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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

RENE DAVID FELICIANO,

Plaintiff and Appellant,

v.

THE BOARD OF TRUSTEES OF THE
VISTA UNIFIED SCHOOL DISTRICT, et
al.

Defendants and Respondents.

D065934

(Super. Ct. No. 37-2012-00055972-
CU-WM-NC)

APPEAL from a judgment of the Superior Court of San Diego County, Earl H. Maas III, Judge. Affirmed.

Law Offices of Gregory Y. Liewers and Gregory Y. Liewers for Plaintiff and Appellant.

Winet Patrick Gayer Creighton & Hanes and Randall L. Winet for Defendants and Respondents.

Rene David Feliciano appeals a judgment denying his petition for writ of mandate challenging his termination from his grounds maintenance position with the Vista Unified School District (District).¹ (Code Civ. Proc., § 1085.) We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

We summarize the relevant facts in the light most favorable to the District, the party prevailing in the administrative and trial court proceedings. (See *Candari v. Los Angeles Unified School Dist.* (2011) 193 Cal.App.4th 402, 407-408 (*Candari*).

In about 2003, Feliciano began working for the District as a grounds maintenance worker responsible for the District's athletic fields. He also served as a security guard for the adult night program. In these positions, Feliciano was required to carry keys for each of the District's 32 schools. Before 2011, Feliciano had no record of any disciplinary action, and was a permanent classified employee.

In the summer of 2011, the District contracted to replace the artificial turf on Vista High School's football field. While this work was being performed, several District maintenance employees (including Feliciano) asked Steve Presley, the District's facilities and maintenance director, whether they could take the removed turf from the school grounds. Presley told them they could not do so unless the material had been thrown away in a school dumpster. Presley indicated the contractor was contractually responsible for disposing of the used turf to prevent hazardous material problems. During this same time, Feliciano's direct supervisor, Rob Christ, also told the employees,

¹ The District was sued in the name of its Board of Trustees (Board) and its Personnel Commission. We shall refer to these defendants collectively as the District.

including Feliciano, they were prohibited from taking used or leftover new turf from the school grounds. The District intended to use the leftover new turf to repair future damage to the athletic field or for projects at other District schools.

These instructions from Feliciano's supervisors were consistent with the District's general policies—known and communicated to all employees—that employees are prohibited from taking any materials away from District work sites (unless it is in a dumpster or trash can).

Despite these directives, on August 8, 2011, Feliciano placed a section of old turf (that had not been in a dumpster) into his automobile. Another employee told him he should ask approval from supervisor Christ before taking this material, but Feliciano responded that he had already received permission from Presley. During this discussion, Feliciano used profanity.

The next day, Feliciano asked Henry Munoz, the turf contractor's foreman, about the extra new turf being kept on pallets near the school's athletic field. Munoz responded that under contractual requirements, the contractor was required to save leftover pieces of artificial turf for future repairs. Feliciano was confrontational and replied "Fuck that, I'm going to take it anyway."

Later that day, Feliciano drove back to the school after his shift, and was soon joined by his friend, George Woods, who drove a pickup truck. A few minutes later, the two men took rolls of both new and used artificial turf and loaded them onto their vehicles. This turf was not in dumpsters, and much of it had been placed on pallets for later storage.

Based on his earlier encounter with Feliciano, Munoz did not want to confront Feliciano as he took the turf. Munoz instead asked one of his employees to discreetly take photographs of the men loading the turf into their vehicles. The following day, the lead grounds worker asked Feliciano about the missing turf. Feliciano said nothing in response. The District then submitted the matter to the sheriff's department.

After an investigation, sheriff detectives contacted Woods and found stacks of new artificial turf in Woods's backyard. Woods said Feliciano gave him permission to take the turf. The detectives estimated that the new turf found in Woods's backyard measured about 1,100 to 1,200 square feet. The material had an approximate value of \$4.32 per square foot.

