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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SANTA ANA UNIFIED SCHOOL
DISTRICT,

Plaintiff and Appellant,

v.

COMMISSION ON PROFESSIONAL
COMPETENCE,

Defendant and Respondent;

ANTONIO ESPINOSA,

Real Party in Interest and Respondent.

G046707

(Super. Ct. No. 30-2011-00447709)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kirk H. Nakamura, Judge. Affirmed; remanded with directions.

Law Offices of Eric Bathen, Eric J. Bathen, Marcia P. Brady, Richard D. Brady and Jordan C. Meyer for Plaintiff and Appellant.

No appearance by Defendant and Respondent.

Reich, Adell & Cvitan, Marianne Reinhold, Carlos R. Perez, Kent Morizawa and Angela Serranzana for Real Party in Interest.

INTRODUCTION

In this case, we review the denial of a petition for writ of mandate filed by Santa Ana Unified School District (the District), seeking to overturn the decision of the Commission of Professional Competence regarding one of the District's counselors, Anthony Espinosa. The District accused Espinosa, a counselor at Segerstrom High School, of immoral behavior with two female students, V. and C., and sought to suspend and dismiss him under Education Code section 44934.¹ Espinosa demanded and had a hearing before an administrative law judge and two panel members, both of whom were counselors.

The Commission unanimously found the District's charges against Espinosa unproven and ordered them dismissed. The District then filed a petition for writ of mandate in the Orange County Superior Court, which petition was denied. The District has appealed the denial of its petition to this court, asserting that it did not get a fair trial before the Commission and that the trial court used the wrong standard of review when it denied the petition. It also asserts substantial evidence did not support the Commission's decision.

We affirm. The trial court clearly used the correct standard of review, independent judgment, when it examined the administrative record, giving due weight to the Commission's findings. The District has waived its argument concerning the sufficiency of the evidence – usually a losing proposition on appeal anyway – by preparing a one-sided recitation of the facts in its opening brief. And we conclude that the District's criticisms of the way the administrative law judge conducted the hearing lack merit. The trial court correctly upheld the Commission's decision.

¹ All further references are to the Education code unless otherwise indicated.

FACTS

Segerstrom High School is a “fundamental” school, encompassing grades 9 through 12, with 2,450 students. It has a school-wide program for managing missed homework assignments, tardy appearances at classes, and dress code violations. Any student can apply to attend Segerstrom; enrollment is not limited to those living in a certain area. Students can also be dismissed (“non-invited”) if they consistently violate the school policies regarding homework, tardiness, and dress. Segerstrom differs from a traditional high school in the commitment of its staff to enforcing their “card system” (for missed homework, tardiness, and dress code violations), so students do not get off track without early intervention.

Espinosa went to high school and college in Santa Ana. He began his teaching career in Santa Ana as a student teacher in 1975 at Santa Ana High School and coached football and soccer there for four years. He completed a master’s degree in counseling in 1980, while continuing to teach, and obtained both counselor and school psychologist credentials. The District then hired him as a school psychologist during the 1980’s.

In 1989, after obtaining an administrative credential, Espinosa became assistant principal at Valley High School, where he remained until 1994. He then served as principal at two other District schools until, in 2001, he returned to Valley as its principal. He remained at Valley until the end of 2006, when he was removed from this position. Espinosa was then put in charge of a legislatively mandated new program to keep track of nongraduating students, until they reached the age of 22. He became a counselor at Segerstrom in July 2007.

Although Segerstrom counselors are assigned blocks of students from an alphabetical list of the student body, the counselors do not restrict their services to their

assigned students. The counselors are part of the discipline system, and they make themselves available to all students, not just those specifically assigned to them.

Espinosa first came into contact with V. as her assigned counselor during the 2008-2009 school year, when she was a freshman. V.'s mother contacted him to ask for special help for V. with her algebra after the first grading period in October. Part of the problem, it appeared, was that V. was not doing her algebra homework. Espinosa developed a plan whereby V. would stop by his office on the way to her algebra class, and he would check her homework to see whether she had completed it. This routine lasted about two weeks, until Espinosa discontinued it because it did not appear to be having any beneficial effect. He also tried to arrange algebra tutoring for V. but was unsuccessful because of her crowded schedule.

