

No. _____

In the Supreme Court of the United States

HOWARD GENSLER,

Petitioner,

v.

BOARD OF TRUSTEES OF THE SOUTH
ORANGE COUNTY COMMUNITY COLLEGE
DISTRICT,

Respondent(s).

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION THREE

APPENDIX

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App-i

APPENDIX

TABLE OF CONTENTS

Appendix A

Opinion [not precedential] Court of Appeal of California for the Fourth Appellate District, *Howard Gensler v. Board of Trustees of the South Orange County Community College District, et al.*,
No. G064067 (Nov. 3, 2025) App-1

Appendix B

Order Denying Petition for Writ of Mandate, Superior Court of California for the County of Orange, *Howard Gensler v. Board of Trustees of the South Orange County Community College District and Orange County Community College District*,
No. 30-2021-01177691 (Feb. 27, 2024) .. App-42

Appendix C

Legal Conclusions, Office of Administrative Hearings for the California Department of General Services, *In the case of the Termination of Howard Gensler*,
No. 2019040965 (Oct. 14, 2020) App-62

App-ii

Appendix D

Order [discretionary review denied], Supreme Court of California, *Howard Gensler v. Board of Trustees of the South Orange County Community College District, et al.*

No. S294180 (Jan. 14, 2026) App-92

App-1

Appendix A

[Filed: Nov. 3, 2025]

**NOT TO BE PUBLISHED IN
OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

HOWARD GENSLER,

Plaintiff and Appel-
lant,

v.

BOARD OF TRUSTEES
OF THE SOUTH OR-
ANGE COUNTY COM-
MUNITY COLLEGE
DISTRICT et al.,

Defendants and Re-
spondents.

G064067

(Super. Ct. No. 30-
2021-01177691)

O P I N I O N

App-2

Appeal from a judgment of the Superior Court of Orange County, Kimberly A. Knill, Judge. Affirmed.

Howard Gensler, in pro. per., for Plaintiff and Appellant.

Walsh & Associates, Dennis J. Walsh and Wendy K. Marcus for Defendants and Respondents.

Howard Gensler appeals from a judgment entered after the trial court denied his petition for writ of mandate. In 2019, the Board of Trustees of the South Orange County Community College District (Board) and the South Orange County Community College District (District) (collectively, respondents) terminated Gensler's employment as a tenured faculty member at Saddleback College. On appeal, Gensler challenges the termination decision, arguing: (1) respondents acted in excess of their jurisdiction when the District dismissed Gensler without conducting a performance evaluation; (2) the administrative law judge (ALJ) erred by finding Gensler was evidently unfit for service under Education Code section 87732, subdivision (d) (all undesignated statutory references are to this code), and the court did not conduct the required judicial review; (3) the ALJ erred by finding Gensler "persistently violated, or refused to obey . . . reasonable regulations" under section 87732, subdivision (f), and the court did not perform the required judicial review; (4) the District and the ALJ contravened Gensler's First Amendment rights and academic freedom, and the court failed to conduct the required judicial

App-3

review; and (5) respondents' actions and the administrative proceedings were biased and unfair.¹

We affirm. We conclude respondents substantially complied with the evaluation requirement in section 87671 and in the District's master agreement with the faculty association. We decline to address any arguments the ALJ erred because, on appeal, we review only the trial court's findings. (*Shenouda v. Veterinary Medical Bd.* (2018) 27 Cal.App.5th 500, 512.)

We determine the court performed the proper judicial review of the ALJ's findings under section 87732, subdivisions (d) and (f). We also find Gensler fails to establish a First Amendment violation and to show how respondents or administrative proceedings were biased and unfair.

FACTUAL AND PROCEDURAL BACKGROUND

I.

EMPLOYMENT TERMINATION AND ADMINISTRATIVE PROCEEDINGS

Gensler started working for the District as a regular academic employee in January 2003, and was a faculty member at Saddleback College during the relevant time periods. He has undergraduate degrees from the University of California, Irvine, in five disciplines; a master of public policy and a juris doctor from the University of California, Berkeley; and a master of arts and doctor of philosophy in economics from the University of California, Irvine. He has been an academic for nearly his entire career. He has a California

¹ For ease of reading, we have omitted some formatting (such as boldface, underlining, or capitalization) from quoted material found in the record and briefs.

App-4

community college teaching credential in various subject matters, including economics, law, social science, public services and administration, and government.

A. Employment Termination

In December 2018, the District put Gensler on administrative leave and notified him of its intent to terminate his employment. In January 2019, Gensler attended a *Skelly* hearing, conducted by Dr. Elliot Stern, who had become president of Saddleback College only two days before.² After considering Gensler's evidence, Stern affirmed the termination decision.

On January 31, 2019, Stern signed the statement of charges and recommendation for termination. On the same day, Dr. Kathleen Burke, the District's chancellor, signed a concurrence. In February 2019, the District sent these documents, along with Gensler's latest performance evaluation covering the period between October 17, 2012, and November 2, 2015, to the Board.

In February 2019, the Board voted to give notice to Gensler the District would terminate his employment 30 days from the service of the notice unless he asked for a hearing. After receiving the notice, Gensler requested a hearing.

In June 2019, Stern filed a 25-page accusation with 42 exhibits in support, alleging two grounds for dismissal: (1) "[e]vident unfitness for service" (§ 87732, subd. (d)), and (2) "[p]ersistent 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

² *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194.

App-5

employing him or her" (§ 87732, subd. (f)). The accusation alleges multiple instances of misconduct. The Board certified the matter to the Office of Administrative Hearings for the appointment of an ALJ under section 87678.

B. Administrative Hearing and Decision

In February 2020, the ALJ held a 10-day hearing on the matter. The ALJ received testimonial and documentary evidence and the parties' arguments.

In October 2020, the ALJ issued a 137-page decision, affirming the District's decision to terminate Gensler's employment. The ALJ found, "Cause exists to dismiss [Gensler] pursuant to [s]ection 87732, subdivisions (d) and (f). The [D]istrict's decision to dismiss [Gensler] from employment is reasonable and supported by a preponderance of the evidence."

1. Section 87732, Subdivision (f)

The ALJ first discussed how Gensler persistently violated or refused to obey policies and regulations under section 87732, subdivision (f). The relevant policy and regulation were: board policy 4000.5 ("Harassment and Discrimination Prevention and Complaints") and administrative regulation 4000.5 ("Harassment and Discrimination Prevention and Complaints Procedures"). The ALJ explained board policy 4000.5 "reflects the [D]istrict's commitment 'to providing an academic and work environment that respects the dignity of individuals and groups.' The policy prohibits harassment and discrimination based on any legally protected characteristic, including 'race, color, ancestry, national origin, physical disability, mental disability, medical condition, marital status, sex,

App-6

gender, or the perception that a person has one or more of the foregoing characteristics.' The policy applies to any aspect of the academic environment, including classroom conditions, grades, and participation in any community college activity. The policy requires the [c]hancellor to adopt regulations pursuant to the policy."

The ALJ explained administrative regulation 4000.5 "provides specific definitions and complaint procedures for harassment and discrimination. Like the board policy, the regulations prohibit harassment based on a protected characteristic. It provides additional guidance on gender-based harassment and states it 'does not necessarily involve conduct that is sexual. Any hostile or offensive conduct based on gender can constitute prohibited harassment.' [Citation.] Forms of prohibited harassment for all categories include, but are not limited to the following:

"1. Verbal: [¶] Inappropriate or offensive remarks, slurs, jokes or innuendoes based on a person's race, gender, sexual orientation, or other protected status. This may include, but is not limited to, inappropriate comments regarding an individual's body, physical appearance, attire, sexual prowess, marital status, or sexual orientation; unwelcome flirting or propositions; demands for sexual favors; verbal abuse, threats or intimidation; or sexist, patronizing or ridiculing statements that convey derogatory attitudes based on gender, race, nationality,

App-7

sexual orientation or other protected status. [¶] . . . [¶]

“4. Environmental: [¶] A hostile academic or work environment may exist where it is permeated by sexual innuendo; insults or abusive comments directed at an individual or group based on gender, race, nationality, sexual orientation or other protected status; or gratuitous comments regarding gender, race, sexual orientation, or other protected statuses that are not relevant to the subject matter of the class or activities on the job. A hostile environment can arise from: [¶] an unwarranted focus on sexual topics or sexually suggestive statements in the classroom or work environment; [¶] an unwarranted focus on, or stereotyping of particular racial or ethnic groups, sexual orientations, genders, or other protected statuses[.] An environment may be hostile toward anyone who merely witnesses unlawful harassment in their immediate surroundings, although the conduct is directed at others. The determination of whether an environment is hostile is based on the totality of the circumstances, including such factors as the frequency of the conduct, the severity of the conduct, whether the conduct is humiliating or physically threatening, and whether the conduct

App-8

unreasonably interferes with an individual's learning or work activities."

Although the ALJ rejected certain allegations by the District, the ALJ found Gensler made the following comments during a Fall 2017 American Government class: "[Gensler] said that Iranian women dressed like 'hookers'; made comments about Middle Easterners hating Persians; and during a lecture on the Iran-Iraq war, said the United States sold weapons to Iraq because Iranians were 'jerks' and called Iranians evil." The ALJ determined: "[T]he [D]istrict established that the story about Iranian women dressing like prostitutes violated [board policy] 4000.5 and [administrative regulation] 4000.5. The reference to 'hookers' constituted 'inappropriate or offensive' remarks based on gender and national origin."

The ALJ also found Gensler made the following comments during a Spring 2018 American Government class: "[Gensler] told a story about a former student in which he described her scant attire and breast size; repeatedly used the word 'tard' to describe himself and students; referred to wives as 'bitches'; wore a jacket containing Playboy insignias to class; and made a crude reference to Ariana Huffington performing oral sex in order to achieve political recognition." The ALJ concluded: "These comments cumulatively constituted hostile or offensive conduct in violation of [board policy] 4000.5 and [administrative regulation] 4000.5, as inappropriate or offensive remarks, jokes or innuendoes based on a person's gender or other protected status. They also constituted inappropriate comments regarding an individual's body, physical appearance, attire, and/or[] were patronizing or

App-9

ridiculing statements that conveyed derogatory attitudes based on a protected status. The gratuitous comments created a hostile academic environment that interfered with the learning or work activities of several students."

After finding the violation of board policy 4000.5 and administrative regulation 4000.5 evidenced "unfitness to teach" based on the factors in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229,³ the ALJ considered whether Gensler's refusal to follow regulations was persistent. The ALJ concluded: "Although the evidence established that [Gensler] violated the harassment/discrimination rules in the course of a single school year, the violations were permeated with an attitude of continued insubordination or willful disobedience to the [D]istrict's directives. As such, the continuous use of inappropriate language that violated [D]istrict harassment policies was persistent."

³ "In determining whether the teacher's conduct thus indicates unfitness to teach the board may consider such matters as the 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 the 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*, *supra*, 1 Cal.3d at p. 229, fns. omitted.)

2. Section 87732, Subdivision (d)

The ALJ also concluded Gensler was evidently unfit for service under section 87732, subdivision (d). The ALJ applied the *Morrison* factors and found Gensler was unfit to teach. The ALJ then considered whether the unfitness was "evident." The ALJ explained: "The single most important consideration is that the [D]istrict provided [Gensler] with multiple opportunities to remediate his behavior. [Gensler] obstinately refused, believing that all the complaints against him were meritless. [Gensler] even ignored the simple directive to refrain from using profanity with students because he did not believe the [D]istrict had the authority to issue him such a directive."

The ALJ elaborated: despite Gensler's several "positive attributes," he nevertheless "expressed no remorse or acceptance of responsibility for his conduct. He maintains the erroneous position that in order to be effective, he needs to maintain the conversational, and often crude, language that one might overhear in a student dining room or on the sports field. The fact is, if [Gensler] elected to do so, he could engage his students with the material, maintain participation, and exhibit the professionalism expected of a professor with [Gensler]'s academic pedigree. There are plenty of examples of educators across many different media platforms who do just that. [Gensler]'s belief that the binary decision of being 'off-the-wall Jerry Springer' or 'boring textbook-reading Mr. Rogers' is simply a fallacy. Finally, and most concerning, is the way [Gensler] dealt with students he deemed to be a problem. [Gensler] might be correct that most complaints were from 'D' or 'F' students. But the

responsibility of a college professor is for *all* students—not just the ones who do well or personally relate to [Gensler]. [Gensler]’s often derisive and dismissive attitude to those who questioned his authority highlight the fact that he lacks the temperament to be in a community college classroom. Accordingly, overwhelming evidence established that [Gensler] does not have the temperament to comport his behavior to the professional standards expected by the [D]istrict and is thus evidently unfit for service.”

3. The ALJ Rejected Gensler’s Defenses

Notwithstanding Gensler’s defenses, the ALJ found the District provided Gensler a timely evaluation under section 87663 and therefore the District complied with section 87661 when it terminated Gensler’s employment. The ALJ determined, even if the District did not strictly comply with section 87661 or the District’s master agreement with the faculty association, the doctrine of substantial compliance applied to the instructor evaluation requirements. Additionally, the ALJ rejected Gensler’s argument the District violated his First Amendment rights.

II.

PETITION FOR WRIT OF MANDATE

“In January 2021, Gensler filed a [petition for writ of mandate], naming the Board and the District as respondents, in which he sought the issuance of a writ ‘to vacate the termination decision of [the ALJ] and order the reinstatement of Gensler with back pay.’ The petition asserted six causes of action.

“In the first cause of action, Gensler asserted respondents provided defective notice and lacked

jurisdiction, [because they violated:] sections 87671, subdivision (a) (failure to conduct a current evaluation);] 87663, subdivision (c) (failure to include a peer review);] 87663, subdivision (g) (failure to include student evaluations);] 87031, subdivision (b)(1) (failure to allow Gensler to provide written comments to derogatory material placed in his personnel file which was used in the termination process);] 87680 (considering and relying upon evidence older than four years);] and 87672 (failure to provide notice of the complete and precise decision of the governing board and the reasons for the termination).

