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## Dismissing a teacher is not easy — the process schools districts must follow

By Michele M. Goldsmith

In recent weeks, the media has flooded us with news of teachers being fired and removed from classrooms amid allegations of lewd or sexual conduct with students. What has not been reported, however, is the lengthy, cumbersome, and expensive process that a school district must undertake to dismiss a teacher.

Unlike private sector employees, public school teachers have vested property rights in their positions. Accordingly, school districts must provide “due process” prior to dismissing teachers. A teacher can only be dismissed for certain, specific enumerated “causes” in California Education Code Section 44932. Those causes are limited to immoral conduct, dishonesty, evident unfitness for service, physical or mental condition, persistent violation or refusal to obey school laws, conviction of a felony or of any crime involving moral turpitude, and drug or alcohol abuse. The list does not include, for example, any acts that cause harm to students, insubordination, excessive absenteeism, or refusal to follow the lawful directives of supervisors.

Therefore, when a teacher is removed from the class for, say, alleged sexual abuse, the teacher cannot be immediately fired. The school district must prepare “charges” of dismissal, and the school district’s Board of Education must adopt those charges. If the Board adopts the charges and wishes to proceed with the dismissal, the school district is required to provide notice to the teacher. Importantly, such notice cannot be provided between May 15 and September 15.

After the charges are adopted, and notice provided, the teacher has a right to demand an appeal. Under the appeal process, largely

prescribed by Education Code Section 44944, the teacher must submit a demand for hearing within 30 days of the school district’s notice to dismiss. If the teacher fails to demand a hearing, the dismissal is considered uncontested and the employee is dismissed. After receiving the demand for hearing, the school district submits to the Office of Administrative Hearings (OAH) a request to set. The OAH is the nation’s oldest and largest central panel agency, established by the Legislature in 1945 as a quasi-judicial court that hears administrative disputes. It is not, as is largely believed, operated by any school district, but

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is independent and provides the administrative law judge for the hearing. After receiving the request to set, the OAH sets a trial setting conference, and the teacher submits a notice of defense, which is effectively his or her answer to the charges. At the trial setting conference, dates are calendared, including the last day to conduct discovery and designate a panel member.

The last point is significant and often impedes the timely process. Unlike most administrative hearings, a teacher dismissal hearing is not heard before a single hearing officer, but by a Commission on Professional Competence. The commission is made up of an administrative law judge, one panel member who may be selected by the teacher and one panel member who may be selected by the school district. There are, however, strict requirements as to who can serve as a panel member, including, at a minimum, that they: cannot be related to the teacher, cannot be an employee of the district initiating the dismissal, and must hold a valid credential

and have at least five years of experience in the past 10 years in the discipline of the employee. A proposed panel member cannot receive any additional wages for their service, although they can be reimbursed by the OAH for reasonable expenses. If either the school district or the teacher cannot locate a panel member that meets these requirements, the right to select a panel member is waived and the county Board of Education must make the selection. Finding a qualified panel member is frequently challenging. Many suggest, and I agree, that the Legislature should repeal the statutory Commission on Professional Competence requirement and permit an administrative law judge to hear the appeal with the right of writ review, as is the process with many termination appeals.

The rub in all of these requirements and limitations is that the Code requires that the hearing “shall be commenced” within 60 days from the date of the demand for hearing. The 60-day period, however, can be waived by the parties or otherwise continued for good cause. Moreover, the preparation for the first day of hearing is not insubstantial. For any administrative proceeding, discovery is possible pursuant to Government Code Sections 11507.5-11507.7, which takes the form of a “request for discovery” that effectively asks each side to list all their witnesses and produce pertinent documents they intend to rely upon at the hearing. Second, the Education Code expands permissible discovery beyond administrative rules into the typical extensive civil procedure discovery options.

The hearing itself is conducted pursuant to the Administrative Procedures Act, and may occur continuously or may be broken up into nonsequential days over a period of months. The Commission on Professional Competence hears the evidence presented by the parties. The school district, however, bears the burden of proof (by a preponderance of the evidence) at the hearing. *Gardner v. Commission on Professional Competence*, 164 Cal.App.3d 1035, 1038-1039 (1985).



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# Teacher dismissals: an expensive, cumbersome process

Presuming that the school district and the teacher are able to secure a panel member, and that the hearing can commence as scheduled, there are still restrictions of what type of evidence may be presented in support of the dismissal. The statutory scheme requires that no testimony shall be given or evidence introduced relating to matters that occurred more than four years prior to the notice. Evidence Code Section 44944(a)(5). There are very limited exceptions to this rule. For example, in *Atwater Elementary School District v. California Dept. of General Services*, 41 Cal.4th 227, 232-235 (2007), the state Supreme Court determined that the four-year requirement was not absolute, applying the doctrine of equitable estoppel (if there is proof that a “delay in commencing action is induced by the conduct of the defendant teacher” such delay “cannot be availed of by him as a defense.”)

After the presentation of evidence by the school district, and the rebuttal by the teacher, the matter is submitted to the Commission on Professional Competence for a decision. As to the Commission’s ultimate decision, they must determine whether the teacher is

considered fit to teach — that is, whether the school district is entitled to dismiss the teacher. Education Code Section 44944(c) (1). “Fitness” is determined pursuant to the standard set forth in *Morrison v. State Board of Education*, 1 Cal.3d 214 (1969), as well as the cases that follow and interpret it. In determining whether a teacher’s conduct constitutes unfitness to teach, the governing body may consider the likelihood that the conduct may have adversely affected students or fellow teachers, the degree of 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 a recurrence, and the extent to which disciplinary action may inflict an adverse impact or chilling effect on the constitutional rights of the teacher involved or other teachers. A teacher dismissal based on the cause of “immoral conduct” will be measured by the standard of if the teacher poses a significant danger of harm to either students, school

employees, or others who may be affected by his or her actions as a teacher.

If the Commission on Professional Competence determines, by a majority vote, that the teacher is unfit, she or he is dismissed. If it determines the employee is fit, the employee is ordered reinstated and awarded backpay and attorney fees. If a school district is successful at the dismissal, however, there is no reciprocal attorney fee provision that allows it to recover its fees and costs. Although the Commission’s decision is considered a final decision of the governing board, if either the teacher or the school district believes the decision was made in error, they can take an administrative writ of mandamus to the Superior Court. The Court, on review, exercises its independent judgment on the evidence.

Recent media coverage of teacher allegations understandably focuses on the severity of the facts of each case, and the traumatic impact on students and the community. While it may seem straightforward to simply terminate accused teachers, the complex and multi-faceted due process requirements prescribed by state law make it anything but simple to do.

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