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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SABELA PORTILLO,

Plaintiff and Appellant,

v.

COMMISSION ON  
PROFESSIONAL COMPETENCE,

Defendant and Respondent,

LOS ANGELES UNIFIED  
SCHOOL DISTRICT et al.,

Real Parties in Interest and  
Respondents.

B220735

(Los Angeles County  
Super. Ct. No. BS116766)

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

J.T. Orr II for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

Office of the General Counsel, Richard Ettensohn, Assistant General  
Counsel, for Real Parties in Interest and Respondents.

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Plaintiff and appellant Sabela Portillo (Portillo) appeals a judgment denying her petition for writ of administrative mandate. (Code Civ. Proc., § 1094.5.)<sup>1</sup> Portillo’s superior court petition sought to overturn a decision by the Commission on Professional Competence (the Commission) upholding the determination of the governing board of defendant and respondent Los Angeles Unified School District (the District) to dismiss Portillo as a certificated employee of the District.<sup>2</sup>

Following the settlement of a workers’ compensation claim, which entitled Portillo to reimbursement for health club memberships and mileage, Portillo knowingly submitted numerous fraudulent claims to her employer for mileage reimbursement and gym membership fees. Portillo pled nolo contendere to violation of Insurance Code section 1871.4, subdivision (a)(1), making a knowingly false or fraudulent statement, a crime of moral turpitude. She was placed on probation and was ordered to pay \$12,000 in restitution to the District. The District terminated Portillo’s employment and the Commission upheld the District’s decision.

Portillo then sought reinstatement and back pay, by way of the instant petition for writ of administrative mandate. We perceive no error in the trial court’s denial of Portillo’s petition for writ of administrative mandate and affirm the judgment.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Portillo was employed by District for over 20 years, with no previous history of discipline. She was a permanent certificated employee, served as a

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<sup>1</sup> All statutory references are to the Code of Civil Procedure, unless otherwise specified.

<sup>2</sup> Education Code section 44944, subdivision (b), provides for the appointment of a three-member Commission on Professional Competence to conduct a hearing to determine whether cause exists for a school district to dismiss a public school employee. (*Pasadena Unified Sch. Dist. v. Commission on Professional Competence* (1977) 20 Cal.3d 309, 311, fn. 1 (*Pasadena*).

teacher, and most recently held the position of assistant principal at an elementary school.

1. *Following settlement of a workers' compensation claim, Portillo submitted numerous fraudulent reimbursement claims to the District.*

In 1992, Portillo filed a workers' compensation claim for injuries to her left wrist, upper extremity, hip, left shoulder and back. The claim was settled with stipulations, including Portillo's right to reimbursement for health club memberships, and reimbursement for mileage to and from the health club and to and from health care providers.

Thereafter, Portillo knowingly submitted numerous false claims for reimbursement of health club membership fees at Bally's Total Fitness (Bally's), for mileage to Bally's, and for mileage to Cooperative Care Medical Group (Cooperative). The District's funds were used to pay Portillo's claims.

Portillo submitted and was paid claims for Bally's memberships totaling \$3,766.58, and for mileage to Bally's, consisting of *hundreds* of round trips, amounting to \$8,960.76. The claims were fraudulent. For example, Portillo submitted a false claim for a \$1,500 Bally's membership fee in 2004, although the fee was never charged by Bally's. Also, Portillo's mileage claims for visits to the gym and to Cooperative were grossly inflated. Bally's records showed that Portillo visited the gym only a few times.

2. *Criminal proceedings; plea of nolo contendere.*

In 2005, the People filed a 16-count felony complaint against Portillo, and bail was initially set at \$240,000.

On February 28, 2007, Portillo pled nolo contendere to a single count of violating Insurance Code section 1871.4, subdivision (a)(1), making a knowingly false or fraudulent statement, a felony, and was found guilty. At the August 13, 2007 sentencing hearing, the trial court ordered the information amended to allege count 1 as a misdemeanor. Portillo was placed on summary probation for two years on certain terms and conditions, including payment of \$12,000 in restitution

to the District, 100 hours of community service and three days in county jail, with credit for time served.

3. *Portillo's termination and administrative proceedings.*

On December 17, 2007, the governing board of the District notified Portillo of its intent to dismiss her from employment, finding she was guilty of immoral conduct and evident unfitness for service. Portillo filed a written request for a hearing. From March 24, through March 28, 2008, a hearing was held to determine whether good cause existed to dismiss Portillo from her position as a certificated permanent employee of the District.