"In the second cause of action in the petition, Gensler asserted the ALJ erred by concluding Gensler had engaged in unprofessional conduct justifying the termination of his employment.

"In the third cause of action, Gensler asserted the ALJ erred by concluding Gensler's statements were not protected by the First Amendment to the United States Constitution and his right to academic freedom.

"In the fourth cause of action, Gensler asserted he was deprived of a fair trial. He asserted the ALJ abused his discretion by precluding opening statements and closing argument, committing evidentiary error, relying on cases the Board had not cited in its briefing, ignoring pretrial motions and the Board's alleged discovery abuses, and denying Gensler's requests for sanctions and continuances.

"In the fifth and sixth causes of action, Gensler asserted the ALJ's findings of Gensler's "evident unfitness" and "persistent failure to follow rules," respectively, should be reversed.

App-13

"In the petition's prayer for relief, Gensler stated he "respectfully prays that the court enter judgment against [r]espondents as follows:

"1. For a [writ of mandate] to be issued under Code of Civil Procedure section 1094.5 under seal of this court, ordering the Board

"a. to reinstate . . . Gensler as a full-time tenured faculty member of Saddleback College[;] and

"b. to reimburse . . . Gensler for lost wages and benefits arising from this action[;]

"2. For . . . Gensler's costs in this action, including attorneys' fees[;]

"and

"3. For such other relief as the court considers just and proper." (Some capitalization omitted.)

"Respondents filed an answer to the petition." (*Gensler v. Bd. of Trustees of the South Orange County Community College Dist.* (Aug. 22, 2023, No. G061503) [nonpub. opn.])

III.

TRIAL COURT'S DECEMBER 2021 ORDER AND APPEAL

In December 2021, after considering the parties' evidence and arguments, Judge Derek W. Hunt remanded the matter to respondents to perform a peer review evaluation. Gensler appealed, and a panel of this appellate court held the order was not appealable. (*Gensler v. Board of Trustees of the South Orange County Community College District, supra*, G061503.)

IV.

TRIAL COURT'S OCTOBER 2023 AND JANUARY 2024 MINUTE ORDERS

In an October 2023 minute order, Judge Kimberly A. Knill noted, during a status conference, both parties asserted no additional briefing was necessary and that she would not remand for a peer review.⁴ In a January 2024 minute order, Judge Knill took the matter under submission, explaining no argument was required.

V.

TRIAL COURT'S DENIAL OF PETITION FOR WRIT OF MANDATE

In February 2024, the trial court denied the petition for writ of mandate. While exercising its independent judgment on the evidence, the court concluded the following. Respondents did not act in excess of their jurisdiction because the ALJ properly found respondents substantially complied with the evaluation requirement in section 87671. The ALJ did not abuse his discretion by considering Gensler's unprofessional conduct in reviewing the charge for evident unfitness to teach. The ALJ did not abuse his discretion by rejecting Gensler's First Amendment and academic freedom arguments. Gensler had a fair trial before the

⁴ In April 2023, Judge Knill was assigned to the present case, due to the retirement of Judge Hunt. As the prior judge was unavailable, Judge Knill was able to reconsider Judge Hunt's prior ruling. (See *In re Marriage of Oliverez* (2015) 238 Cal.App.4th 1242, 1247 ["A trial court's discretion to reconsider another judge's prior ruling is necessarily narrow and usually only appropriate when the prior judge is unavailable"].)

ALJ. The ALJ did not abuse his discretion by finding Gensler was evidently unfit for service under section 87732, subdivision (d) and Gensler persistently failed to follow the rules under section 87732, subdivision (f). The court entered judgment in favor of respondents. Gensler timely appealed.

DISCUSSION

I.

GOVERNING STATUTORY SCHEME

“The terms and conditions of employment for community college employees are governed by a comprehensive statutory scheme set forth in the Education Code. (§ 87660 et seq. [governing ‘the evaluation of, the dismissal of, and the imposition of penalties on, community college faculty’].) Contract or regular employees ‘may be dismissed or penalized for one or more of the grounds set forth in Section 87732.’ (§ 87667.) ‘A “regular” employee is . . . one who has achieved tenure. “Contract” status is the first step toward tenure.’ [Citation.] Section 87732 provides multiple independent bases upon which an employer may take action against an employee.” (*Ricasa v. Office of Administrative Hearings* (2018) 31 Cal.App.5th 262, 272 (*Ricasa*)). The relevant bases here are: “[e]vident unfitness for service” (§ 87732, subd. (d)) and “[p]ersistent 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” (*Id.*, subd. (f)).

“The governing board determines whether an employee is to be dismissed or penalized and whether the

App-16

dismissal or penalty shall be imposed immediately or postponed. (§ 87669.) The 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.' (§ 87671.)

"If a governing board decides it intends to dismiss or penalize a contract or regular employee, it shall deliver a written statement, duly signed and verified, to the employee setting forth the complete and precise decision of the governing board and the reasons therefor.' (§ 87672.) The employee then has 30 days to object to the governing board's decision. (§ 87673.)

"If the parties do not agree to an arbitrator (§ 87674), then the governing board must certify the matter to the [Office of Administrative Hearings] (§ 87678). An ALJ conducts proceedings 'in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.' (§ 87679.) 'The written notice delivered to the employee pursuant to Section 87672 shall be deemed an accusation. The written objection of the employee

delivered pursuant to Section 87673 shall be deemed the notice of defense.' (§ 87679.)

"The ALJ must determine whether cause exists to dismiss or penalize the employee and whether to dismiss or penalize the employee. (§ 87680.) The governing board or the employee may petition the court for review of the ALJ's decision. (§ 87682.)" (*Ricasa, supra*, 31 Cal.App.5th at pp. 272-273.)

II.

STANDARD OF REVIEW

A. Trial Court's Standard of Review of the Administrative Decision

A trial court exercises its independent judgment in reviewing an administrative decision. (§ 87682.) "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.) "[T]he presumption provides the trial court with a starting point for review—but it is only a presumption, and may be overcome. Because the trial court ultimately must exercise its own independent judgment, that court is free to substitute its own findings after first giving due respect to the agency's findings." (*Id.* at p. 818.)

B. Standard of Review on Appeal

On appeal, “[w]e review the trial court’s determination under the substantial evidence test.”⁵ (*Ricasa, supra*, 31 Cal.App.5th at p. 282.) “Our focus is on the trial court’s findings.” (*Shenouda v. Veterinary Medical Bd.*, *supra*, 27 Cal.App.5th at p. 512.) Therefore, we do not consider any of Gensler’s arguments asserting the ALJ erred.

“[T]o the extent pure questions of law (e.g., jurisdiction) were decided at the trial court upon undisputed facts, a de novo standard will apply at the appellate level.” (*Anserv Ins. Services, Inc. v. Kelso* (2000) 83 Cal.App.4th 197, 204.) ““A challenge to the procedural fairness of the administrative hearing is reviewed de novo on appeal because the ultimate determination of procedural fairness amounts to a question of law.”” (*Boermeester v. Carry* (2023) 15 Cal.5th 72, 85.)

III.

THE DISTRICT SUBSTANTIALLY COMPLIED WITH SECTION 87671

Gensler argues respondents acted in excess of their jurisdiction because they were required to conduct a performance evaluation before terminating Gensler’s employment. “A . . . regular employee may be dismissed . . . if one or more of the grounds set forth in Section 87732 are present and” several criteria “are satisfied,” including, *inter alia*: “The employee has

⁵ On appeal, Gensler presents no substantial evidence arguments. His appeal is focused on how the ALJ erred and how the trial court did not conduct the proper judicial review of the ALJ’s findings.

been evaluated in accordance with standards and procedures established in accordance with the provisions of this article.”⁶ (§ 87671, subd. (a).) Pursuant to these standards and procedures, “[r]egular employees shall be evaluated at least once in every three academic years.” (§ 87663, subd. (a).) “Evaluations shall include, but not be limited to, a peer review process.” (*Id.*, subd. (c).) “It is the intent of the Legislature that faculty evaluation include, to the extent practicable, student evaluation.” (*Id.*, subd. (g).)

“[F]aculty evaluation procedures may be negotiated as part of the collective bargaining process” (§ 87663, subd. (e)), and “the evaluation shall be conducted in accordance with the standards and procedures established by the rules and regulations of the governing board of the employing district” (*id.*, subd. (b)). The master agreement here provides a somewhat different evaluation cycle than section 87663, requiring the District to start the evaluation process every three years (rather than academic years): “1. The vice president or dean will initiate the tenured faculty evaluation process every three . . . years. [¶] 2. The evaluation process must be completed within one year of its initiation, or the process must begin anew.”

Here, Gensler’s last evaluation covered the period between October 17, 2012, and November 2, 2015. As the master agreement requires the evaluation process to be initiated every three years, his next evaluation needed to be initiated no later than November 2, 2018.

⁶ “‘Regular employee’ or ‘tenured employee’ means an employee of a district who is employed in accordance with subdivision (c) of Section 87608, subdivision (c) of Section 87608.5, or Section 87609.” (§ 87661, subd. (d).)

Respondents do not represent they initiated the evaluation process by then. The District therefore did not adhere to the evaluation procedures outlined in the master agreement and statute.

Nonetheless, we find respondents substantially complied with the statute (and master agreement). "The rules governing the doctrine of substantial compliance are well settled. [Citation.] As it is used in the decisions of this state, the doctrine excuses literal noncompliance only when there has been 'actual compliance in respect to the substance essential to every reasonable objective of the statute.' [Citations.] Thus, the doctrine gives effect to our preference for substance over form, but it does not allow for an excuse to literal noncompliance in every situation." (*Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, 1430.)

Miller v. Chico Unified School Dist. (1979) 24 Cal.3d 703 (*Miller*) is instructive. In early 1976, the plaintiff, a junior high school principal, received notice of his reassignment to a teaching position. (*Id.* at p. 709.) He sought reinstatement to his position as principal, arguing, inter alia, the school board failed to comply with section 44664 (*Miller*, at p. 706), which is analogous to section 87663. "Section 44664, a provision of the Stull Act (former §§ 13485–13490, now §§ 44660–44665), provides: 'Evaluation and assessment of the performance of each certificated employee shall be made on a continuing basis, at least once each school year for probationary personnel, and at least every other year for personnel with permanent status. The evaluation shall include recommendations, if necessary, as to areas of improvement in the performance of the employee. In the event an employee is not

performing his duties in a satisfactory manner according to the standards prescribed by the governing board, the employing authority shall notify the employee in writing of such fact and describe such unsatisfactory performance. The employing authority shall thereafter confer with the employee making specific recommendations as to areas of improvement in the employee's performance and endeavor to assist him in such performance." (*Id.* at p. 716.) The school board also had guidelines providing "for annual evaluations of supervisory personnel." (*Id.* at p. 717.)

While the trial court in *Miller* found the school board violated section 44664 by neglecting to notify the plaintiff in writing that his performance was unsatisfactory, the California Supreme Court held "the school board substantially complied with the Stull Act's mandate that the board fix performance guidelines for its certificated personnel, evaluate plaintiff in light of such guidelines, inform plaintiff of the results of any evaluation, and suggest to plaintiff ways to improve his performance." (*Miller, supra*, 24 Cal.3d at p. 717.) The Supreme Court explained the school board had evaluated the plaintiff annually in 1973, 1974, and 1975 in accordance with the guidelines. (*Ibid.*) In the 1974 evaluation, the school board suggested areas of improvement. (*Ibid.*) In April 1975, the school board also informed the plaintiff that his performance was a concern and reiterated suggestions for improvement. (*Ibid.*) In the June 1975 evaluation, the school board provided written notice of plaintiff's unsatisfactory conduct and gave his supervisors an opportunity to recommend improvements. (*Ibid.*) The school board scheduled an evaluation for the 1975 to 1976 school year, but the plaintiff refused to

participate. (*Ibid.*) Nevertheless, the school board met with him at least twice and suggested strategies to improve. (*Ibid.*) Thus, the “plaintiff knew of the board’s close attention to his performance and of specific ways in which he could alleviate their concerns.” (*Ibid.*)

The Supreme Court rejected the trial court’s “overly restrictive interpretation of the requirements of section 44664.” (*Miller, supra*, 24 Cal.3d at p. 717.) The Supreme Court considered the purpose of section 44664 and determined: “The obvious objective of the Legislature was to protect the individual employee, in this case, the principal of a high school, against arbitrary action by the institution, here the school board, in order to preserve the individual’s rights against their improper severance. The individual would be helpless against the institution’s wrongful reassigning him to an inferior position unless he had the opportunity to know, and if possible, to counter the reasons for it. At the same time if the trial court in the present case should find that the board in any event, even in the absence of unproven accusations against the principal’s conduct, would still have reassigned him, for its own good reasons, the principal cannot justly complain.” (*Id.* at p. 718.)

Here, as the trial court found, respondents gave Gensler several notices of his unsatisfactory performance. First, in July 2016, the District gave Gensler a “90-Day Notice of Unprofessional Conduct and/or Unsatisfactory Performance—Notice to Correct Deficiencies.” The notice cited administrative regulation 4000.5, *inter alia*. It informed Gensler regarding unprofessional and unsatisfactory performance due to “threatening and derogatory comments to [a] student,” who was a military veteran, and “disparaging

remarks based on students' religious views." The District issued the following directive to assist Gensler "in overcoming these deficiencies: "A. You will immediately stop your unprofessional conduct. [¶] B. You will treat all students with respect, dignity, and civility. [¶] C. You will neither retaliate against nor confront students or employees concerning the aforementioned complaints. [¶] D. You will attend anti-discrimination and harassment training of at least two hours to be provided by or approved by the District at a future date. [¶] E. You will adhere to all District policies and regulations referred to in this notice. [¶] F. You will establish a classroom environment conducive to learning; model effective critical thinking by being open to differences of opinion; invite students to think independently; stimulate your students' interest and desire to learn; provide a positive learning environment for all student populations; and demonstrate sensitivity in working with students and employees with diverse backgrounds and needs." The District warned: "Your performance will be monitored each week to evaluate whether you have improved with respect to the problems outlined in this notice. Should you continue to demonstrate the types of behavior discussed in this notice, you will be subject to further disciplinary action, up to and including dismissal from employment."