After attending a presentation on predatory behavior by Juan Lopez, the District's associate superintendent of human resources, in the fall of 2008, V.'s mother told Lopez that she was worried about Espinosa's conduct with V. Lopez relayed the conversation to Amy Avina, Segerstrom's principal, and told her to investigate the charges. After speaking to V., Avina drafted a Conference Summary Performance Report, which set out allegations V. had made against Espinosa.² Lopez and Avina met with Espinosa and a union representative on December 17, 2008. Lopez questioned Espinosa regarding the allegations, and Espinosa denied each of them. Sometime after the meeting, Avina handed Espinosa his copy of the report, dated December 18, 2008. The report ordered Espinosa to keep his office door and blinds open when he was alone with a student, not to visit students in classrooms, and to discourage students from visiting him during class time. V. was assigned to another counselor. The report was placed in his personnel file, and Espinosa did not prepare a response.

² These included calling her into his office every day, visiting her health class, making comments about her physical appearance and breast development, offering to give her rides, and closing his office door and blinds when alone with female students.

During the 2009-2010 school year, Espinosa came into contact with C., a senior. C. knew Espinosa from 2009 summer school, where he was teaching and she was taking classes. He had helped her to sign up for summer school classes, and she asked for his help in getting one of her friends into summer school. Espinosa was not C.'s assigned counselor, but, as noted, the practice at Segerstrom did not require counselors to restrict their services to their assigned students. As one of the District's witnesses, another Segerstrom counselor, testified, "[C]ounselors have responsibility for all the students at the school. We make ourselves available to students whether they are on our caseload or not." C. sought Espinosa out when she had a tardy card or a missed homework slip because he had a reputation among the students for being "chill," that is, more lenient and less strict about rules than the other counselors.

C. complained to Segerstrom's principal, Avina, that Espinosa was calling her out of class frequently and that he had asked for her cell phone number. She also claimed he came to one of her classes and stared at her for a few seconds and that he had called her cell phone several times on a day when she was absent from school.

Immediately following these complaints, Espinosa was placed on administrative leave. Pursuant to Lopez's recommendation, the District started proceedings to suspend and dismiss Espinosa. The District sought to suspend and dismiss Espinosa on grounds of "immoral or unprofessional conduct," (§ 44932, subd. (a)(1)), "willful refusal to perform regular assignments without reasonable cause" (§ 44939), and "evident unfitness for service" (§ 44932, subd. (a)(5)).

As a permanent employee, Espinosa was entitled to a hearing on the decision to suspend and dismiss him. The Commission conducted an evidentiary hearing on the charges between October 11 and October 14, 2010. The three-person panel consisted of an administrative law judge and two other members, one chosen by the District and one by Espinosa, both of whom were or had been counselors.

The Commission rendered its unanimous decision in Espinosa’s favor on December 13, 2010. The Commission explained its reasoning in a 20-page decision, in which it found that the District had failed to establish any of the charges against Espinosa with respect to either V. or C. “On the contrary, the Commission must conclude that [Espinosa] is a fit teacher and dedicated counselor who tried to help two students and make a difference in their academic and school lives His conduct and activities were at all times consistent with his duties as a high school counselor and demonstrated that he has a caring and giving temperament and is willing to go the extra mile to help a student when asked.” The Commission found Espinosa to be “a credible and persuasive witness” and held that the District had not met its burden to show that he was engaged in sexual harassment or predatory conduct.

The District petitioned the superior court for a writ of mandate. The grounds cited in the petition were (1) the lack of a fair trial for the District and (2) lack of substantial evidence to support the Commission’s findings and its decision. After a hearing, the trial court denied the petition for writ of mandate. This appeal followed.

DISCUSSION

The District identified three issues on appeal: first, the standard of review used by the trial court; second, the sufficiency of the evidence; and third, the fairness of the trial before the Commission. We address each in turn.

I. Standard of Review in the Trial Court and on Appeal

A “decision of a Commission on Professional Competence may be challenged in superior court by means of a petition for a writ of mandate. [Citations.] In reviewing a commission’s decision, the superior court ‘shall exercise its independent judgment on the evidence.’ [Citation.] Where a superior court is required to make such an independent judgment upon the record of an administrative proceeding, the scope of review on appeal is limited. An appellate court must sustain the superior court’s findings if substantial evidence supports them. [Citations.] In reviewing the evidence, an

appellate court must resolve all conflicts in favor of the party prevailing in the superior court and must give the party the benefit of every reasonable inference in support of the judgment. When more than one inference can be reasonably deduced from the facts, the appellate court cannot substitute its deductions for those of the superior court.

