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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

ERIC MOBERG,

Plaintiff and Appellant,

v.

MONTEREY PENINSULA UNIFIED  
SCHOOL DISTRICT BOARD OF  
EDUCATION,

Defendant and Respondent.

H037865

(Monterey County  
Super. Ct. No. M109124)

**I. INTRODUCTION**

Appellant Eric Moberg, a self-represented litigant, was hired in 2009 by respondent Monterey Peninsula Unified School District (the District) as a special education teacher for young adult students with moderate to severe handicaps. In 2010, the District issued a statement of charges and notice of recommendation for dismissal of Moberg as a probationary certified employee. The statement of charges informed Moberg that he was being dismissed for cause, including evident unfitness for service (Ed. Code, § 44932, subd. (a)(5))<sup>1</sup> and persistent violation of or refusal to obey school laws or regulations (§ 44932, subd. (a)(7)). In a supplemental statement of charges, the District added the additional charge of dishonesty (§ 44932, subd. (a)(3)).

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<sup>1</sup> All statutory references hereafter are to the Education Code unless otherwise indicated.

After an administrative hearing, the administrative law judge (ALJ) upheld Moberg's dismissal on the charges of dishonesty (§ 44932, subd. (a)(3)) and persistent violation of or refusal to obey school laws or regulations (§ 44932, subd. (a)(7)). The ALJ's decision was adopted by the District's governing board. Moberg challenged his dismissal by filing a petition for writ of mandate in the superior court. The writ petition was denied on the grounds that the court's independent review of the administrative record showed that the weight of the evidence supported Moberg's dismissal on two charges, persistent refusal to obey school laws or regulations (§ 44932, subd. (a)(7)) and evident unfitness for service (§ 44932, subd. (a)(5)).

On appeal, we understand Moberg to argue that the judgment should be reversed because (1) there is not substantial evidence to support the finding that he persistently refused to obey school laws or regulations by repeatedly sending rude and disrespectful emails to District personnel, and the allegedly disrespectful emails did not affect students; (2) the District's directions to cease sending rude and disrespectful emails to District personnel had a chilling effect on his free speech rights; (3) the District's dismissal constitutes unlawful retaliation for his complaints that the District discriminated against his students; (4) he was subject to disparate treatment because a co-worker was not disciplined for sending a disrespectful letter about him; (5) his exemplary work history constitutes mitigation; (6) the administrative hearing was untimely held more than 60 days after he demanded a hearing; and (7) the District wrongly withheld his pay.

For the reasons stated below, we find no merit in Moberg's contentions and we will affirm the judgment.

## **II. DISMISSAL OF A PROBATIONARY TEACHER**

We will begin with an overview of the Education Code provisions that govern the dismissal of a probationary teacher.

“ ‘The Education Code establishes four possible classifications for certificated employees: permanent, probationary, substitute and temporary.’ [Citation.] The code

authorizes the governing boards of school districts to hire, classify, promote and dismiss certificated employees (i.e., teachers) (see § 44831), but establishes a complex and somewhat rigid scheme to govern a board's exercise of its decisionmaking power.” (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916-917 (*Kavanaugh*); see also § 44915 [governing boards of school districts shall classify as probationary employees persons employed in positions requiring certification qualifications for the school year, who have not been classified as permanent employees or as substitute employees]; *McIntyre v. Sonoma Valley Unified School Dist.* (2012) 206 Cal.App.4th 170, 175 [same].) During the first two years of employment, “a certificated teacher in a large school district (250 or more students) is a probationary employee. (§ 44929.21, subd. (b).)” (*Sullivan v. Centinela Valley Union High School Dist.* (2011) 194 Cal.App.4th 69, 74.)