Second, in October 2016, Dean Cadence Wynter met with Gensler regarding "an informal student complaint" and memorialized the meeting in a memorandum to Gensler. In the memorandum, Wynter wrote the complainant alleged Gensler "demean[ed] and use[ed] derogatory comments throughout [his] class sessions." Wynter also told Gensler he had

embarrassed a student by admonishing her in front of the class for incorrectly writing her name. Gensler replied by stating he "knew who the student was, that she was 'Chinese' and that she was 'hyper sensitive and pampered.'" Wynter advised: "Calling the student 'pampered' is derogatory and subjective. While I know this is not an isolated incident, I expect it to be the last one. Effective immediately, you are to treat students with respect and not [publicly] castigate them. More importantly, you are not to make assumptions about students based on their national origin."

Third, in September 2017, Denise Whittaker, interim president of Saddleback College, met with Gensler, after the Board denied an appeal of a discrimination and harassment claim against him. She memorialized the meeting in a memorandum to Gensler. She wrote the Board wanted to ensure Gensler "understood the seriousness of [the] situation," and Whittaker offered to discuss it with him. Whittaker warned Gensler: "I am concerned that if another complaint against you occurs which results in yet another finding of unprofessional conduct (even if the evidence does not rise to a level of discriminatory behavior), I am concerned that the District would have no choice but to take disciplinary action, up to and including termination, against you." She gave him a copy of section 87732. Whittaker recorded: "After much discussion, you assured me that you understand that I was

alerting you to potential future action if student complaints result in findings of unprofessional conduct.”⁷

This history shows Gensler knew respondents were monitoring his performance, particularly his insensitive and inappropriate language in the classroom. Respondents warned him at least a couple of times he could face disciplinary action if another complaint occurred and provided opportunities to address his conduct. Here, as in *Miller, supra*, 24 Cal.3d at page 718, “[t]he obvious objective of the Legislature was to protect the individual employee . . . against arbitrary action by the institution . . . in order to preserve the individual’s rights against their improper severance.” Gensler cannot assert the charges surprised him or respondents failed to give him an opportunity to fix his problematic conduct. It is not reasonably possible Gensler would have received a more favorable outcome had the District performed an evaluation by November 2018.⁸

⁷ We also note, in Gensler’s 2012 to 2015 evaluation, which he signed in December 2015, he was “advised to be more thoughtful about some of his public comments to students that can and have [led] to student complaints.”

⁸ We note the issue of substantial compliance was properly before the trial court. The District raised the issue, citing *Miller*, in its posthearing briefs before the ALJ, and the ALJ addressed the issue in the administrative decision. Contrary to Gensler’s assertions, the court did not concoct its own substantial compliance theory. Respondents argued in the court the doctrine of substantial compliance applied, citing *Miller*. In its order, the court drew from *Miller* for its substantial compliance analysis. Gensler had opportunities to address the doctrine of substantial compliance, including here before us.

IV.

THE TRIAL COURT CONDUCTED THE PROPER JUDICIAL
REVIEW OF THE ALJ'S FINDINGS UNDER SECTION
87732, SUBDIVISION (D)

Gensler argues the trial court failed to conduct a proper judicial review of the ALJ's finding that Gensler was evidently unfit for service under section 87732, subdivision (d). He first asserts the court provided a "list of distorted allegations, including several even [the ALJ] had rejected, without citation to any supporting evidence." Gensler suggests this list misrepresents the ALJ's findings. But as he recognizes, it is merely a list of allegations, not findings. Even if the specified allegations are "distorted," the purported distortion did not impact the court's analysis of the ALJ's findings.

Gensler next asserts: "There is no acknowledgment that Gensler had contested the allegations in the bullet list, or that [the ALJ] had rejected several as either false or improper attempts to punish acceptable speech, much less any attempt to address and resolve the conflicting evidence. There is not a single citation to the hearing transcripts to support [the trial court]'s statements, any credibility determinations, or factual findings." Gensler does not cite any legal authority requiring the trial court to include such information in its order. We therefore deem this argument forfeited. (See *Pinter-Brown v. Regents of University of California* (2020) 48 Cal.App.5th 55, 95 (*Pinter-Brown*) ["When legal argument is not supported by citation to legal authority on a particular point, 'we may treat the point as forfeited and pass it without consideration'"].)

Gensler also contends the trial court failed to review the evidence because the court's order lacks citations to the record and provides a list of "distorted and disproven allegations." But these do not necessarily indicate the court failed to consider the evidence. Something more would be needed. For example, in *Ocheltree v. Gourley* (2002) 102 Cal.App.4th 1013, 1017-1018, a case cited by Gensler, it was apparent the court did not review the administrative record, because it made its decision on a petition for writ of mandate before the administrative record was prepared.

The trial court here reviewed the ALJ's findings and, after exercising its independent judgment, found the ALJ did not err. The court considered whether the ALJ properly evaluated the *Morrison* factors and the ALJ's examination of whether Gensler's unfitness was evident. Nothing in the record shows the court improperly reviewed the ALJ's findings pursuant to section 87732, subdivision (d).

V.

THE TRIAL COURT CONDUCTED THE PROPER JUDICIAL
REVIEW OF THE ALJ'S FINDINGS UNDER SECTION
87732, SUBDIVISION (F)

Gensler argues the trial court failed to perform a proper judicial review of the ALJ's finding that Gensler persistently refused to follow the rules under section 87732, subdivision (f). He asserts: "A proper review would have (1) construed the District's regulation and identified its essential elements, (2) examined the entire administrative record, including the hearing testimony, to determine the facts, (3) identified and resolved the factual disputes and explained the bases for those determinations, and then (4)

analyzed whether the factual findings satisfied the criteria of the regulation." Except for number "(2)," Gensler does not cite any legal authority in support of his assertions. We therefore deem them forfeited (see *Pinter-Brown, supra*, 48 Cal.App.5th at p. 95), except for number "(2)," which we discuss next.

In support of his contention the trial court failed to consider all the evidence, he asserts the court's order did not include any citations to the hearing transcript, nor did it acknowledge factual disputes or evidence in his favor. But, as we explained *ante*, these do not necessarily show the court did not consider the evidence.

The trial court here acknowledged the ALJ's findings and concluded: "The evidence reflects [Gensler]'s conduct establishes a persistent violation of, or refusal to obey the District rules." The court also concluded: "[Gensler] has not demonstrated the ALJ committed legal error constituting an abuse of discretion, or that the findings are not supported by the weight of the evidence." These statements indicate the court considered the evidence in rendering its decision and, after reviewing the administrative decision under the independent judgment test, it found the ALJ did not err.

VI.

GENSLER'S CONSTITUTIONAL ARGUMENTS FAIL

Gensler argues the District violated his First Amendment rights, and the trial court did not conduct the required judicial review of the administrative

decision.⁹ He also appears to argue administrative regulation 4000.5 is unconstitutionally vague. We disagree.

A. Gensler Fails to Show Unconstitutional Vagueness

We begin by noting Gensler's arguments on unconstitutional vagueness are somewhat ambiguous. In his discussion of the First Amendment in his opening brief, Gensler starts by stating general First Amendment principles and then asserts in a subheading: "Vague Regulations Addressing Sexual Harassment And Racial Discrimination Are Not Valid Substitutes For A Constitutional Language Policy." He next summarizes *Cohen v. San Bernardino Valley College* (9th Cir. 1996) 92 F.3d 968 (*Cohen*).

In *Cohen*, a tenured professor at a community college taught an English class. (*Cohen, supra*, 92 F.3d at p. 970.) A student, Ms. M., was offended with the professor's "repeated focus on topics of a sexual nature, his use of profanity and vulgarities, and by his comments which she believed were directed intentionally at her and other female students in a humiliating and harassing manner." (*Ibid.*) In this class, the professor held a "discussion on the issue of pornography and played the 'devil's advocate' by asserting

⁹ Gensler asserts the District violated his academic freedom. But Gensler does not provide any substantive arguments. "[W]here a point is merely asserted by [appellant] without any [substantive] argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion." [Citation.] 'Issues do not have a life of their own: if they are not raised or supported by [substantive] argument or citation to authority, we consider the issues' forfeited. (*Holden v. City of San Diego* (2019) 43 Cal.App.5th 404, 418.) We therefore consider this argument forfeited.

controversial viewpoints." (*Ibid.*) He disclosed "he wrote for Hustler and Playboy magazines and he read some articles out loud in class." (*Ibid.*) He then assigned his students to compose "essays defining pornography." (*Ibid.*) Ms. M. asked for a different assignment, but the professor refused. (*Ibid.*) She stopped attending the class and failed it. (*Ibid.*) She filed a complaint regarding the professor's statements and conduct asserting the professor sexually harassed her. (*Ibid.*)

The community college had a new sexual harassment policy, providing: "Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal, written, or physical conduct of a sexual nature. [I]t includes, but is not limited to, circumstances in which: [¶] 1. Submission to such conduct is made explicitly or implicitly a term or condition of a student's academic standing or status. [¶] 2. Such conduct has the purpose or effect of unreasonably interfering with an individual's academic performance or creating an intimidating, hostile, or offensive learning environment. [¶] 3. Submission to or rejection of such conduct is used as the basis for academic success or failure." (*Cohen, supra*, 92 F.3d at pp. 970-971.) The community college determined the professor "engaged in sexual harassment which unreasonably interfered with an individual's academic performance and created an intimidating, hostile, or offensive learning environment," and it imposed certain disciplinary penalties. (*Cohen, supra*, 92 F.3d at p. 971.)

The Ninth Circuit Court of Appeals held the community college's sexual harassment policy was unconstitutionally vague as applied to the professor.

(*Cohen, supra*, 92 F.3d at p. 972.) It explained: "There are three objections to vague policies in the First Amendment context. First, they trap the innocent by not providing fair warning. Second, they impermissibly delegate basic policy matters to low level officials for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, a vague policy discourages the exercise of [F]irst [A]mendment freedoms." (*Ibid.*) In *Cohen*, the professor's "speech did not fall within the core region of sexual harassment as defined by the policy. Instead, officials of the college, on an entirely ad hoc basis, applied the policy's nebulous outer reaches to punish teaching methods that Cohen had used for many years. Regardless of what the intentions of the officials of the college may have been, the consequences of their actions can best be described as a legalistic ambush. Cohen was simply without any notice that the policy would be applied in such a way as to punish his longstanding teaching style—a style which, until the college imposed punishment upon Cohen under the policy, had apparently been considered pedagogically sound and within the bounds of teaching methodology permitted at the college." (*Ibid.*, capitalization omitted.) Because the court held the policy was unconstitutionally vague as applied to the professor, it "decline[d] to define today the precise contours of the protection the First Amendment provides the classroom speech of college professors." (*Id.* at pp. 971–972.)

After summarizing *Cohen* in his opening brief, Gensler asserts: "the District's 'hostile environment' regulation requires that the District prove the existence of numerous elements, including (1) a specific

victim, who must be (2) subjectively and (3) objectively offended by conduct which (4) must permeate the class and not be (5) related to the curriculum or (6) protected by the First Amendment. As a harassment policy, it may be reasonably detailed. However, it is not intended to be a policy governing speech and it does not acknowledge, or attempt to comply with, the constitutional strictures of such regulations.”

“[T]o demonstrate error, an appellant must supply the reviewing court with some cogent argument supported by legal analysis and citation to the record.’ [Citation.] ‘We are not obliged to make other arguments for [appellant] [citation], nor are we obliged to speculate about which issues counsel intend to raise.’ [Citations.] We may and do ‘disregard conclusory arguments that are not supported by pertinent legal authority or fail to disclose the reasoning by which the appellant reached the conclusions he wants us to adopt.’” (*Hernandez v. First Student, Inc.* (2019) 37 Cal.App.5th 270, 277.)

Here, Gensler does not explain why the regulation does not “attempt to comply with[] the constitutional strictures of such regulations,” nor does he explicitly connect his assertions to *Cohen*. His assertions do not constitute a cognizable argument that the District violated Gensler’s First Amendment rights. We therefore deem these arguments forfeited. (See *Hernandez v. First Student, Inc.*, *supra*, 37 Cal.App.5th at p. 277.)

Nonetheless, elsewhere in his opening and reply briefs, it appears Gensler is arguing the District’s harassment policy in administrative regulation 4000.5 is unconstitutionally vague, because it resembles the language in the sexual harassment policy in *Cohen*. In particular, Gensler points out both policies contain

language regarding how the offending conduct “unreasonably interfere[s]” with learning. (*Cohen, supra*, 92 F.3d at p. 971.)

“Vagueness doctrine is an outgrowth not of the First Amendment, but of the [d]ue [p]rocess [c]lause of the Fifth Amendment.’ [Citation.] ‘[T]he underlying concern is the core due process requirement of adequate notice.” (*Wilson v. San Luis Obispo County Democratic Central Com.* (2009) 175 Cal.App.4th 489, 499.) “A law is unconstitutionally vague if it fails to meet two basic requirements: (1) The regulations must be sufficiently definite to provide fair notice of the conduct proscribed; and (2) the regulations must provide sufficiently definite standards of application to prevent arbitrary and discriminatory enforcement.” (*Snatchko v. Westfield LLC* (2010) 187 Cal.App.4th 469, 495.) “Only a reasonable degree of certainty is required.’ [Citation.] If a reasonable and practical construction can be given, the law will not be held void for uncertainty.” (*Ibid.*)

As the trial court found, unlike the policy in *Cohen*, administrative regulation 4000.5 specifies in significant detail what conduct constitutes harassment. Administrative regulation 4000.5 defines prohibited verbal harassment: “Inappropriate or offensive remarks, slurs, jokes or innuendoes based on a person’s race, gender, sexual orientation, or other protected status. This may include, but is not limited to, inappropriate comments regarding an individual’s body, physical appearance, attire, sexual prowess, marital status, or sexual orientation; unwelcome flirting or propositions; demands for sexual favors; verbal abuse, threats or intimidation; or sexist, patronizing or ridiculing statements that convey derogatory attitudes based on

gender, race, nationality, sexual orientation or other protected status.” In conjunction with the definitions of prohibited harassment, administrative regulation 4000.5 also explains in sufficient detail what constitutes a hostile academic environment. It specifies a hostile academic environment exists “where it is permeated by sexual innuendo; insults or abusive comments directed at an individual or group based on gender, race nationality, sexual orientation or other protected status; or gratuitous comments regarding gender, race, sexual orientation, or other protected statuses that are not relevant to the subject matter of the class or activities on the job.” And, unlike in *Cohen*, *supra*, 92 F.3d at page 972, where the professor had no notice the new sexual harassment policy “would be applied in such a way as to punish his longstanding teaching style,” Gensler received notice that administrative regulation 4000.5 could apply to him in July 2016 and additional notices warning him of his conduct. We therefore find *Cohen* inapplicable here.