[Citation.]” (*Pasadena Unified Sch. Dist. v. Commission on Professional Competence* (1977) 20 Cal.3d 309, 314; see also *San Diego Unified School Dist. v. Commission on Professional Competence* (2011) 194 Cal.App.4th 1454, 1461-1462.)

Although the trial court exercises independent judgment on the evidence in reviewing the administrative record, it may not simply ignore the work of the Commission, which, unlike the trial court, has had an opportunity to evaluate witnesses and their credibility. The findings of the Commission, a “legislatively mandated professional body, with experience and expertise in the area of determining fitness to teach,” are entitled to “substantial weight, even in an ‘independent judgment’ hearing before the superior court.” (*San Dieguito Union High School Dist. v. Commission on Professional Competence* (1982) 135 Cal.App.3d 278, 288.) “In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning 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; see also *Bixby v. Pierno* (1971) 4 Cal.3d 130, 139; *Mason v. Office of Admin.Hearings* (2001) 89 Cal.App.4th 1119, 1130-1131.)

The District contends the trial court did not exercise its independent judgment, but instead simply adopted the Commission’s findings without further review or reflection. The record does not support this claim. Both its written judgment and its comments at the hearing attest to the trial court’s recognition of its duty to use its independent judgment. The District has seized on a comment made by the judge at the beginning of the hearing – “I don’t think there is enough here for the court to second

guess the trier of fact.” – and interpreted it to mean the judge had not reviewed the record independently but had merely deferred to the Commission’s findings. We do not read the comment that way. Given the context of the rest of his remarks, we believe he was properly affording the “strong presumption of correctness” to the administrative findings and observing that the District had not met its “burden of convincing the court that the administrative findings are contrary to the weight of the evidence.” (*Fukuda v. City of Angels, supra*, 20 Cal.4th at p. 817.)

The judge had obviously reviewed the record with care, as evidenced by the remarks from the bench during oral argument.³ He was also acutely aware of what was at stake: “[T]here is no class of people other than teenage girls I would think would have the [greater] need to be protected against sexual predators” The judge also indicated he did not fully agree with the Commission’s findings, but nevertheless did not believe the District had established Espinosa’s unfitness.⁴ Nothing in this record supports the District’s position that the trial court used the wrong standard of review in ruling on the petition for writ of mandate.

II. Sufficiency of the Evidence

Section 44932, subdivision (a), sets out the only grounds upon which a permanent employee may be dismissed. The District named immoral conduct, evident unfitness for service, and willful refusal to perform regular assignments as its grounds for dismissing Espinosa.

“Immoral conduct” (§ 44932, subd. (a)(1)) is conduct hostile to the welfare of the general public and is not confined to sexual matters. It defines such conduct as that which is ““inconsistent with rectitude, or indicative of corruption, indecency, depravity,

³ For example, when the District was arguing about some evidence it wanted excluded, a minor point, the judge said, “Doesn’t that go to bias?” And when the District’s counsel was giving his version of the evidence before the Commission, the judge corrected him: “There was some dispute about the evidence on that.”

⁴ “And there were certain things done that were obviously in very poor judgment, and I would say things that were said were in poor judgment. But does that show unfitness? I don’t think the evidence rose to that level.” The Commission cited nothing that Espinosa said or did that exhibited poor judgment.

dissoluteness; or as willful, flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare.”“ (San Diego Unified School Dist. v. Commission on Professional Competence (2011) 194 Cal.App.4th 1454, 1466.)

“Evident unfitness for service” (§ 44932, subd. (a)(5)) refers to a “fixed character trait, presumably not remediable merely on receipt of notice that one’s conduct fails to meet the expectations of the employing school district.” (Woodland Joint Unified School Dist. v. Commission on Professional Competence (1992) 2 Cal.App.4th 1429, 1444 (Woodland).) It means “clearly not fit, not adapted to or unsuitable . . . ordinarily by reasons of temperamental defects or inadequacies.” (Ibid.)

Both unfitness for service and immorality as grounds for dismissal are subject to an additional condition. The conduct complained of must adversely affect students or fellow teachers and indicate that the employee is unfit to teach (or, in this case, to be a school counselor). (See Morrison v. State Board of Education (1969) 1 Cal.3d 214, 226, 229 (Morrison); see also Woodland, supra, 2 Cal.App.4th at p. 1445 [Morrison analysis applies to “evident unfitness for service”].) The Supreme Court placed this restriction on power of the boards of education to dismiss employees to counteract the vagueness of such statutory terms as “immoral,” “unprofessional,” and “involving moral turpitude,” which otherwise would give the boards license to dismiss any employee who acted in a way they found disagreeable. (Morrison, supra, 1 Cal.3d. at pp. 225-226, 229.) The court identified several factors that could be used to determine unfitness to teach. (Id. at p. 229.)