The detectives then went to Feliciano's home and found about 400 square feet of used artificial turf in his backyard, which he had used to cover his patio. Feliciano acknowledged he took this turf (and the turf found at Woods's home) from the school, but claimed he had permission to do so from maintenance director Presley. Detectives then telephoned Presley, who denied giving Feliciano permission to take the material from the school grounds. Feliciano was arrested and charged with grand theft.

The next day, the District placed Feliciano on administrative leave. On November 8, 2011, the District served Feliciano with a Notice of Intent to Terminate Employment and Statement of Charges (Notice of Charges), recommending Feliciano's termination. This document detailed the facts upon which the recommended termination was based, including: "On or about August 9, 2011, you and an accomplice removed approximately 1500 square feet of artificial turf from Vista High

School despite your having been told by your supervisors that you did not have permission to do so. A contractor observed you removing that property and took photographs of the event, copies of which are attached. School staff reported the theft to the Sheriff's Department." The Notice of Charges also contained information about Feliciano's arrest, stating he had been arrested and charged with grand theft for his actions in removing the artificial turf.

The Notice of Charges stated the District had lost "trust in [Feliciano] and [his] ability to perform service for the District" because he took the property "despite directives to the contrary"; he failed to inform his supervisors of these actions; and he acted in a rude and discourteous manner. The Notice of Charges alleged that Feliciano violated several specific Personnel Commission rules, including rules prohibiting insubordination; knowingly falsifying or withholding material information; discourteous, abusive, or threatening treatment of others; and "[d]ishonesty, theft, willful misuse for personal gain, willful destruction or mishandling of District property."²

A predisciplinary hearing was held on November 18, 2011. Several days later, the superintendent's office notified Feliciano that the superintendent was adhering to the termination recommendation. On November 30, the Board approved the termination.

² The District later dismissed the charge involving discourteous conduct (Rule 19.1.4.15) based on its view that other employees who engaged in similar conduct had received a lesser discipline.

Two weeks later, in mid-December, a jury trial was held on the criminal charges against Feliciano based on his taking the turf from the school without authorization. The jury acquitted him of all charges, including petty theft and grand theft.

Shortly after, the District sent Feliciano a letter reiterating its decision to terminate Feliciano's employment, unless Feliciano agreed to resign under a proposed resignation agreement. The District also notified Feliciano of his rights to appeal the termination decision to the District's Personnel Commission. Feliciano filed an appeal with the Personnel Commission, asserting that the facts did not support the termination and the penalty was excessive in light of his work history. Feliciano designated union official Laura Zirino to represent him at the appeal hearing.

The two-day evidentiary hearing was held before the District's three-person Personnel Commission in March 2012. At the hearing, the District called numerous witnesses, including individuals who testified regarding their personal knowledge of the relevant events. Feliciano's supervisor Presley testified that he recommended that Feliciano be dismissed from employment—rather than a lesser sanction—because not only did Feliciano take the materials, but he violated an express direction not to do so: "I was very explicit the direction I put forward that . . . none of the material[] [was] to be taken." Feliciano's direct supervisor Christ similarly testified that he told a group of employees, including Feliciano, that they were not allowed to take any of the turf from the school premises. Additionally, the parties stipulated to the admission of the criminal trial testimony of Matthew Bahadur, the contractor's employee who took the

photographs showing Feliciano loading the materials onto the vehicles. A sheriff's detective testified about finding the turf materials at Feliciano's and Woods's homes.

The District's human resources coordinator (Acacia Thede) testified about the reasons for the termination decision. Thede said the District lost confidence in Feliciano because he violated a specific directive and took valuable property. Thede acknowledged that Feliciano had been acquitted of the criminal charges, but said the District had made a decision to continue to seek Feliciano's dismissal because the District had "lost faith in Mr. Feliciano and his ability to be trusted" She explained that District employees must "remain in good standing with the District in terms of their professional judgment, in terms of their ability to be trusted with large amounts of District property, funds, people, students—our employees have access to small children, to places, to millions of dollars of equipment, buildings, and facilities." She stated that employees have "keys to the District," including to "thousands of dollars' worth of equipment [and] materials," and this requires that the District employ only people who it can trust fully and completely. She also said that if the District were to continue to employ Feliciano, this would lower employee morale and send the wrong message to employees that the District is willing to tolerate a violation of trust.