B. Gensler Fails to Demonstrate How the Trial Court Erred.

Gensler next contends the trial court erred for several reasons. First, he asserts: “While [the court] cited a small portion of the regulation [citation], [the court] made no effort to identify the required elements, or what evidence supposedly established the existence of each element, or that no defenses applied.” Gensler does not cite any legal authority in support. We therefore consider this argument forfeited. (See *Pinter-Brown*, *supra*, 48 Cal.App.5th at p. 95.)

Second, Gensler argues the trial court’s distinguishing of *Cohen* from the present case (i.e., the District’s

regulation specified in greater detail proscribed conduct compared with the policy in *Cohen*) “has no basis in fact.” He claims, “*Cohen* does not provide the full text of the San Bernardino Community College District policy, so one cannot make the comparison.” This argument is misguided. Nothing in *Cohen* suggests the *Cohen* court did not set forth the entire sexual harassment policy in its decision.

Third, Gensler contends: “[T]he issue of whether the District’s regulation is *more* detailed than that in *Cohen* is irrelevant. The issue is whether the District’s regulation is *sufficiently* detailed to pass constitutional standards to be employed as a language policy. [The trial court] does not address that issue. [The court]’s statement that Gensler had not provided any legal authority that a language policy is required is demonstrably incorrect, as Gensler cited and discussed *Cohen* in his trial brief.” This contention is misguided too. The relevant issue in *Cohen* was whether the sexual harassment policy was unconstitutionally vague. As the court correctly observed, *Cohen* does not address language policies. Nor did *Cohen* address whether the First Amendment protected the professor’s speech. (*Cohen, supra*, 92 F.3d at p. 972.)

Fourth, Gensler argues the trial court misplaced its reliance on *Demers v. Austin* (9th Cir. 2012) 746 F.3d 402 and *Pickering v. Board of Education* (1968) 391 U.S. 563, because these cases involved “out-of-classroom speech.” That distinction is unpersuasive. *Demers* suggests the *Pickering* test applies to teaching: “We conclude that *Garcetti* [*v. Ceballos* (2006) 547 U.S. 410] does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed ‘pursuant to the official

duties' of a teacher and professor. We hold that academic employee speech not covered by *Garcetti* is protected under the First Amendment, using the analysis established in *Pickering*.¹⁰ (*Demers*, at p. 412.)

C. Gensler Fails to Establish a First Amendment Violation

Even if the trial court committed error, Gensler does not offer any substantive arguments explaining how the District violated the First Amendment. In Gensler's opening brief, under the heading regarding First Amendment violations, he does not identify any purported protected speech or conduct under the First Amendment, except two: his statement concerning Iranian women "dress[ing] like hookers" and his comment regarding a student's physical appearance and attire during a jail tour. But he does not provide any substantive argument with citation to authority. Additionally, in his reply brief, under the heading regarding First Amendment violations, he asserts an additional instance of purported protected conduct: wearing a jacket with a Playboy logo. In support, he cites his opening brief and *Tinker v. Des Moines School Dist.* (1969) 393 U.S. 503, but he fails to

¹⁰ "The *Pickering* test has two parts. First, the employee must show that his or her speech addressed 'matters of public concern.' [Citations.] Second, the employee's interest 'in commenting upon matters of public concern' must outweigh 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" (*Demers v. Austin*, *supra*, 746 F.3d at p. 412.)

explain how that authority applies here.¹¹ We therefore decline to address these arguments.¹² (See *Doe v. McLaughlin* (2022) 83 Cal.App.5th 640, 654.)

VII.

GENSLER'S BIAS AND FAIRNESS ARGUMENTS ARE UN-
VAILING

Gensler presents several arguments regarding bias and fairness. We address them in turn.

A. The Accusation Complied with Section 87672

Gensler argues the accusation failed to give fair notice and contains vague allegations. Aside from citing the pertinent statute, section 87672, Gensler does not cite any authorities, and we are unaware of any authorities addressing this question.

Section 87672 provides in pertinent part: "If a governing board decides it intends to dismiss or penalize a contract or regular employee, it shall deliver a

¹¹ California Rules of Court, rule 8.204(a)(1)(B) requires every brief to "[s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority." To the extent Gensler believes he presented substantive First Amendment arguments elsewhere in his briefs under other headings, we would disregard such arguments and treat them as forfeited. (See *Tsakopoulos Investments, LLC v. County of Sacramento* (2023) 95 Cal.App.5th 280, 310 ["Failure to provide proper headings forfeits issues that may be discussed in the brief but are not clearly identified by a heading"].)

¹² For the first time in his reply brief, Gensler argues the trial court failed to conduct a First Amendment analysis on each individual statement. We consider this argument forfeited, as "we will not consider matters raised for the first time in the reply brief." (*Sachs v. Sachs* (2020) 44 Cal.App.5th 59, 66.)

written statement, duly signed and verified, to the employee setting forth the complete and precise decision of the governing board and the reasons therefor."

Here, the accusation was "complete and precise." (§ 87672.) It alleged Gensler "engaged in [e]vident [u]nfitness for [d]uty and [p]ersistent violations of, or refusal to obey, the school laws of the state or reasonable regulations prescribed for the government of the community colleges by the governing board of the [District] as set forth in . . . section 87732." The accusation, which is 25 pages and contains 42 exhibits in support, then spelled out in detail multiple alleged incidents in support, providing general dates and a summary of the conduct. For example, one allegation states: "In Fall 2017 and Spring 2018, Gensler told his . . . students about having taken a prior group of . . . students on a tour of a jail. He spoke about a female student who dressed inappropriately for the jail. In Fall 2017, he told his class that a former female student wore shorts to the jail and the prisoners made noises and whistled at her. During his Spring 2018 class, he told his . . . students that this female former student wore a revealing shirt to the jail tour and that she had a chest 'out to here,' while he cupped his hands out in front of his chest to simulate large breasts. He also said that the former student's pants were 'painted on.' Gensler referred to a female student as 'really good looking,' and her 'boobs just popping out.'" Contrary to Gensler's assertions, the accusation was far from vague.

B. Gensler Forfeited His Argument Regarding Alleged Bias and Time-Barred Allegations

For the first time on appeal, Gensler argues the ALJ was biased because the ALJ allowed respondents' evidence regarding time-barred allegations in the accusation but prohibited Gensler from introducing evidence to disprove them. Gensler cites section 87680, which provides in relevant part: "No testimony shall be given or evidence introduced relating to matters which occurred more than four years prior to the date of the filing of the notice. Evidence of records regularly kept by the governing board concerning the employee may be introduced, but no decision relating to the dismissal or suspension of any employee shall be made based on charges or evidence of any nature relating to matters occurring more than four years prior to the filing of the notice." (§ 87680.)

"It is axiomatic that arguments not raised in the trial court are forfeited on appeal." (*People v. Graham* (2024) 102 Cal.App.5th 787, 798.) We therefore consider this argument forfeited and decline to address it.

C. Gensler Fails to Provide Any Citations to Authorities in Support of Several Arguments

Gensler presents several arguments without citing any legal authorities in support. First, he argues the District stonewalled the discovery process, and this stonewalling prejudiced him. He asserts the District refused to answer over 150 interrogatories. He also asserts he filed a motion to compel discovery, which the ALJ denied, and a pretrial motion for evidentiary sanctions, which the ALJ denied.

Second, Gensler argues the District sought to conceal witnesses and block him from contacting them.

He asserts the District refused to disclose the last names of student witnesses for more than three months, and the District did not disclose the substance of their projected testimony 19 days before trial. He posits, "Through these stratagems and others, [r]espondents successfully prevented Gensler from learning what evidence would be presented against him and preparing to meet it."

Third, Gensler contends the ALJ improperly denied his request to continue the hearing. He asserts he explained to the ALJ that discovery abuses hindered his preparation.

Fourth, Gensler argues the ALJ demonstrated bias and abused his discretion by limiting the number of witnesses he could call but allowing respondents to call as many witnesses as it wished.

Fifth, Gensler asserts the ALJ showed bias and abused his discretion by relying "on his own speculation to bolster his 'evident unfitness' conclusion."¹³

Because Gensler does not provide any legal authorities in support of these arguments, we decline to

¹³ Gensler also argues the trial court did not address his unfairness and bias arguments. We disagree. Even if the court did not, we have addressed Gensler's arguments *ante*.

App-41

address them.¹⁴ (See *Pinter-Brown, supra*, 48 Cal.App.5th at p. 95.)

DISPOSITION

The judgment is affirmed. Respondents are entitled to costs.

MOTOIKE, ACTING P. J.

WE CONCUR:

SANCHEZ, J.

GOODING, J.

¹⁴ In his reply brief, Gensler contends respondents fail to address the misconduct and therefore concede the existence of the misconduct. Gensler "misperceives his role as appellant: it is" his, rather than respondents', "burden to affirmatively demonstrate error. [Citation.] This burden remains the same whether or not" respondents file "a brief or provide[] argument or authority on an issue." (*Doe v. McLaughlin, supra*, 83 Cal.App.5th at p. 654.) Additionally, in his reply brief, Gensler argues respondents misstate the evidence in the "Statement of Facts" of their brief. As Gensler does not cite any legal authorities in support of his argument, we deem them forfeited. (See *Pinter-Brown, supra*, 48 Cal.App.5th at p. 95.)

App-42

Appendix B

[Filed: Feb. 27, 2024]

SUPERIOR COURT OF
THE STATE OF CALIFORNIA
COUNTY OF ORANGE - CENTRAL JUSTICE
CENTER

HOWARD GENSLER,

Petitioner,

v.

BOARD OF TRUSTEES
OF THE SOUTH OR-
ANGE COUNTY COM-
MUNITY COLLEGE
DISTRICT and THE
SOUTH ORANGE
COUNTY COMMUNITY
COLLEGE DISTRICT,

Respondents

30-2021-01177691

**ORDER DENYING
PETITION FOR WRIT
OF MANDATE**

Hon. Kimberly A. Knill

Dept. C31

The case was extensively briefed (ROAs 69, 94, 96), and no party requested a hearing, oral argument or statement of decision. After considering the administrative record and written argument, the court now rules.

- The petition for writ of mandate is denied.

- Respondents' counsel is ordered to submit a proposed judgment for the court's review and signature within 5 days. (Code Civ. Proc., § 1094.6, subd. (f).)

I. Factual and Procedural History¹

Petitioner, Howard Gensler holds undergraduate degrees from UC Irvine in five disciplines, a Master of Public Policy and Juris Doctor from UC Berkeley, and a Master of Arts and Doctor of Philosophy (Ph.D.) from UC Irvine. Respondent, South Orange County Community College District (District)⁰ employed petitioner as a regular academic employee from 1/1/2003 until his 2019 termination by respondent, Board of Trustees of the South Orange County Community College District (Board). Petitioner was a full-time faculty member in the Economics and Political Science Departments, Social and Behavioral Sciences Division, at Saddleback College. Petitioner held a life California community college teaching credential in economics, law, social sciences, public services and administration, and government.

On 6/12/2019, Dr. Elliot Stern, Saddleback College's President, signed a 25-page Accusation alleging causes for dismissal against petitioner for evident unfitness for service (Ed. Code, § 87732, subd. (d)²); and persistent violation of, or refusal to obey, the school laws of the state or reasonable regulations prescribed for the government of the District's board (*id.* at subd. (f).) The Accusation specifies multiple instances of

¹ Additional legally significant facts are referenced, *infra*.

² All statutory references are to the Education Code unless otherwise specified.

alleged misconduct from the Fall 2015 through Spring 2018 semesters.

After a 10-day hearing, on 10/15/2020, Administrative Law Judge Adam L. Berg (ALJ) issued an opinion concluding cause exists to dismiss petitioner pursuant to section 87732, subdivisions (d) and (f), and respondents' decision to dismiss petitioner from employment is reasonable and supported by a preponderance of evidence.

On 1/6/2021, petitioner filed a verified petition for writ of mandate pursuant to Code of Civil Procedure section 1094.5 [review of an adjudicatory decision]. The petition, an appeal from the ALJ's decision, alleges six causes of action styled more aptly as argument headings. In his prayer for relief, petitioner requests a writ of mandate ordering respondents to reinstate him as a full-time tenured faculty member of Saddleback College, to reimburse him for lost wages and benefits, and for costs and attorney fees.

The petition was tried to the court (Hon. Derek Hunt) on 10/22/2021. Petitioner requested a statement of decision, and on 12/6/2021, the court issued a one, remitting the cause to respondents for a review of petitioner's employment evaluation. The court later issued a 3/21/2022 order remanding the proceedings in accordance with the statement of decision.

Petitioner appealed (Case No. G061503). On 8/22/2023, the Court of Appeal dismissed the appeal for lack of jurisdiction, finding the trial court's remand order was not appealable. The Court of Appeal remanded to this court for further proceedings.

II. Standard of Review

The inquiry into the validity of an administrative order or decision

shall extend to questions whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

(Code Civ. Proc., § 1094.5, subd. (b).)

Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(*Id.*, subd. (c).)

In a proceeding on a writ of administrative mandate, 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. Though the trial court is required to exercise its independent judgment on the evidence, it is to give a strong presumption of correctness to the [agency]'s findings.

(*Crawford v. Commission on Professional Competence of Jurupa Unified School Dist.* (2020) 53 Cal.App.5th 327, 336.)

III. Respondents Did Not Act in Excess of Jurisdiction

Petitioner contends respondents lacked jurisdiction to terminate him, because they did not conduct a statutorily required faculty evaluation within three years preceding the initiation of termination proceedings.

Section 87671 states in pertinent part, "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."

Having charged petitioner with violation of sections 87732, subdivisions (d) and (f), respondents were required to comply with the evaluation requirement of section 87671. Section 87663 addresses the standards and procedures for evaluations. Section 87663, subdivision (a), states, "Regular employees shall be evaluated at least once in every three academic years."

Petitioner's last evaluation was completed on 11/2/2015, and covered the period from 10/17/2012 to 11/2/2015. The ALJ found since the last evaluation was during the 2015-2016 academic year, an

App-47

evaluation needed to be completed before the end of the 2018-2019 academic year, or May 2019. The ALJ further found the notice of termination in January 2019 preempted the need for another evaluation and there was no violation of Section 87663. (Office of Administrative Hearings Clerk's Record (OAH) pp. 4744-4745.)

Petitioner argues the termination proceedings were void ab initio, citing *Tarquin v. Comm'n on Prof. Competence* (1978) 84 Cal.App.3d 251 (*Tarquin*). Petitioner is correct the ALJ incorrectly applied *Tarquin*, because unlike former section 13407 at issue in *Tarquin*, the statute applicable here, section 87671, subdivision (a), requires a current faculty evaluation for dismissal for *any of the grounds set forth* in Section 87732, including "evident unfitness for service" and "persistent violation of, or refusal to obey" as alleged against petitioner.

However, the ALJ also found respondents had jurisdiction because they substantially complied with the evaluation requirement, relying on *Miller v. Chico Unified Sch. Dist. Bd. Of Educ.* (1979) 24 Cal.3d 703, 717 (*Miller*). The doctrine of substantial compliance excuses literal noncompliance when there has been "actual compliance in respect to the substance essential to every reasonable objective of the statute." (*Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, 1430 (citation omitted).)

The ALJ did not err in finding substantial compliance with the evaluation requirement. Although petitioner's last performance evaluation was completed on 11/2/2015, it was signed on 2/11/2016, which is within three years of the Statement of Charges and Recommendation for Termination dated 1/31/2019. (OAH pp.

19, 4744.) Moreover, after petitioner's last evaluation, respondents provided numerous notices of his unsatisfactory performance.

On 7/7/2016, Dean Cadence Wynter gave petitioner a 90-day Notice of Unprofessional Conduct and/or Unsatisfactory Performance - Notice to Correct Deficiencies. The letter included six directives to petitioner: immediately stop his unprofessional conduct; treat all students with respect, dignity, and civility; neither retaliate against nor confront students or employees concerning the complaints discussed in the letter; attend anti-discrimination and harassment training of at least two hours provided by or approved by the District; adhere to all District policies and regulations referred to in the letter; and establish a classroom environment conducive to learning, model effective critical thinking by being open to differences of opinion, invite students to think independently, stimulate students' interest and desire to learn, provide a positive learning environment for all student populations, and demonstrate sensitivity in working with students and employees with diverse backgrounds and needs. The 90-day Notice directed petitioner to correct the deficiencies immediately and warned should petitioner "continue to demonstrate the types of behavior discussed in this notice, you will be subject to further disciplinary action, up to and including dismissal from employment." (OAH p. 482.)

On 10/12/2016, Wynter again met with petitioner to address an informal student complaint. In an email dated 10/13/2016, Wynter summarized the meeting stating: "Calling the student 'pampered' is derogatory and subjective. While I know this is not an isolated incident, I expect it to be the last one. Effective

immediately, you are to treat students with respect and not publicly castigate them. More importantly, you are not to make assumptions about students based on their national origin." (OAH p. 579)

On 9/13/2017, Interim President Denise Whittaker met with petitioner and on 9/19/2017 sent him a memo stating, "After much discussion, you assured me that you understand that I was alerting you to potential future action if student complaints result in findings of unprofessional conduct." (OAH p. 582)

Based on the above notices and meetings, even though no formal performance evaluation was completed for the relevant time period, respondents substantially complied with the evaluation requirement, and, like in *Miller*, petitioner thereby knew of respondents' close attention to his performance and specific ways in which he could alleviate their concerns. (*Miller, supra*, 24 Cal.3d at p. 717; see *Governing Bd. v. Comm'n On Pro. Competence* (1985) 171 Cal.App.3d 324, 333 ["To allow hypertechnical procedural oversights to thwart the orderly process delineated by the statutory scheme would be to exalt form over substance and would result in an abuse of the judicial process."].)

Petitioner has not demonstrated the ALJ erred in determining respondents did not act in excess of jurisdiction

IV. The ALJ Did Not Abuse His Discretion in Considering Petitioner's "Unprofessional Conduct"

Petitioner contends the ALJ committed legal error when, after the hearing and on his own initiative, he constructed an unprofessional conduct charge, which

was not charged by respondents, and which constitutes a separate ground for termination under section 87732, subdivision (a).

The ALJ acknowledged petitioner was not charged with unprofessional conduct under section 87732, subdivision (a), but found instances of unprofessional conduct are relevant to a charge for evident unfitness to teach, citing *Perez v. Commission on Professional Competence* (1983) 149 Cal.App.3d 1167, 1174, *Shea v. Bd. Of Medical Examiners* (1978) 81 Cal.App.3d 564, 575 and *Bd. Of Education v. Swan* (1953) 41 Cal.2d 546, 553. (OAH p. 4646, fn. 18.)

Petitioner relies on *Woodland Joint Unified Sch. Dist. V. Comm'n on Pro. Competence* (1992) 2 Cal.App.4th 1429 (*Woodland*) to argue the ALJ erroneously equated unprofessional conduct with evident unfitness for service. The *Woodland* court found "Unprofessional conduct is, as it were, often a lesser included form of proscribed behavior within evident unfitness for service. Thus, conduct constituting evident unfitness for service requires that unfitness for service be attributable to a defect in temperament—a requirement not necessary for finding of unprofessional conduct." (*Id.* at p. 1445 (cleaned up).)

The ALJ's treatment of petitioner's unprofessional conduct is not inconsistent with *Woodland*. Petitioner has not demonstrated the ALJ committed legal error constituting an abuse of discretion.

V. The ALJ Did Not Abuse His Discretion in Finding Petitioner's Action Are Not Protected by the First Amendment and Academic Freedom Rights

Petitioner contends the ALJ committed legal error in holding petitioner's classroom statements are not protected by his First Amendment and academic freedom rights. He argues his speech was directly relevant to the curriculum or could be characterized as playful familiarity and trivial profanity intended to be humorous and used as interjection.

The District alleged during the Fall 2017 American Government class, Petitioner said that Iranian women dressed like "hookers." The ALJ found, "[b]ased on the totality of the circumstances, the [D]istrict established that the story about Iranian women dressing like prostitutes violated [Board Policy (BP)] 4000.5 and [Administrative Regulation (AR)] 4000.5. The reference to 'hookers' constituted 'inappropriate or offensive' remarks based on gender and national origin." (OAH p. 4739.)

The District alleged during the Spring 2018 American Government course, petitioner continued to violate multiple directives. The ALJ found a preponderance of the evidence established petitioner told a story about a former student in which he described her scant attire and breast size; repeatedly used the word "lard" (short for retarded) to describe himself and students; referred to wives as "bitches"; wore a jacket containing Playboy insignias to class; and made a crude reference to Ariana Huffington performing oral sex in order to achieve political recognition. The ALJ found these comments cumulatively constituted hostile or

offensive conduct in violation of BP 4000.5 and AR 4000.5. (OAH p. 4739-4740.)

Petitioner relies on *Cohen v. San Bernardino Community College District* (9th Cir. 1996) 92 F.3d 968, 971-972 (*Cohen*), which found the college's sexual harassment policy unconstitutionally vague as applied. Petitioner contends Bp 4000.5 on harassment and discrimination prevention is similarly unconstitutionally vague, because it lacks content detail and does not substantially elucidate what speech is forbidden.

Unlike the sexual harassment policy in *Cohen* which vaguely proscribed "intimidating, hostile, or offensive learning environment," (*Cohen, supra*, 92 F.3d at p. 971) the District's harassment policy provided in AR 4000.5 specifically describes conduct which constitutes harassment and is not unconstitutionally vague. The District specifically states verbale harassment is prohibited and may include:

Inappropriate or offensive remarks, slurs, jokes or innuendoes based on a person's race, gender, sexual orientation, or other protected status. This may include, but is not limited to, inappropriate comments regarding an individual's body, physical appearance, attire, sexual prowess, marital status, or sexual orientation; unwelcome flirting or propositions; demands for sexual favors, verbal abuse, threats or intimidation; or sexist, patronizing or ridiculing statements that convey derogatory attitudes based on gender, race, nationality, sexual

orientation or other protected status.
(OAH p. 1155.)

Further, unlike *Cohen*, here petitioner was on notice AR 4000.5 could be applied to petitioner's teaching style. The 90-Day Notice of Unprofessional Conduct and/or Unsatisfactory Performance dated 7/7/2016, notified petitioner of BP and AR 4000.5 and noted his comments to the military veteran and comments based on students' religious views violate AR 4000.5. (OAH p. 484.)

As to petitioner's argument the District should have an "offensive language" policy distinct from an anti-harassment/discrimination policy, *Cohen* does not address it, and petitioner has not submitted any relevant legal authority in support.

Petitioner also argues the ALJ improperly applied the analysis set forth in *Pickering v. Board of Education* (1968) 391 U.S. 563, 568 (*Pickering*) to find petitioner's comments were not protected by the First Amendment.

The Ninth Circuit has held "teaching and academic writing that are performed pursuant to the official duties of a teacher and professor . . . is protected under the First Amendment, using the analysis established in *Pickering*. The *Pickering* test has two parts. First, the employee must show that his or her speech addressed matters of public concern. Second, the employee's interest in commenting upon matter of public concern must outweigh the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." (*Demers v. Austin* (9th Cir. 2014) 746 F.3d 402, 412 (cleaned up) (*Demers*).)

Petitioner disputes the applicability of *Pickering* and *Demers*, arguing neither case involved or analyzed the First Amendment and free speech rights accorded a college professor in the classroom. It is a distinction without a difference. In *Demers*, the Ninth Circuit held the *Pickering* analysis is applicable to academic speech. (*Demers, supra*, 746 F.3d at p. 412.) Petitioner has not attempted to establish his speech meets the *Pickering* test as applied in *Demers*. Notably, petitioner appears to concede some of his speech was unrelated to the curriculum, but he believes it amounted to playful familiarity and trivial profanity, intended to be humorous and used as interjection.

Petitioner next contends he did not violate BP 4000.5 and AR 4000.5. Many of petitioner's comments were directed to an individual's body and physician appearance. Others were inappropriate or offensive based on students' protected status (race, gender, etc.). (See OAH p. 1154 et seq.) (See also discussion under Part VII, *infra*.)

Petitioner has not demonstrated the ALJ committed legal error constituting an abuse of discretion, or that the findings are not supported by the weight of the evidence.

VI. Petitioner Received a Fair Trial

Petitioner contends he did not receive a fair trial, because the District failed to provide complete and precise notice of the charges against him in compliance with section 87672 which provides, "If a governing board decides it intends to dismiss or penalize a contract or regular employee, it shall deliver a written statement, duly signed and verified, to the employee setting forth the complete and precise decision of the

governing board and the reasons therefor." The District's statement of charges is a 25-page document with 892 pages of exhibits. Although the statement of charges is lengthy, the court determines it sufficiently provided "complete and precise" notice to petitioner of charges against him. (OAH p. 222, et seq.)

Petitioner contends respondents acted unfairly by submitting a witness list identifying 33 witnesses even though they called only 18 witnesses, eight of whom were students. Petitioner has not shown the uncalled witnesses were listed on the witness list for an improper purpose. Petitioner complains the District refused to provide the students' contact information. Initially, the District only provided the first name and last initial of the students, but on 12/16/2019, the ALJ ordered the District to provide identifying information for the students respondents intended to call. (OAH pp. 1240-1241.) The identifying information was provided to petitioner the following day. (*Id.* at p. 1254-59.) Petitioner had six weeks before the hearing to depose or interview the witnesses.

Petitioner contends the ALJ improperly characterized his percipient student witnesses as character witnesses which caused petitioner to cancel several other student witnesses and instead call only five student witnesses to testify on his behalf. Although the ALJ indicated having five students testify generally to the same topic would be sufficient, it was petitioner's decision to not call the additional witnesses. Further, the ALJ's view the testimony was character evidence and cumulative was not error. The student witnesses who testified on behalf of petitioner all offered testimony concerning petitioner's reputation and whether petitioner made racist or sexist comments.

Petitioner has not established the ALJ failed to conduct a fair trial.

VII. The ALJ Did Not Abuse His Discretion in Finding Petitioner's "Unfitness to Teach"

Petitioner contends the ALJ committed legal error in finding petitioner violated section 87732, subdivision (d), which authorizes dismissal for evident unfitness for service. The ALJ found petitioner's comments created a hostile environment that interfered with the learning or work activities of several students. (OAH p. 4740.) Petitioner argues the ALJ cobbled together a hypothetical hostile environment charge not included in the Accusation.

The Accusation in paragraph 83 alleges the District has provided training to Gensler regarding its harassment policy and harassment prevention. Despite attending this training, Gensler's conduct continues to repeatedly violate District policy. (OAH p. 244.) The Accusation in paragraph 86 further alleges the conduct disrupts the educational process, because Gensler persistently violates District policies and procedures and creates a hostile environment for students. (OAH p. 244.) The ALJ did not cobble together a hypothetical hostile environment charge not included in the Accusation.