Section 44939 permits a governing board of a school district to immediately suspend a permanent employee for, among other things, “willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules

and regulations of the employing school district.”⁵ The District based “willful refusal” on Espinosa’s alleged failure to comply with the directives he was given in the December 18, 2008, Conference Summary Performance Report. Like immorality and evident unfitness to serve, the alleged insubordination must affect the students. (See *Bourland v. Commission on Professional Competence* (1985) 174 Cal.App.3d 317, 321.)

The Commission did not analyze Espinosa’s conduct using the *Morrison* factors, because it determined Espinosa did not commit the offenses with which the District had charged him. The trial court found that Espinosa had said and done things showing poor judgment (without specifying what these things were), but that his conduct did not rise to the level of unfitness for service. On appeal, the District disagrees with both the Commission and the trial court, asserting that the record contains sufficient evidence to warrant Espinosa’s dismissal.

An appellant challenging the sufficiency of the evidence on appeal must set forth in its brief “all the material evidence on the point and *not merely [its] own evidence*. Unless this is done the error is deemed waived.” (*Foreman & Clark Corp. v. Fallow* (1971) 3 Cal.3d 875, 881; see also *Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 713-714; *Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 52-53; *Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 749; *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.)

The District’s statement of facts in its opening brief is entirely one-sided, giving only the District’s evidence and totally ignoring the evidence presented in Espinosa’s favor. A few examples illustrate this tactic.

⁵ We note that one of the exclusive grounds for which a permanent employee may be dismissed is “[p]ersistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him or her.” (§ 44932, subd. (a)(7).) Although the District charged Espinosa under section 44939, the Commission rendered its decision based on section 44932, subdivision (a)(7). The relationship of this latter cause for dismissal to “refusal to perform regular assignments,” as provided in section 44939, has not been briefed, and we express no opinion about it.

The most bizarre episode in this entire proceeding was V.'s testimony that, during one of her visits to Espinosa's office, after her picture had come up on the school computer's screen during a grade check, Espinosa said, "The little kitty was full of milk" or "Is the kitty full of milk?" V. interpreted the remark to be referring to her breasts. V. testified that she told her mother about the "kitty" comment, and V.'s mother testified that V. swore her to secrecy before telling her about it. Avina testified that V. told her about the comment, which came out in Avina's testimony as "It looks like the kitty is ready to drink milk."⁶ All of this testimony is recounted in the District's brief.

Espinosa testified that he never commented at all on V.'s physical appearance. During one counseling session, after V.'s picture came up on the school computer and V. said she hated the picture, he told her he thought it was a nice picture.⁷ He also stated he had not heard about the "kitty" comment until V.'s deposition, on the first day of the hearing. Moreover, Lopez, the District's HR representative, had not heard about the "kitty" comment, which he characterized as "disgusting" and "immoral," until he testified at the hearing itself. The report placed in Espinosa's personnel file did not mention the "kitty" comment, and it never appeared in any written statement.⁸ None of these facts made their way into the District's statement of facts in the opening brief.

The District recounted testimony from V. that Espinosa met with her in his office with partially closed blinds and a closed door. Another Segerstrom counselor also testified that she had observed a closed door and closed blinds in Espinosa's office. Espinosa testified that during the 2008-2009 school year he never met with a student

⁶ Avina "wasn't quite sure" what the comment meant and asked V. what she thought it meant. Avina then accepted V.'s interpretation that it referred to her breasts.

⁷ From the testimony we gather that a student's picture appeared automatically whenever certain parts of the student's record were pulled up on the computer.

⁸ The Commission found the "kitty" evidence unpersuasive, for several reasons. First, the remark did not sound like something a grown man would say. Moreover, the Commission found it odd that a comment everyone regarded as so offensive was never memorialized in writing. Finally, the fact that such an "inappropriate" comment did not make it into the report placed in Espinosa's personnel file in December 2008 – and the fact that Espinosa received only a report and not more severe discipline – strongly suggested that he never made the comment.

while the blinds on his office door were closed. He added that he had become very aware of the danger of doing so after one of the teachers at a school where he had been a principal was falsely accused of sexual harassment. As a principal, he had always advised his male staff to keep the doors open when they were in a room with female students, and he followed this practice himself as a school counselor.⁹ The District did not refer to Espinosa's testimony in its statement of facts.