On May 16, 2008, the Commission issued its decision upholding the District's determination to dismiss Portillo. The Commission found, inter alia: Portillo knowingly presented false reimbursement claims to the District for Bally's membership fees and for mileage; her nolo contendere plea to an offense punishable as a felony operated as an admission of guilt as to each element of Insurance Code section 1871.4, subdivision (a)(1); and good cause existed for dismissal based on immoral conduct, dishonesty, persistent violation of or refusal to obey school laws, conviction of a crime involving moral turpitude, and evident unfitness for service.

4. *Superior court proceedings.*

On September 3, 2008, Portillo filed a petition for writ of administrative mandate, seeking to set aside the Commission's decision, as well as reinstatement and back pay. Portillo's papers contended, inter alia, the dismissal was improper because she was fit to teach, the findings did not support a discharge, the charges relating to the legitimacy of her benefit claims were within the exclusive jurisdiction of the Workers Compensation Appeals Board, and the District had failed to meet its burden to prove the charges.

On August 17, 2009, after hearing argument in the matter, the trial court denied Portillo's petition. The trial court found, inter alia, the weight of the evidence supported the Commission's decision. "Apart from the plea admission,

the evidence of guilt was overwhelming, reaching beyond clear and convincing evidence to beyond a reasonable doubt that Portillo was guilty of fraud.” The trial court further found the penalty of discharge was not an abuse of discretion. “For example, a teacher’s purchase and receipt of stolen property was cause to dismiss a teacher for immoral conduct, dishonesty, and evident unfitness for service. *Pittsburg Unified School District v. Commission on Professional Competence* (1983) 146 Cal.App.3d 964, 971.” The trial court rejected Portillo’s argument that a certificated employee can be dismissed from employment only if the employee’s work performance is inadequate.

On October 29, 2009, the trial court entered judgment denying the petition for writ of administrative mandamus. Portillo filed a timely notice of appeal.

### **CONTENTIONS**

Portillo contends: the agency’s decision must be based on the evidence presented at the hearing; implicit in section 1094.5 is a requirement that the agency set forth findings to bridge the analytic gap between the raw evidence and the ultimate decision or order; she should have been accorded more lenient treatment; a teacher has a property interest in continued employment within the purview of the due process clause; and no nexus was shown between Portillo’s conduct outside the classroom and her performance within the classroom.<sup>3</sup>

### **DISCUSSION**

#### *1. Statutory grounds for termination.*

Education Code section 44932, subdivision (a), sets forth various grounds for dismissal of a permanent employee, including: “(1) Immoral or unprofessional conduct. [¶] . . . [¶] (3) Dishonesty. [¶] . . . [¶] (5) Evident unfitness for service. [¶] . . . [¶] (7) Persistent violation of or refusal to obey the

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<sup>3</sup> Although Portillo frames the issue as whether she is fit to be in the classroom as a teacher, the issue here is *not* the revocation of Portillo’s teaching credential, but rather, whether the District properly dismissed Portillo from employment.

school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him or her. [¶] (8) Conviction of a felony or of any crime involving moral turpitude.”

The District relied on the above five grounds in dismissing Portillo, and the Commission found cause existed to dismiss Portillo as a certificated employee of the District under all five grounds.

## 2. *Standard of appellate review.*

The “decision of a Commission on Professional Competence may be challenged in superior court by means of a petition for a writ of mandate. [Citations.] In reviewing a commission’s decision, the superior court ‘shall exercise its independent judgment on the evidence.’ [Citation.] *Where a superior court is required to make such an independent judgment upon the record of an administrative proceeding, the scope of review on appeal is limited.* An appellate court must sustain the superior court’s findings if substantial evidence supports them. [Citations.] In reviewing the evidence, an appellate court must resolve all conflicts in favor of the party prevailing in the superior court and must give that party the benefit of every reasonable inference in support of the judgment. When more than one inference can be reasonably deduced from the facts, the appellate court cannot substitute its deductions for those of the superior court. [Citation.]” (*Pasadena, supra*, 20 Cal.3d at pp. 313-314, italics added; accord *Wilmot v. Commission on Professional Competence* (1998) 64 Cal.App.4th 1130, 1138-1139.)

As noted, the trial court, in exercising its independent judgment, found: “Apart from the plea admission, the evidence of guilt was overwhelming, reaching beyond clear and convincing evidence to beyond a reasonable doubt that Portillo was guilty of fraud.” On appeal, Portillo does not challenge the sufficiency of the evidence to support the finding she was guilty of fraud. Thus, the essential issue

before this court is whether discharge was an excessive penalty under the circumstances.