In defense, Feliciano did not dispute that he and Woods took the artificial turf for their personal use, but he said he believed he had approval to do so. He testified that when the project was " 'almost done,' " he asked supervisor Presley whether he could have " 'a couple of scraps' " (referring to the *used* artificial turf) from " 'the football field,' " and that Presley had responded that " 'I don't see a problem with

that.' " Feliciano said a few days later, he called his friend and asked whether he wanted to help him take some of the "stuff" the school was intending to "throw away." When he and Woods arrived at the school on August 9, he said he took only small pieces of the turf that were "scattered all over the place" and denied taking any of the materials that were loaded on the pallets. He said that when he placed the materials in the vehicles, there were many people standing around, including construction workers, but no one said anything to him. When he got home, he "laid" the "scraps" out in his backyard.

Following the hearing, the Personnel Commission voted unanimously to uphold Feliciano's termination and issued a nine-page decision with detailed factual findings. The Personnel Commission found Feliciano "was advised on numerous occasions during July and August 2011, including [by his supervisors] Rob Christ and Steve Presley, that no materials, including . . . artificial turf, were to be taken from the . . . athletic field," and that Christ specifically told Feliciano "that the old turf from the athletic field was not to be taken because of environmental concerns." The Personnel Commission further found that Feliciano was "aware of the long standing policy of the Grounds/Maintenance Department that no property of the District was to be taken by any employee unless the property was in a trash receptacle[,] [¶] . . . and he was not given permission by any authorized person to take leftover new turf from the [school grounds]." The Commission found the total value of the new turf taken by Feliciano was approximately \$4,200.

Feliciano filed a petition for writ of mandate in the superior court, challenging the Personnel Commission's decision on numerous grounds. After examining the papers and conducting a hearing, the trial court denied Feliciano's petition. In a written explanation, the court indicated it had reviewed the administrative record, including the hearing transcript, and found each of Feliciano's legal and factual contentions to be without merit.

DISCUSSION

I. *Review Standards*

Because the Personnel Commission's decision affected Feliciano's fundamental vested right, the trial court was required to exercise its independent judgment in evaluating the administrative record and considering Feliciano's legal and factual challenges to the administrative decision. (*Candari, supra*, 193 Cal.App.4th at p. 407; *Davis v. Los Angeles Unified School Dist. Personnel Com.* (2007) 152 Cal.App.4th 1122, 1130.) Under this standard, the trial court was permitted to draw its own reasonable inferences from the evidence in the administrative record and make its own credibility determinations. (*Candari, supra*, at p. 407.) But the court was also required to afford a strong presumption of correctness to the administrative findings and require the challenging party to demonstrate that such findings were contrary to the weight of the evidence. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 816-817; *San Diego Unified School Dist. v. Commission on Professional Competence* (2013) 214 Cal.App.4th 1120, 1140-1141, 1145-1148; *Candari, supra*, 193 Cal.App.4th at p. 407.) As this court recently reiterated, the trial court must respect the administrative body's credibility

determinations and give them " 'great weight.' " (*San Diego Unified School Dist., supra*, 214 Cal.App.4th at pp. 1146, 1148.)

"Our task is to review the record and determine whether the *trial court's* findings (not the administrative agency findings) are supported by substantial evidence.

[Citations.] We resolve all evidentiary conflicts and draw all legitimate and reasonable inferences in favor of the trial court's decision. [Citation.] 'Where the evidence supports more than one reasonable inference, we are not at liberty to substitute our deductions for those of the trial court.' [Citation.]" (*Candari, supra*, 193 Cal.App.4th at pp. 407-408.)

In reviewing the disciplinary decision, the trial court and appellate court apply an abuse-of-discretion standard. " ' "The penalty imposed by an administrative body will not be disturbed in mandamus proceedings unless an abuse of discretion is demonstrated. . . . Neither an appellate court nor a trial court is free to substitute its discretion for that of the administrative agency concerning the degree of punishment imposed.' . . . " ' " (*Cate v. State Personnel Bd.* (2012) 204 Cal.App.4th 270, 283-284.)