Petitioner also argues the ALJ improperly applied the *Morrison v. State Board of Education* (1969) 1 Cal.3d 214 (*Morrison*) factors. In *Morrison*, the 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.) "These factors are relevant to the extent that they assist the board in determining ... 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." (*Id.* at pp. 229-30.) "[N]ot all *Morrison* factors need be examined, only the pertinent ones." (*Governing Board v. Haar* (1994) 28 Cal.App.4th 369, 384.)

Petitioner argues the ALJ determined in a conclusory manner the factors set forth in *Morrison* were established when the "ALJ's 137-page decision is devoid of any explanation as to how those factors should be analyzed and applied." Not so. The ALJ extensively analyzed *Morrison* and how the factors applied to this matter in pages 106 through 110. (OAH pp. 4724-4728.)

Petitioner also incorrectly argues the *Morrison* factors do not apply to a charge of evident unfitness for service. Petitioner contends the *Morrison* factors weigh immoral behavior to see if they affect one's teaching ability which is a different question from the actual prohibition on evident unfitness for service. The court in *Woodland* discussed this issue and found the *Morrison* factors apply as well to actions based

only on evident unfitness for service. (*Woodland, supra*, 2 Cal.App.4th at p. 1445.) "Our conclusion does not mean that the criteria for unfitness set out in *Morrison* ... may be disregarded where 'evident unfitness for service' is at issue. These criteria must be analyzed to determine, as a threshold matter, whether the cited conduct indicates unfitness for service. If the *Morrison* criteria are satisfied, the next step is to determine whether the 'unfitness' is 'evident'; i.e., whether the offensive conduct is caused by a defect in temperament." (*Ibid.* (citation omitted).)

The ALJ properly applied the Morrison factors. (OAH pp. 4724-4728.) The ALJ analyzed petitioner's behavior concerning five students (Adrian, Anand, Jordan, Pardis, and Emma), including, inter alia:

- petitioner telling a military veteran he was wasting his life and asking, "How many people did you have to kill to get into this class?" and "Come over here so I can slit your throat.";
- petitioner demeaning students in class, laughing at students, and telling a student, "That's a rude thing to say to your professor" when the student said she felt intimidated to ask petitioner a question in class;
- petitioner telling a student if she could not keep up with assignments, maybe college was not for her, when there was a glitch in Blackboard, an online program, and asking the student if her parents had graduated from college, stating, "I wasn't sure because of your last name." (Jordan has a Hispanic last name);
- petitioner telling class that women in Iran dressed like hookers and all Iranian women were hookers, Middle Easterners hate Israel and

Persians (Pardis is Middle Eastern and Persian), Iranians are jerks and deserve to have U.S. weapons sold to Saddam Hussein to use against them, i.e., "Iranians deserve it";

- petitioner telling a story about a female student who arrived for a tour of the jail wearing "painted [on] clothing" and talking about the student's hair color and breasts;
- during an exercise about the cost of living in California and how much a single mother would have to budget for life, petitioner including feminine hygiene products in the budget and making a statement about women being swindled by auto mechanics because they know nothing about cars and referring to single mothers as bitches;
- petitioner referring to Arnold Schwarzenegger as a Nazi;
- petitioner referring to rape excessively in class;
- petitioner referring to Spanish people who used to be beautiful with blond hair and blue eyes until they were colonized by another people and became ugly with black hair and big noses;
- petitioner saying Russians were horrible at raping people, but the Japanese are worse;
- petitioner calling students who were too slow "tards."

As provided by *Woodland*, the ALJ also examined whether the unfitness is evident. (OAH pp. 4742-4743.) The ALJ concluded petitioner does not have the temperament to comport his behavior to the professional standards expected by the District. (OAH pp. 4743-4744.)

Petitioner has not demonstrated the ALJ committed legal error constituting an abuse of discretion, or that the findings are not supported by the weight of the evidence.

VIII. The ALJ Did Not Abuse His Discretion I Finding Petitioner's Persistent Failure to Follow Rules

Petitioner contends the ALJ committed legal error in finding Petitioner violated section 87732, subdivision (f) which authorizes dismissal for 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.

The ALJ found the violation of the District's harassment/discrimination policy and regulation evidences unfitness to teach, which was persistent. (OAH pp. 4740-4741.) The ALJ found petitioner "ignored directives in 2010 and 2016 to comply with district policies and regulations. Although the evidence established that [petitioner] violated the harassment/discrimination rules in the course of a single school year, the violations were permeated with an attitude of continued insubordination or willful disobedience to the [D]istrict's directives. As such, the continuous use of inappropriate language that violated [D]istrict harassment policies was persistent." (OAH p. 4741.)

The evidence reflects petitioner's conduct establishes a persistent violation of, or refusal to obey the District rules. Continuing or repeated refusal, as opposed to isolated behavior, is sufficient to establish persistent conduct. (*Governing Board of the Oakdale*

App-61

Union School Dist. v. Seaman (1972) 28 Cal.App.3d 77, 82 [persistent "has been interpreted to mean 'continuing or constant' ".]

Petitioner has not demonstrated the ALJ committed legal error constituting an abuse of discretion, or that the findings are not supported by the weight of the evidence .

App-62

Appendix C

[Filed: Oct. 14, 2020]

In the case of the
Termination of Howard Gensler.

Office of Administrative Hearings Case No.
2019040965.

LEGAL CONCLUSIONS

1. A community college district that seeks to dismiss a tenured academic employee bears the burden of establishing the appropriateness of that action by a preponderance of the evidence. (Evid. Code, §§ 115; 500; *Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035.) "Preponderance of the evidence" means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that one is unable to say that the evidence on either side of an issue preponderates, the finding on that issue must be against the party who had the burden of proving it. (*People v. Mabini* (2000) 92 Cal.App.4th 654, 663.)

Applicable Law

2. Education Code sections 87667 provide that a regular employee may be dismissed for one or more of the grounds set forth in Section 87732. In addition, Section 87671 requires the following conditions to be satisfied:

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

App-63

(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.

3. Education Code section 87663, subdivision (a), provides that regular employees shall be evaluated at least once in every three academic years. The governing board of the district must adopt rules and regulations establishing the specific procedures for the evaluation of its contract and regular employees. (Ed. Code, § 87664.)

4. A regular academic employee may be dismissed for "Evident unfitness for service" and "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." (Ed. Code, § 87732, subds. (d) & (f).)

5. If a board decides it intends to dismiss a regular employee, it must deliver a verified written statement to the employee setting forth the complete and precise decision of the board and the reasons therefor.

(Ed. Code, § 87672.) "A governing board may postpone the operative date of a decision to dismiss or impose penalties for a period not to exceed one year, subject to the employee's satisfying his or her legal responsibilities as determined by statute and rules and regulations of the district. At the end of this period of probation, the decision shall be made operative or permanently set aside by the governing board." (*Ibid.*)

6. The ALJ shall determine whether there is cause to dismiss or penalize the employee, and if so, determine whether the employee shall be dismissed and determine the precise penalty to be imposed, and shall determine whether the decision should be imposed immediately or postponed pursuant to Section 87672. (Ed. Code, § 87680.) "No testimony shall be given or evidence introduced relating to matters which occurred more than four years prior to the date of the filing of the notice. Evidence of records regularly kept by the governing board concerning the employee may be introduced, but no decision relating to the dismissal or suspension of any employee shall be made based on charges or evidence of any nature relating to matters occurring more than four years prior to the filing of the notice." (*Ibid.*)

Applicable District Policies, Regulations

7. District Board Policy (B.P.) 4000.5 "Harassment and Discrimination Prevention and Complaints" (Rev. 9/24/12) reflects the district's commitment "to providing an academic and work environment that respects the dignity of individuals and groups." The policy prohibits harassment and discrimination based on any legally protected characteristic, including "race, color, ancestry, national origin, physical disability,

mental disability, medical condition, marital status, sex, gender, or the perception that a person has one or more of the foregoing characteristics." The policy applies to any aspect of the academic environment, including classroom conditions, grades, and participation in any community college activity. The policy requires the Chancellor to adopt regulations pursuant to the policy.

8. Administrative Regulation (A.R.) 4000.5 "Harassment and Discrimination Prevention and Complaints Procedures" (6/28/10) provides specific definitions and complaint procedures for harassment and discrimination. Like the board policy, the regulations prohibit harassment based on a protected characteristic. It provides additional guidance on gender-based harassment and states it "does not necessarily involve conduct that is sexual. Any hostile or offensive conduct based on gender can constitute prohibited harassment." (*Id.*, subd. II.A.2..) Forms of prohibited harassment for all categories include, but are not limited to the following:

1. Verbal:

Inappropriate or offensive remarks, slurs, jokes or innuendoes based on a person's race, gender, sexual orientation, or other protected status. This may include, but is not limited to, inappropriate comments regarding an individual's body, physical appearance, attire, sexual prowess, marital status, or sexual orientation; unwelcome flirting or propositions; demands for sexual favors; verbal abuse, threats or intimidation; or sexist,

App-66

patronizing or ridiculing statements that convey derogatory attitudes based on gender, race, nationality, sexual orientation or other protected status.

[¶] . . . [¶]

4. Environmental

A hostile academic or work environment may exist where it is permeated by sexual innuendo; insults or abusive comments directed at an individual or group based on gender, race, nationality, sexual orientation or other protected status; or gratuitous comments regarding gender, race, sexual orientation, or other protected statuses that are not relevant to the subject matter of the class or activities on the job. A hostile environment can arise from:

an unwarranted focus on sexual topics or sexually suggestive statements in the classroom or work environment;

an unwarranted focus on, or stereotyping of particular racial or ethnic groups, sexual orientations, genders, or other protected statuses;

An environment may be hostile toward anyone who merely witnesses unlawful harassment in their immediate surroundings, although the conduct is directed at others. The determination of whether an environment is hostile is

App-67

based on the totality of the circumstances, including such factors as the frequency of the conduct, the severity of the conduct, whether the conduct is humiliating or physically threatening, and whether the conduct unreasonably interferes with an individual's learning or work activities.

Academic Freedom¹

The policy will be implemented in a manner that recognizes principles of free speech and academic freedom. (*Id.*, subd. (II.B))

9. Administrative Regulation 5413 "Nondiscrimination" (6/28/10) affirms the District's commitment to providing an academic and work environment free of unlawful discrimination in educational programs and employment and provides "designated officers" charged with receiving complaints.

10. The Saddleback "Faculty Code of Ethics and Professional Standards" (10/14/98) (Code of Ethics) approved by the Academic Senate provides standards of conduct for faculty members and is based on the standards set forth by the American Association of University Professors. The document provides ethical principles and standards of conduct faculty must exhibit in relation to students, colleagues, their discipline, the college, and the community. The

¹ In its closing argument, the district cites language in the regulation related to academic freedom. However, this language was added in an October 2019 revision, and is inapplicable to this case.

Saddleback "Faculty Handbook" (Rev.8/16) published by the Academic Senate references the Code of Ethics and gives "fair notice to all that departures from these standards may rise to disciplinary proceedings." (*Id.* at p. 31.)

Persistent Violation/Refusal

11. The district alleges that respondent is subject to dismissal for persistent violation of, or refusal to obey, laws or the district's regulations. (§ 87732, subd. (f).) As grounds for dismissal, the district generally contends that respondent persistently violated directives regarding his behavior; board policy and administrative regulations relating to harassing and discriminatory behavior; the Faculty Code of Ethics and Faculty Handbook; and the Statement of Mutual Respect and Collegial Behavioral.

Specifically, the district contends respondent failed to comply with the directives contained in the 90-day notice issued in 2010 by failing to refrain from the use of profanity in the classroom, physically assaulting a student in class, continuing to violate district policies, and intimidating students. The district further contends respondent failed to comply with the directives contained in the 90-day notice issued in 2016, and directives issued by Whittaker in 2017, with regards to complaints by Anand, Jordan, Pardis, Emma, Carrissa, and Michael. Finally, the district contends that Reilly's investigation uncovered additional examples where respondent's conduct violated directives.

**RESPONDENT PERSISTENTLY VIOLATED
DISTRICT REGULATIONS**

12. Section 87732, subdivision (f), authorizes respondent's dismissal for persistent violation of, or refusal to obey, the school laws of the state or reasonable prescribed by the district's board (persistent violation/refusal).

The district argues that respondent violated multiple directives by college administrators to modify his behavior, which constitutes persistent violation/refusal under Section 87732, subdivision (f). In this regard, the district appears to conflate this provision with that of "insubordination" or "willful disobedience," which are frequently grounds for dismissal in other public employment (*cf.* Gov. Code, § 19572, subd. (e) & (o)) but are not included for academic employees under the Education Code. While the district contends that respondent repeatedly disregarded directives contained in the two 90-Day Notices, in order to constitute cause for discipline under Section 87732, subdivision (f), those directives must relate to a school law 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." Put another way, unless violation of the directive also violates a law or district regulation, subdivision (f) is not implicated. For example, the district alleges that respondent violated the directive to cease using profanity in the classroom. It is uncontested that respondent refused (persistently) to follow this directive. Yet, refusal to follow the directive is not dispositive of a violation. In order to constitute grounds for dismissal under this charge, the use of profanity

App-70

must have violated a law or policy/regulation promulgated by the board. The district cites no such policy. In fact, the only policies and regulations cited by complainant are B.P. 4000.5 and A.R. 4000.5 and 5413. Although the district also cites the Faculty Code of Ethics, Faculty Handbook, and Statement of Mutual Respect, none of these documents qualifies as a regulation prescribed by the board. The Faculty Senate is not the district's governing board, and unless the board expressly delegated it rulemaking authority, neither the Code of Ethics nor Faculty Handbook can constitute a district regulation within the meaning of subdivision (f). Accordingly, the directives contained in the two 90-day notices are largely superfluous for purposes of discipline under subdivision (f), unless the conduct independently violates a law or regulation.²

13. Turning to the specific allegations contained in the Accusation and the district's closing argument, the district alleges respondent used frequent profanity in the classroom, including "shit," "what the fuck," "horseshit," and "bitches." As previously discussed, there was no evidence that the board has adopted a policy or authorized regulations related to the use of profanity in the classroom. The district did not explicitly contend that the use of profanity constituted a violation of either the harassment/discrimination policy or regulation. None of the examples of profanity cited in the accusation implicate this policy/regulation. The

² Of course, this does not render directives issued in accordance to a 90-Day notice meaningless; failure to follow the directives could result in charges of unprofessional conduct, unsatisfactory performance, or evident unfitness. (§ 87732, subds. (a), (c), & (d).) However, failure to adhere to the directives only constitute persistent violation/refusal if a law or regulation is also violated.

reference to wives as "bitches" in the "punchline" of a lecture on the banking system is discussed in relation to other comments.