V. testified that, after she had returned to school from home during the school day, Espinosa once said, "Why didn't you ask me for a ride? I could have taken you home. I could have picked you up." She also testified that, on another occasion, Espinosa had said, "So if we go to the shoe store, she's going to be there?" after V. told him her mother was not home but was at a shoe store. The District repeated this testimony in its statement of facts, as evidence of Espinosa's offering V. rides in his car. It left out, however, Espinosa's testimony that he had never offered V., or any other student, a ride during the 2008-2009 school year, testimony that the Commission found credible.¹⁰

With respect to C., the District accused Espinosa of asking for her cell phone number and then calling her five times on a day when she was absent from school. Although the District referred to some of Espinosa's testimony on this issue, it was a very limited and slanted reference. The District recounted C.'s testimony that Espinosa entered C.'s cell phone number into his own cell phone; Espinosa denied doing this. He testified he simply wrote down the number on a piece of paper. The statement of facts did not include his denial.

The District also left out the part about why Espinosa wanted the cell phone number. He testified he had been unsuccessful in his efforts to contact C.'s mother for

⁹ The Commission found that the District had not established the charge that Espinosa met with V.M or any other female students behind closed doors.

¹⁰ It also left out V.'s testimony that she regarded the remark about the shoe store as a joke.

three weeks, despite calling the home and work numbers on file with the school, to schedule a parent conference about C.'s failing grades and about C.'s brother, who was also a Segerstrom student.¹¹ He asked C. for her cell phone number to try to reach her mother through her.

Espinosa also asked C. to ask her mother to come to school on a certain day and time, and C. agreed to tell her mother about the conference. After making these arrangements, Espinosa learned he had a conflicting obligation. On the day before the meeting with C.'s mother was supposed to take place, he testified he called C.'s cell phone twice, once in the morning and once in the afternoon, to cancel the meeting, although he had not received any confirmation that C.'s mother would be attending. He denied calling C. five times in one day or calling her at all on any other day. He also testified he made the calls regarding the conference with C.'s mother from his office phone, not his cell phone. The District acknowledged all this testimony in one sentence: "Mr. Espinosa admitted he called C.'s cell phone at least twice on December 7, 2009, and that it was to contact C.'s mother to discuss a homework issue C.'s brother was having." This is not a fair summary of "all the material evidence" on this point, as envisioned by the case law.

C. also accused Espinosa of following her to a seminar class, during which she was supposed to be reading silently, and staring at her. A classmate also testified that Espinosa stared at C. during this class. The District presented this testimony at some length in its statement of facts as evidence that Espinosa was stalking C.

The District did not allude to the contrary testimony. For example, in a statement C.'s classmate gave to Avina, she wrote that Espinosa stared at C. for "like five minutes." On the stand, this period of time was reduced to "a few seconds." The District also neglected to mention Espinosa's testimony that he had visited the seminar class not

¹¹ C., a senior, was failing senior English and economics, both of which were graduation requirements, as well as art and psychology.

to see C., but to confer with the teacher about another student who had been the subject of an earlier meeting. He denied staring at C., but stated he had noticed her when he walked into the classroom because, instead of reading silently, she was talking to her classmate and putting on makeup. (C. had previously testified she was reading when Espinosa walked into the seminar class. Her classmate, however, said they were talking.) The classroom teacher also testified she did not notice Espinosa staring at C., but felt she had to report what C. said to her.

The District having failed to present all the evidence relevant to its claim of insufficient evidence, it has waived this argument. And, in any event, it is not our function to reweigh evidence. From the examples given, it should be clear that substantial evidence supported both the trial court's ruling and the Commission's decision. Under those circumstances, we do not have the option of disagreeing with the trial court. (See *Pasadena Unified Sch. Dist. v. Commission on Professional Competence*, *supra*, 20 Cal.3d at p. 314; *Board of Trustees v. Metzger* (1972) 8 Cal.3d 206, 211.)

III. Fair Trial

In addition to rearguing the evidence, the District claims that the administrative law judge denied it a fair trial. Whether an administrative proceeding is fundamentally fair is a question of law, subject to de novo review. (See *Mednik v. State Dept. of Health Care Services* (2009) 175 Cal.App.4th 631, 639.) We deal separately with each of the District's complaints regarding the conduct of the trial.

A. (Non-)Exclusion of V.’s Testimony

The administrative law judge was prepared to exclude V. as a witness for the District because she had not been made available for deposition. Counsel were able to work out a solution to the problem, and V. was deposed. She then testified at the second day of the hearing.