Additionally, we examine statutory interpretation challenges on a de novo review standard. (*JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1058, fn. 11.) Because constitutional considerations are implicated, we must strictly construe statutes pertaining to a public employee's right to continued employment. (*Tuffli v. Governing Board of the San Diego Unified School District* (1994) 30 Cal.App.4th 1398, 1404 (*Tuffli*.)

II. *No Reversible Error as to Trial Court's Review Standard*

Feliciano contends the trial court applied the wrong review standard. In support, he points to one sentence at the end of the court's written findings, stating: "In reaching the above decision, the Court applied an abuse of discretion standard. However, even if the standard was lower—or even de novo—the actions and findings of the [Personnel Commission] were amply supported with sufficient evidence."

This sentence does not constitute reversible error. First, it is not clear whether the court was referring to the penalty decision or the factual findings underlying the decision to terminate. As set forth above, the abuse of discretion standard applies to a trial court's evaluation of whether the termination remedy was appropriate under all the circumstances.

Moreover, even if the court was referring more broadly to the factual findings, the court specifically stated that it would have reached the same conclusions under a de novo (i.e., independent) review standard. The court's detailed explanation for its decision supports that the court did independently review the administrative record for both factual and legal error. Further, there is no suggestion that any of the court's factual conclusions were unsupported or unreasonable or contrary to the gist of the factual record. The overwhelming evidence supports the court's factual findings and Feliciano does not challenge the sufficiency of the evidence to support the findings.

III. *Effect of Jury Acquittal at Criminal Trial*

As the centerpiece of his appeal, Feliciano contends the District was estopped from seeking his termination after he was acquitted in the criminal trial. He relies on

judicial estoppel and equitable estoppel doctrines. The District counters that Feliciano forfeited his right to assert this argument because he did not raise the estoppel issue in the proceedings below. We are satisfied that Feliciano adequately raised the estoppel issue to properly preserve the challenge. But we determine the factual record does not support a judicial or equitable estoppel theory in this case.

A. *Judicial Estoppel*

" ' " Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. [Citations.] The doctrine's dual goals are to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies. . . . ' " ' " (*People v. Castillo* (2010) 49 Cal.4th 145, 155, italics omitted.)

The judicial estoppel defense is inapplicable here because there are no facts showing the District took inconsistent positions. Feliciano contends the District first took the position in its "formal Statement of Charges, at the Skelly hearing . . . and at the . . . Board . . . meeting that Mr. Feliciano should be fired because he had been arrested and charged with theft. After he was acquitted, however, the District took the position in the Notice of Disciplinary Action . . . , at the Personnel Commission hearing, and in this lawsuit that the outcome of the criminal case was irrelevant."

This argument is factually unsupported. The record does not show the District initially recommended termination based on the arrest or criminal *charges*. As discussed above, the Notice of Charges identified numerous reasons for the recommended discipline, including insubordination, willful and persistent violation of applicable rules,

and knowingly falsifying or withholding material information. Although Feliciano's arrest was noted in the charging document's factual background, there is nothing in the Notice of Charges suggesting the administrative charges were dependent on, or tied to, a finding of guilt in the criminal trial.

Additionally, as discussed more fully below, there is no support for Feliciano's argument that the District later found the acquittal to be "irrelevant." The record reflects that the District was aware of, and considered, the acquittal but found it appropriate to continue to pursue the termination because Feliciano's continued employment (in which he carried keys to every school) would jeopardize the safety and security of the District's students and property, and would lower morale and set a bad example for other employees.

Feliciano's reliance on *Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509 is misplaced. In *Ferraro*, the court applied the judicial estoppel doctrine where respondents' claims were "*flatly incompatible*" with their statements made in the trial court proceedings and contained fabrications in the form of "self-contradictions and opportunistic flip-flops." (*Id.* at p. 558.) Unlike in *Ferraro*, the District did not take inconsistent positions or engage in any form of deception.