14. The district alleges respondent assaulted Adrian by threatening to kill him. The claim that respondent assaulted Adrian lacks merit and is belied by the fact that had the district seriously believed respondent assaulted a student, it would not have waited four years to take any disciplinary action. As discussed extensively in the evaluation related to Adrian's complaint, the evidence did not establish respondent committed an assault, and thus violated a school law or district regulation (neither of which were cited).

The district also alleges that the statement, "How many people did you have to kill to get into this class?" violated a law or regulation. Although not conclusive, the district previously denied Adrian's unlawful discrimination complaint, which is strong evidence that even the district concluded that respondent did not discriminate or harass Adrian as a result of a protected status. The district offers no compelling argument to the contrary.

15. The district contends that respondent continued to use class rules that violate the 2010 90-day notice and district rules and regulations. Specifically, it argues that provisions regarding the use of humor in class, the requirement that students first meet with respondent before making a complaint with the district, and various other provisions respondent was directed to remove, remained in the class syllabus. The district cites examples from respondent's class rules from the Spring 2016 semester that violate the 2010 directive.

Although, the district correctly notes that the rules continued to violate the 2010 directive, the district failed to establish that respondent violated a law or district regulation. It is true that respondent's complaint procedures could conflict with the district's discrimination/harassment complaint procedures, which do not require a student to first attempt to resolve the issue with the subject of the complaint. The district clearly has the authority to direct respondent to cease using the provision in his rules. While continued use of this provision could be cause for other statutory bases for discipline, it is not persistent violation/refusal.

16. The district alleges respondent violated the 2010 directive not to impede a district investigation and not to have students sign a statement or contract regarding their conduct in class. The district cites respondent's use of his own student evaluation and alleges respondent impeded the Roth investigation into complaints by Adrian, Jordan, and Anand. The district cites the February 8, 2017, letter from Bugay directing respondent to appear for an investigative interview. The letter also states that respondent's "excuses for attempting to circumvent this investigation are not justified."

These allegations are not contained in the Accusation. Even if they were, the district failed to establish respondent violated a law or district regulation. Even if there exists a regulation requiring respondent's cooperation with a district investigation (none was cited), respondent did appear for the investigative interview after being directed to do so. The district failed to establish that respondent was under any legal obligation to meet with Roth until he was ordered to do so by Bugay.

17. The district alleges respondent violated district policies and procedures as it relates to Ben. Neither the Accusation, nor the district's closing, specify what regulation respondent violated. The Accusation only references Roth's conclusion that respondent "failed to take a proactive approach to assist a student with a physical disability by denying Ben P. class attendance points when Ben P.'s disability required his absence from class." While the district objects to the manner in which respondent dealt with the situation, none of the facts fall within the ambit of a violation of a district regulation, specifically harassment/discrimination.

18. The district alleges that after respondent received the 90-day notice on July 7, 2016, he continued to violate district directives the following semester. In the case of the Fall 2016 Economics class, the district asserts respondent demeaned of students, embarrassed a student who was asking Anand a question during class, embarrassed a foreign student by writing her name on the board to highlight that she wrote her name incorrectly, and made disparaging remarks about the military.

Again, the district did not cite a regulation respondent violated. The allegation that respondents made disparaging remarks about the military is not contained in the Accusation. Regardless, Anand's testimony on this issue is not credible. The district failed to establish that respondent's conduct in the class, as alleged in the accusation, violated district regulations.

19. The district alleges that in the Fall 2016, respondent's interaction with Jordan violated district directives. No violation of any district regulation was established.

20. The district alleges that during the Fall 2017 American Government class, respondent said that Iranian women dressed like "hookers"; made comments about Middle Easterners hating Persians; and during a lecture on the Iran-Iraq war, said the United States sold weapons to Iraq because Iranians were "jerks" and called Iranians evil.

Based on the totality of the circumstances, the district established that the story about Iranian women dressing like prostitutes violated B.P 4000.5 and A.R. 4000.5. The reference to "hookers" constituted "inappropriate or offensive" remarks based on gender and national origin.

21. The district alleges that during the Spring 2018 American Government course, respondent continued to violate multiple directives. A preponderance of evidence established that respondent told a story about a former student in which he described her scant attire and breast size; repeatedly used the word "tard" to describe of himself and students; referred to wives as "bitches"; wore a jacket containing Playboy insignias to class; and made a crude reference to Ariana Huffington performing oral sex in order to achieve political recognition. These comments cumulatively constituted hostile or offensive conduct in violation of B.P. 4000.5 and A.R. 4000.5, as inappropriate or offensive remarks, jokes or innuendoes based on a person's gender or other protected status. They also constituted inappropriate comments regarding an individual's body, physical appearance, attire, and/or, were patronizing or ridiculing statements that conveyed derogatory attitudes based on a protected status. The gratuitous comments created a hostile academic environment

that interfered with the learning or work activities of several students.

THE VIOLATIONS RELATE TO FITNESS TO TEACH

22. A violation of section 87732, subdivision (f), must also be established by reference to the *Morrison* factors. (*San Dieguito, supra*, at pp.1182-83 (addressing Section 44932, subdivision (a)(7), applicable to public school teachers).) Application of the *Morrison* factors to the conduct that violated the district's harassment/ discrimination policies yield the same conclusions established in factual finding numbers 99 and 100 and indicate an unfitness to teach. The violation of the district's harassment/discrimination policy and regulation evidences unfitness to teach.

RESPONDENT'S REFUSAL TO FOLLOW REGULATIONS WAS PERSISTENT

23. If unfitness to teach is shown, then the district must further establish that respondent's refusal to follow the laws or regulations was "persistent," i.e., "stubborn and continuing." (*San Dieguito, supra* at p. 1183; *Governing Board of the Oakdale Union High School District v. Seaman* (1972) 28 Cal.App.3d 77, 82 (*Oakdale*).) Courts interpreting the same provision for public school teachers (§ 44932, subd. (a)(7)) have focused obey rules and whether an employee was intentionally insubordinate. For example, in *Oakdale*, the Court of Appeal reversed a judgment for a school district in an action for dismissal where a special education teacher requested a leave of absence to accompany her husband abroad to study foreign special education programs. The district never responded to her

request, and she returned to school a month after the school year started. The Court of Appeal held that under the circumstances, the teacher's violation of the school's regulations was not "persistent." (*Id.* at p. 82.) In doing so, the Court of Appeal rejected as "specious" the district's argument that every day she was absent was a separate violation and demonstrated the "persistent" requirement of the statute.

Unlike in *Oakdale*, respondent ignored directives in 2010 and 2016 to comply with district policies and regulations. Although the evidence established that respondent violated the harassment/discrimination rules in the course of a single school year, the violations were permeated with an attitude of continued insubordination or willful disobedience to the district's directives. As such, the continuous use of inappropriate language that violated district harassment policies was persistent.

Evident Unfitness for Service

24. Section 87732, subdivision (d), "evident unfitness for service is established by conduct demonstrating that the teacher is "clearly not fit, not adapted or suitable for teaching, ordinarily by reason of temperamental defects or inadequacies." (*Woodland, supra* at p. 1444.) As a threshold matter, the *Morrison* criteria must be examined to ascertain whether the conduct in question indicates unfitness for service. "If the *Morrison* criteria are satisfied, the next step is to determine whether the 'unfitness' is 'evident'; i.e., whether the offensive conduct is caused by a defect in temperament." (*Id.* at p. 1445.)

Respondent's unfitness to teach was established pursuant to the *Morrison* factors, by reason of factual

App-77

finding numbers 99 and 100. Since unfitness to teach was established, it is necessary to examine whether such unfitness is "evident." The single most important consideration is that the district provided respondent with multiple opportunities to remediate his behavior. Respondent obstinately refused, believing that all the complaints against him were meritless. Respondent even ignored the simple directive to refrain from using profanity with students because he did not believe the district had the authority to issue him such a directive. Respondent's repeated assertion that the district's complaint investigation process was flawed because it did not contain the procedural protections investigations, those conducted by Roth in particular, this is not sufficient to nullify the associated with formal disciplinary action was misplaced. While there is some justification for respondent's frustration with some of the district's findings or justify defiance of directives issued hither. Likewise, respondent's belief that most of the complaints were made in "bad faith" because the complainant had ulterior motives is rejected. While an individual's subjective motivation in filing a complaint relates to his or her credibility and determination of adversity under *Morrison*, it has no bearing on the validity of the complaint itself. For example, respondent's contention that Anand had no "standing" to complain about respondent's interactions with regards to La is unpersuasive. Whatever motivation Anand had in complaining about respondent, the fact is respondent engaged in behavior that was inappropriate and unbecoming a tenured faculty member. Finally, while it is clear that respondent has had a contentious relationship with the district that started well before the period subject to the Accusation, his

App-78

belief that he has always followed the rules and the district's directives is wholly unsupported by the evidence.

Weighed against these considerations are respondent's many positive attributes. He has an impeccable educational background, is well-published, and has extensive academic experience. It is also established that many students had exceedingly positive things to say about respondent, and that he had a positive impact on their education. Not a majority, of students viewed respondent positively and believed he was an effective. In fact, the evidence from respondent's witnesses, evaluations, and students interviewed by Reilly spanning two semesters established that many, if not most, of his students viewed him as an effective instructor.

However, respondent expressed no remorse or acceptance of responsibility for his conduct. He maintains the erroneous position that in order to be effective, he needs to maintain the conversational, and often crude, language that one might overhear in a student dining room or on the sports field. The fact is, if respondent elected to do so, he could engage his students with the material, maintain participation, and exhibit the professionalism expected of a professor with respondent's academic pedigree. There are plenty of examples of educators across many different media platforms who do just that. Respondent's belief that the binary decision of being "off-the-wall Jerry Springer" or "boring textbook-reading Mr. Rogers" is simply a fallacy. Finally, and most concerning, is the way respondent dealt with students he deemed to be a problem. Respondent might be correct that most complaints were from "D" or "F" students. But the responsibility of a college professor is for *all* students –

not just the ones who do well or personally relate to respondent. Respondent's often derisive and dismissive attitude to those who questioned his authority highlight the fact that he lacks the temperament to be in a community college classroom. Accordingly, overwhelming evidence established that respondent does not have the temperament to comport his behavior to the professional standards expected by the district and is thus evidently unfit for service.

Respondent's Defenses

DISTRICT'S FAILURE TO TIMELY COMPLETE EVALUATION

25. Respondent contends the district failed to comply with Section 8761 because the district had not evaluated his performance in the previous three years in accordance with Section 87663, subdivision (a), which provides that "regular employees shall be evaluated at least once in every three academic years."³

Respondent's last evaluation was completed November 2, 2015, and covered the period from October 12, 2012, to November 2, 2015.⁴ Section 87663, subdivision (a), requires one evaluation every three academic years. Respondent's last evaluation was during the 2015/2016 school year. In order to comply with the

³ Subdivision (b), provides that the evaluation "shall be conducted in accordance with the standards and procedures established by the rules and regulations of the governing board of the employing district." The district's "Academic Employee Master Agreement 2015-2018" governs faculty evaluations and provides that the district will initiate the tenured faculty evaluation process every three years.

⁴ The evaluation was signed by the Saddleback President on February 11, 2016.

statute, the district was required to again evaluate respondent three academic years following the last evaluation, which would be during the 2018/2019 academic year. Thus, compliance with Section 87663, subdivision (a), would have been maintained so long as an evaluation was completed before the end of the 2018/2019 academic year, or May 2019. Respondent's notice of termination in January 2019 preempted the need for another evaluation. No violation of Section 87663 was established, and the district complied with the requirements of Section 87661.

Even had there not been strict compliance with Section 87661 based on failure to initiate the evaluation process every three years as specified in the district's collective bargaining agreement, the doctrine of substantial compliance may be applied to the instructor evaluation requirements. (*Miller v. Chico Unified Sch. Dist. Bd. Of Educ.* (1979) 24 Cal.3d 703, 717 (rejecting an "overly restrictive" interpretation of similar evaluation requirements in the Education Code).) In this regard, the district substantially complied with the statutory requirements. Finally, even if there were a technical violation of the instructor evaluation requirements, such a violation does not prohibit the district from pursuing respondent's dismissal on grounds other than instructor incompetence. (*Tarquin v. Commission on Professional Competence* (1978) 84 Cal.App.3d 251, 260.)⁵

⁵ In *Tarquin*, a teacher was charged with incompetency, evident unfitness for service, and persistent violation of, or refusal to obey, the school rules. (*Id.* at p. 255.) 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

VIOLATION OF RESPONDENT'S FIRST AMENDMENT RIGHTS

26. While respondent frames his dismissal as a "profanity" case, the causes for discipline extend beyond his actual speech in the classroom. Nevertheless, respondent contends that the district may not proceed with termination because it violated his rights under the First Amendment of the United States Constitution. In support of his position, respondent cites *Cohen v. San Bernardino Community College District* (9th Cir. 1996) 92 F.3d 968. The following summarizes the facts from the *Cohen* decision:

Cohen was a tenured professor at the College who taught English and Film Studies there since 1968. In the Spring of 1992, Cohen taught a remedial English class, which was a prerequisite to other college-level English classes. One student in the class became offended by Cohen's repeated focus on topics of a sexual nature, his use of profanity and vulgarities, and by his comments which she believed were directed intentionally at her and other female students in a humiliating and harassing manner. During this class Cohen began

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.*) In rejecting the teacher's claim, the Court of Appeal held that the district's failure to comply with the evaluation requirement precluded it only from proceeding against respondent on the charge of incompetency. (*Id.* at p. 260.) As to the remaining charges (evident unfitness for service and persistent violations of school laws and regulations), the evaluation requirements were inapplicable, and the district had jurisdiction to proceed on those grounds for removal which did not involve incompetency. (*Ibid.*)

a class discussion on the issue of pornography and played the "devil's advocate" by asserting controversial viewpoints. Cohen has for many years typically assigned provocative essays such as Jonathan Swift's "A Modest Proposal" and discussed subjects such as obscenity, cannibalism, and consensual sex with children in a "devil's advocate" style. During classroom discussion on pornography in the remedial English class in the Spring of 1992, Cohen stated in class that he wrote for Hustler and Playboy magazines and he read some articles out loud in class. Cohen concluded the class discussion by requiring his students to write essays defining pornography. When Cohen assigned the "Define Pornography" paper, the student asked for an alternative assignment, but Cohen refused to give her one.