Nevertheless, the District has made an issue of this nonevent. In the trial court, this was the lead-off instance of the District’s argument about the unfairness of the trial. Even after Espinosa pointed out to the trial court that V. did in fact testify at the hearing, the District continued to harp on this issue. The judge could make no sense of the District’s argument.¹² The problem was solved. V. was deposed, and she testified.

In this court, the District first characterized the administrative law judge’s ruling as “prejudicial because the [judge] had to know granting the motion would prevent the District from presenting any part of its case because V.’s testimony was crucial to proving the series of events that led to Mr. Espinosa’s dismissal. The [judge] should have looked for alternatives to granting the motion; in particular Mr. Espinosa’s counsel did not object to the District’s request for continuance, which would have permitted the deposition to occur.” The District then suggested that the administrative law judge made the ruling in order to bring the case to an early close, so that he “would not have had to conduct this hearing.”

In its reply brief, the District shifted ground. The prejudice was not the ruling or the administrative law judge’s desire to get rid of the case quickly. It was the fact that the other two members of the panel heard the argument about excluding the witness. The District made the wholly speculative argument that hearing the dispute about excluding V. as a witness prejudiced the other two panel members against the District. The District argued that the two panel members function as “jurors” in an

¹² “I was kind of wondering. What’s the big deal? She was able to testify.”

administrative hearing, and extended arguments about evidence are usually not conducted in the presence of jurors.

The District offered no authority for regarding the nonjudicial panel members as jurors. Given the qualifications required to be selected to serve on a panel, it appears that these members function much more like experts or special masters than like jurors.¹³ And the reason admissibility-of-evidence arguments are usually conducted outside the presence of a jury is that if the evidence is ruled inadmissible, the jury will not have heard it and have to “unring the bell,” not out of concern about prejudice to the party losing the argument.

The District also presented us with no legal authority to support its position that a nonjudicial panel member should not hear debates about evidence or that hearing them somehow prejudices this member against the losing party. The administrative law judge made numerous evidentiary rulings during the hearing, some of which included arguments. Is it the District’s position that the other panel members should have left the room while the judge was making these rulings? Was Espinosa prejudiced in their eyes each time a ruling went against him?

Nothing in the record suggests that the ruling on the exclusion motion prejudiced the District. The basis for the ruling – V.’s nonappearance at her deposition – was resolved, and she testified. By the time the Commission got around to finalizing its decision in early December 2010, the entire panel had probably forgotten all about the exclusion motion. The argument borders on the frivolous.

B. Hearsay Objections

Section 44944, subdivision (a)(1), requires a dismissal or suspension hearing to be conducted in accordance with Chapter 5 of the Government Code,

¹³ A panel member must “hold a currently valid credential and have at least five years’ experience in the past 10 years in the discipline of the employee.” (§ 44944, subd. (b)(2).) If this case were tried in court to a jury, it is highly unlikely that someone with this background would be a member of that jury.

commencing with section 11500. Government Code section 11513, subdivision (d), provides: “Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before the submission of the case or on reconsideration.” Government Code section 11513, subdivision (c), provides: “The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.”

Government Code section 11513, subdivision (c), relaxes the rules of evidence in administrative hearings, “except as hereinafter provided.” Subdivision (d) provides that hearsay evidence may be used to supplement or explain other evidence. The prohibition against hearsay evidence is thus relaxed to a certain extent, but not entirely.

In this case, the administrative law judge repeatedly sustained objections to hearsay testimony that the District sought to elicit *before* providing the nonhearsay testimony it was supposed to supplement or explain. For example, the District’s counsel asked one of C.’s teachers what C. had said to her regarding Espinosa *before* C. herself had testified. Espinosa’s counsel objected on hearsay grounds, and the judge sustained the objection. When the District’s counsel protested that hearsay was admissible in an administrative proceeding to corroborate direct evidence, the judge observed, “And we haven’t had the direct evidence.” “[W]e will have it this afternoon,” counsel promised. “Maybe. I don’t know,” replied the judge.

The District was attempting to put the supplemental hearsay cart before the direct evidence horse. Unless there is direct evidence already in the record, there is

nothing to supplement or explain. (See *DeMartini v. Department of Alcoholic Beverage Control* (1963) 215 Cal.App. 2d 787, 809, overruled on other grounds in *Harris v. Alcoholic Bev. etc. Appeals Bd.* (1965) 62 Cal.2d 589.) What if the direct evidence never materializes? If hearsay evidence has already been admitted on spec, then the panel members have to remember to disregard it, creating a record almost guaranteed to cause confusion. Clearly, this is a call that relies on the experience and discretion of the hearing officer.