B. *Equitable Estoppel*

To establish a claim is barred by the equitable estoppel doctrine, the moving party must show the opposing party intended to, and did, reasonably induce an action (or nonaction) that prejudiced the moving party's rights. (See *Youngman v. Nevada Irrigation Dist.* (1969) 70 Cal.2d 240, 249, fn. 7; *Cotta v. City and County of San*

Francisco (2007) 157 Cal.App.4th 1550, 1567.) Feliciano contends this doctrine applies here because the District's notices led him to believe that if he successfully defended against the criminal charges, he would be reinstated and therefore he "chose, at great risk and expense, to go to trial in order to prove his innocence."

This argument is without merit. First, there is nothing in the District's notices that would lead a reasonable person to believe the District made a promise or representation that Feliciano would be reinstated if he was acquitted in the criminal trial. Second, Feliciano's decision to defend against the criminal charges in a criminal trial did not prejudice him in this action or in any other way. If he had not done so, he would have pled guilty to the charges or to a lesser offense. In such case, the District would have had an even stronger case to terminate him. Feliciano's decision to defend against the charges in the criminal case (rather than plead guilty) did not harm or prejudice his employment rights.

These circumstances are different from *Shuer v. County of San Diego* (2004) 117 Cal.App.4th 476, relied upon by Feliciano. In *Shuer*, this court found that the county had "negligently led [a supervising county psychiatrist] to conclude that she had no administrative recourse" to challenge her termination. (*Id.* at p. 487.) Based on that negligence finding, we concluded the county was estopped from asserting that the employee had "failed to exhaust her administrative remedies." (*Ibid.*) There is no showing in this case that the District similarly misinformed its employee or misrepresented the facts relating to the termination or the termination process.

IV. *Applicable Statutes Do Not Require Reinstatement Under Circumstances Here*

Feliciano next contends there exists a public policy requiring reinstatement of permanent school district employees who are placed on leave for "criminal sex or drug charges, but are later acquitted," and urges us to extend this public policy to "an employee who is fired for theft charges, but is later acquitted"

The factual premise underlying this argument is flawed. As we have discussed, Feliciano was not fired for theft *charges*. He was terminated because he violated numerous District rules, including taking valuable property for his personal use despite being told that he was not permitted to take this property from school grounds, and for insubordination, including misleading his supervisors when asked about the missing property. Because the termination was based on this conduct—and not merely because criminal charges were brought against him—the asserted public policy is inapplicable.

Moreover, we reject Feliciano's suggestion that there exists a public policy against terminating public employees who have been acquitted in criminal proceedings. The courts have long recognized that a school district may terminate an employee who was acquitted of criminal charges even if the grounds for the employment termination are the same as the alleged facts underlying the criminal charges. (*Board of Education v. Calderon* (1973) 35 Cal.App.3d 490, 495-497; see *Tuffli, supra*, 30 Cal.App.4th at pp. 1407-1409; see also *Barr v. City of San Diego* (1960) 182 Cal.App.2d 776, 776-777; *Prevost v. Home Ins. Co.* (1995) 660 So.2d 67, 69-70; *Jenkyns v. Board of Education* (D.C. Cir. 1961) 294 F.2d 260, 261.) As the *Calderon* court explained, there is a different burden of proof in criminal and administrative hearings and the school district is

not a party in the criminal proceedings. (*Calderon, supra*, 35 Cal.App.3d at p. 495.) Additionally, the objectives of the two actions are different. Unlike a criminal proceeding that seeks to punish an offender, an administrative hearing focuses on the school district's educational mission and considers whether continued employment is consistent with that mission and would protect the public under all the circumstances. (*Id.* at p. 496.) If the employee is provided with proper notice and an opportunity to be heard, a school district may dismiss an employee for reasonable cause, regardless of the outcome of a parallel criminal proceeding.

Feliciano's reliance on Education Code section 44940.5 is misplaced.³ Section 44940.5 applies solely to cases involving specific sex and drug related offenses that require a compulsory leave of absence. Feliciano recognizes the limited scope of the statute, but argues that *Unzueta v. Ocean View School Dist.* (1992) 6 Cal.App.4th 1689 (*Unzueta*) interpreted the code section as reflecting a public policy requiring reinstatement of school district employees whose criminal charges were dismissed. Feliciano misreads the *Unzueta* decision.

