with the requirements of former section 13407 and was therefore without jurisdiction to proceed with the charges. (*Id.* at p. 256.) Former section 13407 required that the District provide the teacher with an evaluation of his performance and allow the teacher an opportunity to correct the faults and overcome the grounds for the charges of incompetency. (*Ibid.*) The Commission on Professional Competence (Commission) found that the District had substantially complied with the statute. (*Ibid.*) The trial court disagreed, and issued a writ of mandate commanding the Commission to set aside its decision. (*Id.* at p. 257.)

On appeal, the District argued that it complied with former section 13407. Alternatively, the District argued that noncompliance with former section 13407 did not affect the right of the Commission to proceed against the teacher on charges other than incompetency. (*Tarquin, supra*, 84 Cal.App.3d at p. 257.) The Court of Appeal agreed with this second contention:

“The failure of appellants to comply with [former] section 13407 precluded them only from proceeding against respondent on the charge of

incompetency. As to the remaining charges (evident unfitness for service and persistent violations of school laws and regulations), the requirements of [former] section 13407 were inapplicable. The Board had jurisdiction to proceed on those grounds for removal which did not involve incompetency.”

(*Tarquin, supra*, 84 Cal.App.3d at p. 260.)

Here, appellant’s dismissal did not involve incompetency. Instead, he was discharged under section 87732, subdivision (b), for his dishonesty in shredding documents and erasing his computer hard drive. Under *Tarquin*, LACCD was permitted to proceed against him for this dishonesty regardless of any violation of section 87663, subdivision (a).

Finally, even if LACCD had not substantially complied with the requirements of section 87663, subdivision (a), such error would be harmless under the circumstances of this case. Appellant was not terminated for poor performance in his position as physical education instructor. Instead, he was terminated for discrete acts of dishonesty. The evaluations that existed did not address the acts for which appellant was terminated. Nor would any evaluations regarding appellant’s competence as a physical education instructor have included reference to those acts. They were not long-term concerns, but specific actions taking place over a two-day period of time.

Thus, because the termination was for reasons unrelated to appellant’s performance as an instructor, he “cannot justly complain” of irregularities in the instructor evaluation process. (*Miller, supra*, 24 Cal.3d at p. 718.)

B. Section 87671, subdivision (b)

The OAH found that there were no “statements of evaluation which *considered the events for which dismissal or penalties may be imposed.*” (§ 87671, subd. (b), italics added.)

Jones's evaluations predated the events at issue. Although Baron's evaluation of appellant was completed May 13, 2009 -- after the shredding of documents and erasure of the hard drive -- Baron omitted any mention of the relevant issues in appellant's evaluation.⁴ Thus, the trial court found that there were no evaluations that needed to be taken into account by the Board prior to deciding to terminate appellant. Appellant does not challenge this factual finding, and the evidence supports it.

Because there were no relevant evaluations, appellant has not shown a violation of section 87663, subdivision (b).

Further, even if there had been a technical violation, for the same reasons set forth above, such violation is not relevant. Appellant was not discharged for incompetence. The purpose of section 87663, subdivisions (a) and (b), is for the instructor to know, and be given the opportunity to counter the reasons for a dismissal on the grounds of incompetence. (*Miller, supra*, 24 Cal.3d at p. 718.) This purpose could not be served in this matter, where appellant was discharged for discrete acts of dishonesty having nothing to do with his teaching ability.

C. Section 87671, subdivision (c)

Appellant argues that LACCD violated section 87671, subdivision (c), because no recommendation was made by President Moore.

⁴ The OAH viewed Baron's final review of appellant skeptically, explaining: "Baron knew there were concerns about [appellant's] acts during pending federal and internal investigations, yet he purportedly concluded [appellant's] acts were not problematic without even alluding to concerns in the evaluation. Baron's contentions in connection with his handling of the shredding and the erasure of the hard drive were unconvincing and suggested that, like Jones, Baron had self-protective or biased reasons to protect [appellant]."

The OAH made the following factual findings regarding this issue:

“On June 2, 2009, [appellant] filed an official complaint of unlawful discrimination against Moore based on his race (white) age (45), and retaliation. [Appellant] contended Moore improperly placed him on paid administrative leave in retaliation for filing complaints of discrimination and misuse of public funds, that Moore removed [appellant] as head Men’s Basketball coach because of his race, age, and in retaliation for filing complaints of discrimination and misuse of public funds, and that Moore improperly referred to [appellant] as ‘the old white guy’ when discussing the coaching position with other employees.”

As to appellant’s claims that Moore did not carry out her statutory obligation under section 87671, subdivision (b), the OAH found:

“Moore was not involved in the decision to terminate [appellant] because of the pending claims of discrimination and retaliation [appellant] had made against her. . . . With Moore’s authorization, Barrera, and Weider assumed her role in making any recommendations to the Board with respect to whether [appellant] should be dismissed. Under these circumstances, Barrera and Weider are properly considered Moore’s designees.”