The student stopped attending Cohen's class and received a failing grade for the semester. She subsequently complained about Cohen's statements and conduct to the chair of the English Department, asserting that Cohen had sexually harassed her. She subsequently filed a formal written student grievance against Cohen.

Following a hearing before a grievance committee, the Board found that Cohen engaged in sexual harassment which unreasonably interfered with an individual's academic performance and created an intimidating, hostile, or offensive learning environment. The College took adverse employment action against Cohen based on this conclusion. Cohen asserted that his First Amendment rights have been violated. (*Id.* at pp. 969 -971.)

The Ninth Circuit Court of Appeals concluded that the College's sexual harassment policy was

unconstitutionally vague as applied to Cohen but declined to define "the precise contours of the protection the First Amendment provides the classroom speech of college professors." (*Id.* at pp. 971-972.) In this case, the College punished Cohen based on his teaching methods under the provision of the sexual harassment policy that prohibited conduct having the "effect of unreasonably interfering with an individual's academic performance or creating an intimidating, hostile, or offensive learning environment." (*Id.* at p. 972.) The Court noted that Cohen used a confrontational teaching style designed to shock his students and make them think and write about controversial subjects. (*Ibid*) He assigned provocative essays and discussed controversial subjects. At times, he used vulgarities and profanity in the classroom and placed substantial emphasis on topics of a sexual nature. (*Ibid.*)

The court stated, "We do not decide whether the College could punish speech of this nature if the Policy were more precisely construed by authoritative interpretive guidelines or if the College were to adopt a clearer and more precise policy. Rather, we hold that the Policy is simply too vague as applied to Cohen in this case." (*Ibid*) The court highlighted that Cohen's speech did not fall within the core region of sexual harassment as defined by the Policy, but instead, officials of the College, on an entirely ad hoc basis, applied the Policy to punish teaching methods that Cohen had used for many years. "Cohen was simply without any notice that the Policy would be applied in such a way as to punish his longstanding teaching style—a style which, until the College imposed punishment upon Cohen under the Policy, had apparently been considered pedagogically sound and within the

Respondent argues that the district does not have an offensive language policy, and the "vague" policies cited in the Accusation are inadequate as a matter of law to apply to college instructors who approach controversial topics that might offend students and inspire complaints. Respondent also argues that the conduct by Cohen was "orders of magnitude" beyond what is alleged by respondent.

Respondent's reliance on *Cohen* is misplaced. The Ninth Circuit expressly declined to decide whether the College could punish Cohen's speech if the sexual harassment policy "were more precisely construed by authoritative interpretive guidelines or if the College were to adopt a clearer and more precise policy." (*Id.* at p. 972.) Moreover, the court determined that Cohen was never placed on notice that the sexual harassment policy would be applied to Cohen until he had been punished. (*Ibid.*) In this case, the constitutionality of the district's harassment/discrimination policy and regulation is outside the jurisdiction of the administrative hearing process. (See Cal. Const. art. III, § 3.5 (administrative agency has no power to refuse to enforce a statute, on the basis of its being unconstitutional unless an appellate court has decided that such statute is unconstitutional).) Notwithstanding, the district's harassment/ discrimination regulations are far more specific and precise than the one at issue in *Cohen*. Moreover, unlike in *Cohen*, respondent was placed on notice on multiple occasions that the district believed his classroom conduct to be inappropriate. Finally, because the *Cohen* court held that the College's harassment policy was unconstitutionally vague, it did not analyze whether Cohen's speech fell within First Amendment protections.

The Ninth Circuit has ruled that a public university professor's academic speech is protected by the First Amendment under the analysis set forth in *Pickering v. Board of Education* (1968) 391 U.S. 563, 568. (*Demers v. Austin* (9th Cir. 2014) 746 F.3d 402, 411–14.) The *Pickering* test contains two essential inquiries. First, for a public employee's speech to receive protection under the First Amendment, the employee must show that his or her speech addresses "matters of public concern." (*Pickering*, supra, at p. 568.) Second, an employee's interest "in commenting upon matters of public concern" must outweigh "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." (*Ibid*). Under this inquiry, the burden shifts to the government to show that its "legitimate administrative interests outweigh the employee's First Amendment rights." (*Thomas v. City of Beaverton* (9th Cir. 2004) 379 F.3d 802, 808.)

Along with these two essential inquiries, the Ninth Circuit has established several additional showings that a public employee must make in order to prevail on a First Amendment retaliation claim. (*Eng v. Cooley* (9th Cir. 2009) 552 F.3d 1062, 1070) A public employee must also show that the government "took adverse employment action . . . [and that the] speech was a 'substantial or motivating' factor in the adverse action." (*Id.* at p. 1071 (citing *Coszalter v. City of Salem* (9th Cir. 2003) 320 F.3d 968, 973).) And finally, if the government fails the balancing test, it alternatively bears the burden of demonstrating that it "would have reached the same [adverse employment] decision even in the absence of the [employee's] protected conduct." (*Id.* at p. 1072 (internal citations omitted).)

In this case, then, there is a four-step series of questions in order to determine whether the district disciplined respondent for exercising his free speech rights under the First Amendment: (1) whether respondent's speech involves a matter of public concern; (2) whether the district's legitimate administrative interests outweigh respondent's First Amendment rights to free speech; (3) whether respondent's protected speech was a substantial or motivating factor in an adverse employment action; and (4) whether the district would have subjected respondent to the adverse employment action even absent the protected speech. (*Demers, supra*, at p. 417.)

The first step in determining whether respondent's speech is protected under the First Amendment is to determine whether it addresses a matter of public concern. (*Pickering, supra*, at p. 568.) Public concern is "defined broadly." (*Demers, supra*, at pp. 415-16.) "Speech involves a matter of public concern when it can fairly be considered to relate to 'any matter of political, social, or other concern to the community.'" (*Johnson v. Multnomah Cnty* (9th Cir. 1995) 48 F.3d 420, 422 (citation omitted).) The fundamental question is "whether the speech addressed matters of public as opposed *to* personal interest." (*Demers, supra*, at p. 415.) "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." (*Connick v. Myers* (1983) 461 U.S. 138, 147-48.)

There is little question that respondent's lectures on subjects such as America's involvement in the Iran-Iraq war, Ariana Huffington's rise to power, and the evolution of the banking system, as a whole, pertain

to matters of public concern. However, the content of the lectures is not at issue. Rather, the questionable speech at issue is respondent's repeated use of profanity for no academic reason, use of derogatory slang such as "tards," reference to wives as "bitches," use of the term "hookers" to describe Persian dress, reference to Huffington "blowing" her way to the top, discussion of a student's appearance and large chest unrelated to an academic subject, and "jokes" about killing students who ask math questions. Statements that clearly do not constitute matters of public concern include the joke about killing students who ask math questions, the story about a previous student's physical appearance on a jail tour, the repeated use of profanity without any educational purpose, and calling himself and students "tards" or "retarded." Respondent does not have a constitutional right to employ such statements in a classroom setting where they are not germane to the subject matter or are in contravention of the district's harassment/ discrimination policy. (See *FCC v. Pacifica* (1978) 438 U.S. 726, 747 (finding speech that is "vulgar," "offensive," and "shocking" . . . is not entitled to absolute constitutional protection under all circumstances").)

The remaining statements were all within the context of lectures that do qualify as a public concern. Free speech protections of the First Amendment trigger even when other aspects of a communication do not qualify as a public concern. (*Connick, supra*, at p.149.) Therefore, even if certain components of respondent's lectures do not constitute a matter of public concern, some part of the lecture did address a matter of public concern, so it meets the public concern requirement under *Pickering*.

The fact that respondent's speech touched on a matter of public concern does not end the inquiry. The "public concern" prong is a necessary, but not a sufficient, condition of constitutional protection under the First Amendment. "It merely brings the claim within the 'coverage' of the First Amendment and ensures that a court will test the reasons for restrictions against First Amendment standards." (*Gilbrook v. City of Westminster* (9th Cir. 1999) 177 F.3d 839, 867 (internal citation and quotations omitted).) Once a plaintiff shows that his or her statements were of public concern, the burden shifts to the defendant to show that, under the balancing test, its legitimate administrative interests in regulating the speech outweigh the plaintiff's First Amendment rights. (*Bauer v. Sampson* (9th Cir. 2001) 261 F.3d 775, 784.) The balancing "requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." (*Voigt v. Savell* (9th Cir. 1995) 70 F.3d 1552, 1561.)

The Ninth Circuit has listed five factors for use in the balancing analysis: (1) whether the employee's speech disrupted harmony among co-workers; (2) whether the relationship between the employee and the employer was a close working relationship with frequent contact which required trust and respect in order to be successful; (3) whether the employee's speech interfered with performance of his or her duties; (4) whether the employee's speech was directed to the public or to a colleague; and (5) whether the employee's statements were ultimately determined to be false. (*Brewster v. Bd. of Ed.* (9th Cir. 1998) 149 F.3d 971, 980-81.) Because *Pickering* requires the balancing of these factors, which involves a fact-sensitive

inquiry based on the totality of the circumstances, no factor is dispositive. (*Gilbrook*, 177 F.3d at p. 868.)

In *Bauer*, the Ninth Circuit applied these factors to find that a public university's interests as an employer did not outweigh the plaintiff-professor's First Amendment rights. In that case, a tenured professor at Irvine Valley had prepared and circulated various writings and illustrations in a campus newspaper (*Id.* at p. 780.) The district, however, did not approve of the professor's speech. When analyzing the district's interests in prohibiting the speech as compared to the professor's interests in free speech, the court noted first that while the professor's speech created some disharmony among his colleagues, it was unlikely that the speech was the primary reason for disharmony on the college campus because the school was going through a contentious period. (*Id.* at p. 785.) Second, the court reasoned that given the nature of academic life, especially at the college level, it was not necessary for the professor and the administration to enjoy a close working relationship. (*Ibid.*) Third, the court determined that the College had not shown that the professor's speech had any negative impact on his teaching or other professional responsibilities. (*Ibid.*) Fourth, the court found that the speech had not been directed to the media or a government colleague, but exclusively to the college community. (*Ibid.*) And fifth, the court found that the professor's expression was an opinion, and not factual assertions that could be proven false. (*Ibid.*)

Here, it was not established that that respondent's speech caused disharmony among respondent and his colleagues, and as the Ninth Circuit determined in *Bauer*, a "close working relationship" is not necessary

at the university level. (*Id.* at p. 785.) However, the district has presented convincing evidence that the speech had a significant negative impact on respondent's teaching responsibilities. Multiple students dropped, or failed to continue attending, respondent's class. Multiple students have complained about respondent's comments, and it was established that the comments interfered with their ability to learn in the class. The district's interest in maintaining a hostile-free learning environment, particularly as it relates to its requirements under federal and state law, is well recognized. However, the interests of allowing persons to speak freely in the college and university setting are equally as well-established. Academic freedom is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." (*Keyishian v. Bd. of Regents* (1967) 385 U.S. 589, 603.) Unlike in *Bauer*, the evidence established that respondent's right to free speech was outweighed by the district's interest in regulating such speech. Moreover, the restriction on respondent's speech is minimal. Of the offending conduct, none was related to the substance of respondent's lectures. The only limitation was that he refrain from using unnecessarily gratuitous language. As stated by the Sixth Circuit Court of Appeals,

While a professor's rights to academic freedom and freedom of expression are paramount in the academic setting, they are not absolute to the point of compromising a student's right to learn in a hostile-free environment. To hold otherwise under these circumstances would send a message that the First Amendment may be used as a shield by teachers who choose to use their unique and superior position to sexually

App-91

harass students secure in the knowledge that *what-ever* they say or do will be protected. (*Bonnell v. Lorenzo* (6th Cir. 2001) 241 F.3d 800, 823-24 (emphasis in original)).

Accordingly, respondent's argument that the district unlawfully infringed on his First Amendment rights is rejected.

Conclusion

27. Cause exists to dismiss respondent pursuant to Section 87732, subdivisions (d) and (f). The district's decision to dismiss respondent from employment is reasonable and supported by a preponderance of the evidence.

ORDER

The South Orange County Community College District's decision to terminate respondent Howard Gensler's employment is affirmed.

DATE: October 14, 2020

ADAM L. BERG
Administrative Law Judge
Office of Administrative Hearings

App-92

Appendix D

[Filed: Jan. 14, 2026]

Court of Appeal, Fourth Appellate District, Division
Three – No. G064067

S294180

IN THE SUPREME COURT OF CALIFORNIA

En Banc

HOWARD GENSLER, Plaintiff and Appellant,

v.

BOARD OF TRUSTEES OF THE SOUTH ORANGE
COUNTY COMMUNITY COLLEGE DISTRICT, et
al., Defendants and Respondents.

The petition for review is denied.

The request for an order directing publication of
opinion is denied.

GUERRERO

Chief Justice