Unzueta involved a teacher who was suspended after his arrest on a cocaine offense. (*Unzueta, supra*, 6 Cal.App.4th at p. 1693.) The school later voluntarily (without objection) reinstated the teacher after the cocaine charges were dismissed under a drug diversion program. (*Id.* at p. 1694.) The teacher then successfully sued for back wages, and the school district appealed. (*Id.* at p. 1693.) Over a vigorous dissent, the

³ All further statutory references are to the Education Code.

majority held the teacher was entitled to backpay based on specific language in section 44940.5, subdivision (c) providing the employee is entitled to "full compensation" if the criminal charges are "dismissed."⁴ (*Unzueta, supra*, at pp. 1693-1700.) This holding pertaining to the proper interpretation of specific language in section 44940.5 has no applicability here and does not suggest a "public policy" of requiring reinstatement of employees who were acquitted in a criminal trial. The *Unzueta* majority did not state or suggest it was intending to modify the well-settled general rule that an employee may be terminated for engaging in conduct that warrants termination under the applicable statutes, regardless of the outcome of criminal charges.

V. *Fairness of Personnel Commission Hearing*

Feliciano next contends he did not receive a fair hearing because the Personnel Commission did not perform an adequate investigation and his representation at the hearing was inadequate.

A. *Applicable Legal Principles*

The Education Code sets forth the various terms and conditions of employment for school employees. These statutes contain the constitutionally-based procedural due process requirements before a school district's permanent employee can be terminated. Specifically, section 45302 requires reasonable cause to remove a permanent classified employee. Section 44932 provides a "permanent employee" shall not be dismissed

⁴ The dissent agreed that the interpretation was proper under the statute's "literal" language, but disagreed with the interpretation because it led to an "absurd" result. (*Unzueta, supra*, 6 Cal.App.4th at pp. 1702-1703 (dis. opn. of Gilbert, J.).)

except for one or more enumerated causes. (§ 44932, subd. (a)(1)-(11); *Tuffli, supra*, 30 Cal.App.4th at p. 1407.) The grounds for termination include: "Dishonesty," "Unprofessional conduct"; "Unsatisfactory performance"; "Evident unfitness for service" and "conviction of a felony or of any crime involving moral turpitude." (§ 44932, subd. (a)(2), (4), (5), (6), (9).) "Any such 'cause' must be established after adequate notice and opportunity for a hearing." (*Shields v. Poway Unified School Dist.* (1998) 63 Cal.App.4th 955, 958-959 (*Shields*); see §§ 44934, 44935, 44936, 44937, 44944.)

A school district's power to dismiss an employee for reasonable cause is subject to the employee's right of appeal to the district's personnel commission. (See § 45305; *California School Employees Assn. v. Personnel Com.* (1970) 3 Cal.3d 139, 143.)

Section 45306 defines the duties of the personnel commission in considering the appeal:

"The commission shall investigate the matter on appeal and may require further evidence from either party, and may, and upon request of an accused employee shall, order a hearing. The accused employee shall have the right to appear in person or with counsel and to be heard in his own defense. The decision shall not be subject to review by the governing board."

Section 45311 further provides:

"The commission may conduct hearings, subpoena witnesses, require the production of records or information pertinent to investigation, and may administer oaths. It may, at will, inspect any records of the governing board that may be necessary to satisfy itself that the procedures prescribed by the commission have been complied with. Hearings may be held by the commission on any subject to which its authority may extend as described in this article."

These rules are intended to ensure the employee is afforded due process before being terminated from public employment. (See *Shields, supra*, 63 Cal.App.4th at pp. 958-959; see also *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 206-208.)

B. Analysis

On our review of the administrative record, we concur with the superior court's determination that the Personnel Commission complied with these procedures and Feliciano had a fair hearing. The Personnel Commission held an evidentiary hearing before a three-person panel during which numerous witnesses testified and the Commission members actively participated by asking questions of the witnesses. The District presented compelling evidence that Feliciano engaged in the alleged theft and insubordination, and Feliciano had a full and fair opportunity to rebut the District's case and present his own evidence and arguments.