Although Government Code section 11513 eases the rules of evidence in an administrative hearing, the statute specifically puts conditions on hearsay evidence. It does not countenance the evidentiary free-for-all for which the District's counsel argued. The judge correctly required the District to question C. directly before it allowed someone else to testify about what she said. As all of the challenged hearsay rulings followed this pattern, the administrative law judge correctly sustained these objections as well. (See, e.g., *Bledsoe v. Biggs Unified School Dist.* (2008) 170 Cal.App.4th 127, 130, 141 [hearsay administrative decision admitted to support direct evidence of reason for retaining junior teachers over laid-off senior teacher].) When the hearsay testimony was truly corroborative, however, the judge overruled the objection. The rulings seem completely appropriate to us.

C. Section 44944(a)(5) Exclusion

Section 44944, subdivision (a)(5) provides in pertinent part: "No testimony shall be given or evidence introduced relating to matters that 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.”¹⁴ The record does not indicate when the notice was “filed,” but the District states that the date was February 9, 2010, and we will accept that date. Testimony or evidence relating to “matters” that occurred on or before February 9, 2006, is barred, except for the specified records.

The application of this code section became an issue when it turned out that V.’s mother had had a previous encounter with Espinosa when he was the assistant principal of Valley High School. He recommended her son’s expulsion, a recommendation with which V.’s mother did not agree. Espinosa’s counsel questioned her about the incident during cross-examination – as evidence of bias – and the District’s counsel sought to exclude this line of questioning as being beyond the four-year window. V.’s mother refused to answer questions on this topic during her cross-examination. Espinosa also testified regarding the expulsion, again over objection. The administrative law judge permitted the testimony for a limited purpose, as evidence of previous acquaintance. The District now cites the admission of this testimony as further evidence of the prejudicial unfairness of the trial.

In *Atwater Elementary School Dist. v. California Dept. of General Services* (2007) 41 Cal.4th 227, the California Supreme Court declined to decide whether section 44944, subdivision (a)(5), represented a statute of limitations, an evidentiary bar, or a condition on a substantive right. (*Id.* at p. 231.) Regardless of what it was, the ban on evidence more than four years old was subject to equitable estoppel. (*Id.* at p. 232.) The Court previously regarded the ban as “more of a bar against the use of stale information to buttress a current charge than a true statute of limitations. . . .” (*Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208, 222, fn. 15; see also *Boliou v. Stockton Unified School Dist.* (2012) 207 Cal.App.4th 170, 178, fn. 3.)

¹⁴ The “notice” is the one given pursuant to section 44934, notifying the employee of a district’s governing board of its intention to suspend or dismiss the employee.

We conclude the “matters” referred to in the statute – those occurring more than four years before the date of the notice – are *employee* actions that the employer seeks to use to support suspension or dismissal, whether directly or as instances of other bad behavior. The code section prohibits the Commission from “basing” a decision on charges or evidence relating to matters older than four years. The section thus restricts the age of the information that can be used to support a dismissal, but it does not preclude introducing other kinds of older relevant evidence. For example, each of the adult witnesses, including Espinosa, recounted his or her professional background in detail from the very beginning, clearly exceeding the four-year limit on testimony. Under the District’s interpretation of the code section, none of this evidence regarding the witnesses’ professional lives before February 2006 would be admissible.

With respect to the specific evidence the District is challenging, it hardly seems likely that the Commission would “base” its decision about dismissing Espinosa on whether V.’s mother had a grudge against him. And, in fact, the Commission’s decision does not mention Espinosa’s previous acquaintance with V.’s mother.¹⁵

The admission of the evidence regarding V.’s mother did not prejudice the District or cause the trial to be unfair. On the contrary, it would have been unfair to Espinosa to create the impression in the minds of the panel members that he and V.’s mother had no prior history. The ruling was entirely proper.

D. Miscellaneous Remarks

The District also complains about three comments made by the administrative law judge during the course of the hearing, claiming they prejudiced its case in the eyes of the two nonjudicial panel members. One of the remarks was “Please be polite. You make me real mad when you keep arguing my rulings.”

¹⁵ We should also point out that the improper admission of evidence would not warrant overturning the Commission’s decision if sufficient properly admitted evidence supports it. (See *So. Cal. Jockey Club, Inc. v. California Horse Racing Board* (1950) 36 Cal.2d 167, 176.)