Our review of the propriety of the penalty is deferential. As we stated in *Pegues v. Civil Service Com.* (1998) 67 Cal.App.4th 95, “ ‘It is well settled that the propriety of a penalty imposed by an administrative agency is a matter resting in the sound discretion of the agency and that its decision will not be disturbed unless there has been an abuse of discretion.’ [Citation.] In reviewing the penalty imposed by an administrative body which is duly constituted to announce and enforce such penalties, ‘ “neither a trial court nor an appellate court is free to substitute its own discretion as to the matter; nor can the reviewing court interfere with the imposition of a penalty by an administrative tribunal because in the court’s own evaluation of the circumstances the penalty appears to be too harsh.” ’ [Citation.] However, if the penalty imposed, under all the facts and circumstances, clearly was excessive, this will be deemed an abuse of discretion and the reviewing court is not powerless to act. [Citation.] [¶] If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion the administrative body acted within the area of its discretion. [Citations.]” (*Id.* at pp. 106-107.)

3. *No abuse of discretion in imposition of penalty of discharge.*

Not only was Portillo convicted of a crime of moral turpitude, but she directed the fraud at her own employer, the District. Further, Portillo engaged in a continuous course of dishonest conduct over an extended period of time.

Dismissal in these circumstances is authorized by Education Code section 44932, subdivision (a). We perceive no abuse of discretion.

We now turn to Portillo’s arguments.

4. *No merit to Portillo’s contentions on appeal.*

Portillo contends “the agency’s decision must be based on the evidence presented at the hearing.” She asserts the Commission failed to consider the

pertinent evidence surrounding Portillo’s conduct to determine whether she were able to return to the classroom.

The contention fails. The record clearly establishes the Commission duly considered the pertinent evidence. The trial court specifically found the Commission “reviewed and applied all of the *Morrison* factors” in determining whether Portillo is fit to teach.<sup>4</sup> We agree with the trial court’s evaluation of the Commission’s decision. We have reviewed the Commission’s decision and it contains a thorough discussion and application of the *Morrison* factors. Therefore, the record belies Portillo’s contention the Commission failed to consider her fitness to return to the classroom.

Next, Portillo contends the Commission failed to set forth findings to bridge the analytic gap between the raw evidence and the ultimate decision or order, as required by *Topanga Assn. for a Scenic Community v. County of*

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<sup>4</sup> In *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, our Supreme Court articulated factors relevant to a determination of a teacher’s unfitness to teach as follows: (1) “the likelihood that the conduct may have adversely affected students or fellow teachers [and] the degree of such adversity anticipated;” (2) “the proximity or remoteness in time of the conduct;” (3) “the type of teaching certificate held by the party involved;” (4) “the extenuating or aggravating circumstances, if any, surrounding the conduct;” (5) “the praiseworthiness or blameworthiness of the motives resulting in the conduct;” (6) “the likelihood of the recurrence of the questioned conduct;” and (7) “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.” (*Id.* at p. 229, 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 [school district’s] standards.” (*Id.* at pp. 229-230.) To establish a teacher is unfit to teach, *Morrison* requires a nexus between government employment and alleged employee misconduct stemming from the principle that “[n]o person can be denied government employment because of factors unconnected with the responsibilities of that employment.” (*Morrison, supra*, 1 Cal.3d at p. 234.)

*Los Angeles* (1974) 11 Cal.3d 506, 515. The trial court ruled the *Topanga* contention was waived on the ground Portillo raised it for the first time in her reply papers.

In any event, we have reviewed the Commission's 12-page decision and it contains a clear road map from the raw evidence to the ultimate findings. The Commission set forth the raw evidence relating to the numerous fraudulent claims submitted by Portillo. The Commission then proceeded to apply the *Morrison* factors and explained why Portillo's misconduct warranted dismissal. Accordingly, Portillo's *Topanga* argument is meritless.

Next, Portillo seems to argue that because the 16-count felony complaint was resolved by a plea of nolo contendere to a single count which was reduced to a misdemeanor at sentencing, the penalty of dismissal is excessive. However, as the trial court found, "Apart from the plea admission, the evidence of guilt was overwhelming, reaching beyond clear and convincing evidence to beyond a reasonable doubt that Portillo was guilty of fraud." Given all these circumstances, as already discussed, the penalty of dismissal was not an abuse of discretion.

Portillo further contends a teacher has a property interest in continued employment protected by the due process clause of the state and federal constitutions, and here there was no nexus between her acts outside the classroom and her right to remain in the classroom. The contention fails. The fact Portillo engaged in a course of conduct which defrauded her employer of scarce education funds provides a sufficient nexus between the misconduct and the dismissal.

In sum, we perceive no abuse of discretion in Portillo's dismissal, which penalty is authorized by Education Code section 44932, subdivision (a).

**DISPOSITION**

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

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.