Feliciano argues the hearing was unfair because the Personnel Commission did not consider his acquittal by a jury at his criminal trial. The argument is factually unsupported.

During the hearing, District's counsel specifically asked the human resources representative (Thede) why the District was moving forward with the termination despite Feliciano's acquittal, and she responded that because of Feliciano's acts of "dishonesty," the District had "lost faith" in him "and his ability to be trusted . . . ," explaining that "our employees have access to small children, to places, to millions of dollars of equipment, buildings, and facilities." Thede also noted the different burden of proof in a criminal trial (beyond a reasonable doubt) and in the administrative proceeding (preponderance of

the evidence). Feliciano also testified about the acquittal, and stated that his testimony at the criminal trial was essentially the same as the testimony at the administrative hearing, suggesting that a similar result should follow.

On this record, we necessarily presume the Personnel Commission understood and took into consideration the fact that Feliciano was acquitted at the criminal trial, but concluded this fact was insufficient to show that the District erred in terminating Feliciano for his conduct. In light of Thede's testimony, this was a reasonable determination. There is nothing in the record showing the Personnel Commission improperly "ignored" or refused to consider the acquittal evidence.

To the extent Feliciano complains the Personnel Commission did not review the entire criminal trial transcript, there was no affirmative duty to do so absent a request from Feliciano. Before the hearing, Feliciano was informed he could present relevant portions of the criminal trial transcript and his union expressly reserved this right. The parties thereafter stipulated to admit the criminal trial transcript of one witness's testimony. In response, the Personnel Commission chair stated that documentary evidence "is certainly admissible at this proceeding." Because Feliciano had the opportunity to, but did not, request the Personnel Commission to review the entire criminal trial transcript, the Commission could reasonably infer the transcript did not contain any materially different information than was presented at the hearing. Additionally, because the criminal trial transcript is not part of the appellate record, there is no basis for this court to conclude the Commission's review of the transcript would

have changed the outcome of the hearing or would have enhanced the fairness of the hearing.

We also reject Feliciano's contention he was denied a fair hearing because he was not adequately represented at the hearing. Consistent with applicable rules, Feliciano was told that he had the right to represent himself at the Personnel Commission hearing or to be represented by an attorney, a union representative, or any other individual. Feliciano initially selected his criminal defense attorney, but later designated a union representative, Laura Zirino, to represent him. The record shows Zirino fulfilled her role as an advocate at the administrative hearing. She cross-examined the District's witnesses, conducted a detailed examination of Feliciano, and gave a cogent closing argument in which she discussed the evidence and urged the Commission to find that the termination penalty was unjustified. Additionally, the Commissioners actively participated at the hearing, and directly asked the witnesses questions. As noted by the trial court, given Feliciano's independent decision to be represented by Zirino rather than an attorney, the fact that Zirino may not have been as effective as an attorney does not show Feliciano had an unfair hearing. (See *Borror v. Department of Investment* (1971) 15 Cal.App.3d 531, 543.)

Feliciano complains that Zirino failed to call George Woods or introduce the transcripts from the criminal proceeding. However, there is no factual basis showing these actions fell below applicable standards or that these actions unduly prejudiced Feliciano's case. Additionally, there is no reasonable basis to find Woods's testimony would have been helpful to Feliciano. Feliciano did not dispute that he told Woods he

had permission to take the new artificial turf, but the evidence (found credible by the Personnel Commission and trial court) established that Feliciano did not have permission to do so. Likewise, there is nothing to suggest that any of the information contained in the criminal trial transcript would have been helpful to Feliciano, other than the fact that a jury acquitted him of the criminal charges (a fact of which the Commission was well aware).