To place the remark in context, it was made during the fifth time in two days that the administrative law judge had ruled that the District could not introduce supplemental hearsay before the direct evidence it was intended to supplement and the fifth time that the District's counsel had disputed the ruling at some length, and once at some volume. While we prefer that judicial officers keep their cool, we cannot but sympathize with a judge who is hearing the same argument over and over after making a ruling.¹⁶ We do not believe this remark was prejudicial to the District's case.

The District also singled out this exchange between a witness and the administrative law judge as prejudicial:

“[The Witness (Lopez)]: You know, you can give somebody the benefit of the doubt one time that you make people uncomfortable and maybe you didn't mean it. The second time it was clear to me that it's not an accident, you can't excuse it, [Espinosa's] on the prowl of a deeper relationship with a high school girl.

[District counsel]: And that is what you concluded on December 10th?

[The Witness]: I thought that's what this was leading to, definitely.

[District counsel]: Why did you come to that conclusion?

[The Witness]: Because [Espinosa] had been warned specifically about similar behavior a year before, and here he was doing it again.

The Court: What before, what kind of behavior?

The Witness: Making girls uncomfortable.

The Court: Did you [say] seminal behavior?

The Witness: No. I like that word, but I didn't use it.

The Reporter: Similar.

The Court: Similar. You could use that word next time.

¹⁶ The District's counsel asserted he was “mak[ing] a record” by continuing to argue after the administrative law judge ruled. Counsel makes a record by objecting and stating the grounds for objection or by making an offer of proof, as appropriate. (See Evid. Code, §§ 353, 354.) Arguing at length about the rules of evidence with the judge after he or she has ruled is not making a record; it is being disrespectful and obstructive.

The Witness: I will try.”

The District characterizes the exchange between the court and the witness as proof that the judge “was not paying attention to the proceedings” and that he was also telling the witness, Lopez, “what words he should use.” This exchange also, in the District’s opinion, prejudiced its case before the other panel members.

The expression “tempest in a teapot” comes to mind, except that a teapot is far too spacious an arena for this particular storm. People are frequently asked to repeat themselves while testifying; this is not evidence that the judge is inattentive, but only that he or she did not catch something the first time. This judge’s remarks included a futile attempt to introduce a bit of humor into the proceedings and were hardly prejudicial, except perhaps to his potential career as a comedian.

Finally, the District objected to a “sarcastic comment” made during the cross-examination of Avina, Segerstrom’s principal: “Thank you, God, for this case.” Once again, context is everything. Here is the entire exchange:

“[Espinosa’s counsel, Perez]: Good morning, Dr. Avina.

[The Witness]: Good morning.

[Espinosa’s counsel]: I want to say you look fabulous.

[The Witness]: Thank you.

The Court: Especially with the U.H. shirt on. [¶] I was going to say he’s not wearing the Harvard shirt. Mr. Perez went to Harvard.

Mr. Perez: We discovered we went almost the same year.

The Court: But you didn’t know Mr. Perez?

The Witness: I didn’t.

The Court: Thank you, God, for this case.”

It is not clear why the judge was giving thanks to the deity. Perhaps he was expressing relief that he would not need to explore any bias Avina might have had because she and Perez had been contemporaries at Harvard. But whatever the remark meant, it is clear

that it was made during banter among the witness, counsel, and the court. How this joking exchange could prejudice the District's case is a complete mystery. The District does its cause no favors by elevating these trivial complaints to appellate issues.

The Commission gave the District a thorough opportunity to present all its evidence of Espinosa's claimed misdeeds. The trial court reviewed the record and agreed with the Commission's conclusion. We have reviewed the record, and we do not see anything to indicate an unfair trial or an improper standard of review by the trial court, issues that we review de novo. The District waived its argument with respect to the sufficiency of evidence by giving us a one-sided statement of facts, and in any event our role in reviewing evidence would be a very limited one. Like the trial court, we are fully aware of the necessity to protect teenage girls, but, as the trial court observed, "the evidence just wasn't there."

DISPOSITION

The judgment denying the petition for writ of mandate is affirmed. Espinosa shall recover his costs on appeal. Espinosa is also entitled to reasonable attorney fees on appeal (*Russell v. Thermalito Union School Dist.* (1981) 115 Cal.App.3d 880, 884; § 44944, subd. (e)(2)), and we remand the matter to the trial court for this determination.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

THOMPSON, J.