“[Appellant] has provided no legal authority for the proposition that a community college district’s Board of Trustees may not act upon the recommendation of a designee of the President in deciding to dismiss a tenured faculty employee, particularly under the circumstances of this matter. As noted by the District, had Moore been involved in the decision to dismiss [appellant], [appellant] would

have contended that the dismissal was the culmination of Moore’s purportedly discriminatory and retaliatory acts.”

Appellant does not challenge these factual findings, which are supported by the evidence. Under the circumstances, Moore substantially complied with section 87671, subdivision (c), by permitting her designees to make the required recommendation to the Board.

D. Substantial compliance may be applied in this case

Appellant argues as to all statutory violations that substantial compliance cannot be applied under the facts of this case. We disagree. Pursuant to *Miller*, a court may find substantial compliance where the essential statutory objectives have been met. (See also *Flannery v. VW Credit, Inc.* (2014) 232 Cal.App.4th 606, 614 [in considering application of the substantial compliance doctrine, “[o]ur primary concern is the objective of the statute.” [Citation.]”].) As set forth above, LACCD sufficiently complied with the relevant statutes as to carry out their objectives.

Appellant argues that this matter is similar to *Achene v. Pierce Joint Unified School Dist.* (2009) 176 Cal.App.4th 757 (*Achene*). In *Achene*, a probationary teacher was dismissed for unsatisfactory performance during the school year without written notice of the deficiencies in her performance or an opportunity to correct them, as required by statute. The District argued that it had substantially complied with the statutory requirements. The trial court disagreed, finding that the teacher was not notified of her unsatisfactory performance until she was notified of her dismissal. (*Id.* at p. 769.) Under these circumstances, the teacher was “not given sufficient time to

improve her performance as contemplated by [statute].” (*Id.* at p. 771.)

The matter before us is distinguishable because appellant was not dismissed for unsatisfactory performance. Instead, he was dismissed for dishonesty. The statutory objectives relevant in *Achene* -- allowing a teacher notice of his or her deficiencies and giving the teacher an opportunity to correct those deficiencies -- are not applicable here. Appellant has failed to cite a case or statute requiring an opportunity for improvement where the basis for the termination is dishonesty.

Appellant next argues that there was no evidence in the record supporting the OAH’s and the trial court’s determination that appellant was primarily AD, not instructor, at the time of his firing.

The OAH found that “[t]he testimony, as well as the documentary evidence, reflected that a substantial portion of [appellant’s] time on campus during the relevant time period was devoted to the Athletic Director position.” In support of this finding, the OAH referenced a memo dated May 19, 2008, in which Jones “requested that [appellant] take one year leave of absence from coaching Men’s Basketball at LACC so that he could ‘devote 100% of [his] time to [his] Athletic Director . . . duties.’” Appellant’s handwritten notes on the memo reflected that he agreed. This constitutes substantial evidence that the majority of appellant’s time during the relevant period was spent carrying out his duties as AD.

Regardless of the primary role that appellant was fulfilling at the time, he was dismissed for dishonesty, not unsatisfactory teaching. Thus, LACCD was under no obligation to provide appellant with an opportunity for improvement.

III. Substantial evidence supported appellant's termination

Appellant argues that the initial trial court decision to eliminate the charge of persistent violations under section 87732, subdivision (f), as a basis for appellant's termination, underscores his long work record of excellent performance. Appellant argues that he engaged in no misconduct for 17 years -- thus, the findings that he acted improperly twice in April 2009 do not support the conclusion that appellant is likely to engage in future wrongdoing.

Appellant's propensity for future wrongdoing is relevant to a review of whether dismissal is the appropriate penalty in this matter.

In determining whether an individual is unfit to teach, the following factors may be considered:

“[T]he likelihood that the conduct may have adversely affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness or blameworthiness of the motives resulting in the conduct, the likelihood of recurrence of the questioned conduct, and 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.”

(Morrison v. State Board of Education (1969) 1 Cal.3d 214, 229-230 (Morrison), fns. omitted.)

These factors “are relevant to the extent that they assist the board in determining whether the teacher's fitness to teach, i.e., in determining whether the teacher's future classroom

performance and overall impact on his students are likely to meet the board's standards." (*Morrison, supra*, 1 Cal.3d at p. 229.)

The trial court carefully considered these factors in upholding the OAH's decision to terminate appellant. Appellant challenges the trial court's findings as to only one factor, the likelihood that appellant will engage in future misconduct.

As to this particular factor, the trial court noted that:

"[Appellant's] multiple acts of dishonesty including shredding documents, erasing the hard drive, and lying about his reasons for erasing the hard drive suggest that the subject conduct is likely to be repeated. [Appellant's] continued attempts to portray his acts as being relatively insignificant further suggest a risk of repetition."

The court referred to the OAH's finding No. 182h, where the OAH similarly noted that there were multiple acts of dishonesty and that appellant attempted to downplay his acts as being relatively insignificant. The OAH cited *San Dieguito Union High School Dist. v. Commission on Professional Competence* (1985) 174 Cal.App.3d 1176 as support for the proposition that an employee's indifference to the "seriousness of the problem" supports a conclusion of likelihood of recurrence. (*Id.* at p. 1183.)