Finally, we reject Feliciano's assertion that the Personnel Commission breached its "legal duty" to affirmatively investigate the facts underlying the charges. (§ 45306.) The Commission fulfilled its investigation duty by conducting a hearing. The Commission did not rely solely on the evidence that was before the Board, but conducted a full and formal two-day evidentiary hearing during which both sides were represented and both parties were permitted to present any and all evidence relevant to the charges. At the hearing, the commissioners were engaged and actively participated in attempting to determine the true facts and whether the District's termination decision was justified.

The factual and legal issues pertaining to the charges were not complicated. It was undisputed Feliciano took the turf materials, allowed his friend to install the new turf in his backyard, and retained the used tuft for his own backyard. The primary factual issues were whether Feliciano was given permission to take these materials; whether he knew that taking the materials was not permitted; and whether the termination decision was an appropriate penalty under all the circumstances. We are satisfied the Personnel Commission fulfilled its duty to investigate these questions and determine the truth of the allegations and whether the facts supported a termination. Although the Commission had

the power to conduct additional investigation (issue subpoenas, take depositions or hold further hearings), there is nothing in the record showing an additional investigation was warranted.

VI. *Personnel Commission Did Not Abuse Discretion in Terminating Feliciano*

Feliciano next challenges the trial court's rejection of his contention that termination was an "excessive" discipline.

A. *Legal Principles*

An administrative body has broad discretion in determining the appropriate discipline for a public employee's rule violation. (*Talmo v. Civil Service Com.* (1991) 231 Cal.App.3d 210, 230.) In reviewing the decision, "[c]ourts should let administrative boards and officers work out their problems with as little judicial interference as possible . . ." In determining whether an agency abused its discretion in assessing a particular penalty, a court will look to 'whether reasonable minds may differ as to the propriety of a penalty imposed.' [Citations.] Judicial interference with the agency's assessment of a penalty 'will only be sanctioned when there is an arbitrary, capricious or patently abusive exercise of discretion by the administrative agency.' [Citation.] (*Kazensky v. City of Merced* (1998) 65 Cal.App.4th 44, 54; see *Paulino v. Civil Service Com.* (1985) 175 Cal.App.3d 962, 970-971.)

B. *Analysis*

At the administrative hearing, the human resources director stated that the District made the decision to terminate Feliciano because his conduct in taking District property despite being told not to do so caused the District to lose trust in him and would make it

"incredibly difficult" to enforce rules in the future. Thede testified that dismissal was necessary because Feliciano's conduct (insubordination, disregard of District policy, taking District property) had caused the District to lose confidence in an employee who had to be trusted with the keys to all of the District schools. The reasoning underlying this conclusion is sound.

Feliciano argues his actions "were consistent with a good faith belief that he had consent and approval to remove turf scraps," particularly because he took the turf during the day while students and workers were nearby. Although this may have been one reasonable inference from this evidence, the Personnel Commission and the trial court were entitled to reach a different conclusion—that Feliciano took the turf material, knowing that it was against the rules but wrongfully believing he was above the rules or the District would not enforce the rules. The Commission and the trial court were entitled to find credible Feliciano's supervisors' testimony that Feliciano was expressly told not to take this material from the school grounds. As an appellate court, we cannot second-guess the factual conclusions and credibility determinations reached in the proceedings below. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053; *Barboni v. Tuomi* (2012) 210 Cal.App.4th 340, 349.)

Feliciano contends the Personnel Commission abused its discretion because it failed to adequately consider mitigating circumstances, such as his acquittal, and the facts that he had an "unblemished employment history" and was "three years away from retirement with full benefits." The record supports that the Commission did consider this evidence, but found it unavailing. A central part of Feliciano's representative's closing

argument was Feliciano's outstanding prior employment record; that Feliciano's turf removal was an isolated incident that reflected only a "series of bad decisions"; and that a lesser punishment would be more "appropriate to a first time offense for a long term employee." The Commission did not abuse its discretion in rejecting these arguments and crediting Thede's determinations that permitting Feliciano to continue working for the District under the circumstances would put the District's property at risk and would lower employee morale and set an improper example for the other employees.

DISPOSITION

Judgment affirmed. Appellant to bear respondents' costs on appeal.

HALLER, J.

WE CONCUR:

BENKE, Acting P. J.

McINTYRE, J.