The record supports the findings of the trial court and the OAH that appellant downplayed the seriousness of his actions. He first claimed that he innocently began shredding the Form 1s -- an explanation the OAH found "strained credulity." He claimed that he was attempting to protect information regarding his discrimination and retaliation claims -- an explanation that the OAH also found to be incredulous. Further, the OAH noted:

"During the hearing, [appellant] expressed regret that he had erased the hard drive on his LACC-issued computer, but his regret was focused on

the negative effect on his career, rather than arising from any recognition that what he had done was wrong. [Appellant] failed to recognize any wrongdoing at all in connection with the shredding of documents.”

This evidence supports the factual conclusion that appellant has downplayed his actions. Thus, in contrast to appellant’s position, there is substantial evidence in the record to support a finding of likelihood of recurrence.

IV. Appellant is not entitled to backpay

Appellant argues that when the trial court issued its writ of mandamus to the OAH setting aside its legal conclusion 9, and remanding the matter to the OAH for reconsideration of the penalty imposed, the termination of appellant was invalidated and appellant was returned to his status as a tenured employee of LACCD. Thus, appellant argues, he is entitled to backpay from December 16, 2013, the date of the original decision by the ALJ, until January 22, 2016, the date of the return from the OAH.

Appellant is incorrect. Appellant’s termination was effective December 16, 2013, when the OAH issued a decision upholding appellant’s dismissal for dishonesty and persistent violation of rules. Nothing in the record suggests that the termination was ever invalidated, nor was appellant ever reinstated as an employee of LACCD.

In support of his argument, appellant cites cases in which the adverse employment decision was overturned, thus requiring an award of backpay. (See *Eureka Teachers Assn v. Board of Education* (1988) 202 Cal.App.3d 469 [temporary teacher wrongly passed over for hiring awarded backpay because she qualified for reemployment under statutory scheme]; *Von Durjais v. Board of Trustees* (1978) 83 Cal.App.3d 681 [backpay awarded for time

period of suspension without pay after employee cleared of all charges].) Appellant's termination was never overturned, thus these cases do not apply.

Roe v. State Personnel Bd. (2004) 120 Cal.App.4th 1029 (*Roe*), is also distinguishable. In *Roe*, an employee received a notice of adverse action informing him that he would be dismissed for cause effective August 31, 1992. The employee claimed that he was warned by his employer that if he did not resign by September 24, 1992, the date of his scheduled *Skelly* hearing, he would not be able to avoid discipline.⁵ The employee thus tendered his resignation on September 24, 1992, at 11:14 a.m. (*Roe*, at p. 1033.) When the employee looked into backpay and benefits, he learned that his employer was taking the position that his termination was effective August 31, 1992. (*Id.* at p. 1034.) On petition for writ of mandate, the superior court determined that the employee had been terminated without due process. The August 31, 1992 termination was deemed to be invalid, as was the September 24, 1992 resignation. Thus, the employee was entitled to backpay from August 31, 1992, through the date of correction of the *Skelly* violation, which was deemed to be May 5, 1999, the date of the second decision issued by the State Personnel Board. (*Roe*, at p. 1039 ["An employee terminated without being afforded *Skelly* procedural protections is entitled to an award of backpay from the date of dismissal until the date of correction of the constitutional infirmity"].)

Appellant's termination was never ruled invalid. Instead, LACCD's decision to terminate appellant was upheld twice by the OAH and was affirmed by the trial court. Appellant presents no

⁵ The reference is to *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, which requires that an employee be allowed to respond to allegations prior to the imposition of discipline.

authority that he is entitled to backpay under these circumstances.

Furthermore, the revised charges following the initial writ of mandamus to the OAH relate back to the original charges. (*West Valley-Mission Community College Dist. v. Concepcion* (1993) 16 Cal.App.4th 1766, 1781 (*Concepcion*).) In *Concepcion*, a faculty member at a community college was suspended without pay during a two-year period during which the faculty member was on trial for selling cocaine. Although he was ultimately acquitted of the crime, he was found guilty of immoral conduct by both the arbitrator and the trial court hearing his disciplinary action and was ordered to be discharged from employment. In considering his claim for backpay during the time of his criminal trials, the court noted that immoral conduct could support imposition of a suspension without pay, and explained:

“While it is true that District did not charge [the faculty member] with immoral conduct until after the second criminal case resulted in an acquittal, we find the amended accusation relates back to the filing of the original accusation. . . . This is so because the relief sought is based on the same general set of facts although the legal theory is different.”

(*Concepcion, supra*, 16 Cal.App.4th at p. 1781.)

In the matter before us, appellant was initially charged with dishonesty as well as persistent violation of rules. While the charge of persistent violation of rules was nullified, the charge of dishonesty was ultimately held to support the penalty of termination. Under the circumstances, appellant is not entitled to backpay.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.*
GOODMAN

* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.