“A certificated teacher’s classification also governs the level of statutory job protection the teacher enjoys and controls the level of procedural protections that apply if he or she is not reelected. In general, permanent employees may not be dismissed unless one or more statutorily enumerated grounds are shown. (§ 44932.) Probationary employees may not be dismissed during the school year except for cause or unsatisfactory performance (§ 44948.3), but, on timely notice, ‘may be non-reelected without any showing of cause, without any statement of reasons, and without any right of appeal or administrative redress.’ [Citation.]” (*Kavanaugh, supra*, 29 Cal.4th at p. 917.)

Section 44948.3, subdivision (a) provides: “First and second year probationary employees may be dismissed during the school year for . . . cause pursuant to Section 44932.” Pertinent here, cause to dismiss a probationary teacher under section 44932 includes “[d]ishonesty” (§ 44932, subd. (a)(3)), “[e]vident unfitness for service” (§ 44932, subd. (a)(5)), and “[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)).

Section 44948.3, subdivision (a) also provides the procedure for dismissal of a probationary teacher during the school year: “Any dismissal pursuant to this section shall be in accordance with all of the following procedures: [¶] (1) The superintendent of the school district or the superintendent’s designee shall give 30 days’ prior written notice of dismissal, not later than March 15 in the case of second year probationary employees. The notice shall include a statement of the reasons for the dismissal and notice of the opportunity to appeal. . . . [¶] (2) The employee shall have 15 days from receipt of the notice of dismissal to submit to the governing board a written request for a hearing. The governing board may establish procedures for the appointment of an administrative law judge to conduct the hearing and submit a recommended decision to the board.”

Where the ALJ has rendered an adverse decision that is adopted by the school district’s governing board, the probationary teacher may seek review in the superior court by filing a petition for writ of mandate. (Code Civ. Proc., § 1094.5; see, e.g., *Vick v. Board of Education* (1976) 61 Cal.App.3d 657, 658.)

### **III. FACTUAL AND PROCEDURAL BACKGROUND**

#### ***A. The Statement of Charges and Notice of Recommendation for Dismissal***

In August 2009, the District hired Moberg to teach young adult students (18 to 22 years old) with moderate to severe handicaps in the District’s regional special education transition program during the 2009-2010 school year.

In February 2010, the District submitted a statement of charges and notice of recommendation for Moberg’s dismissal pursuant to section 44948.3. The charges for dismissal included “[e]vident unfitness for service ([§] 44932, subd. (a)(5))” and “[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 (§ 44932, subd. (a)(7)).”

The statement of charges specified that the charges were based upon numerous incidents involving Moberg’s conduct as a teacher, including “mak[ing] it very difficult” for the program manager to perform her job duties; refusing to recognize the program manager’s authority; failing to maintain appropriate relations with other District staff; treating District staff “in a disrespectful and rude manner, often violating District policy by using e-mail for disrespectful communications”; failing to comply with District directives to utilize a District-provided communication device for emergency contacts; and being unwilling or unable to correct “numerous deficiencies in [his] classroom teaching.”

In June 2010, the District submitted supplemental charges supporting dismissal, which stated that the District’s dismissal of Moberg was supported by an additional cause for dismissal, dishonesty (§ 44932, subd. (a)(3)). The charge of dishonesty was based upon Moberg’s application for employment with the District, which stated that he had left his previous employment with the San Mateo County Office of Education “ ‘[t]o seek better opportunities and avoid budget and program cuts.’ ” This statement constituted dishonesty, according to the supplemental charges, because Moberg had actually entered into a settlement agreement with the San Mateo County Office of Education that resolved dismissal proceedings against him and required him to resign.

In a letter dated February 12, 2010, the District informed Moberg that the District’s governing board had considered the adoption of charges for his dismissal as a probationary certificated employee at a February 9, 2010 meeting. The letter further informed Moberg that the governing board had taken action to place him on immediate suspension without pay and to initiate dismissal proceedings. Moberg was also advised of his right to request a hearing within 30 days.

After Moberg timely requested a hearing, the District's attorneys informed him via email dated March 15, 2010, that they were working with the state Office of Administrative Hearings to schedule his dismissal hearing and inquired as to his availability for a hearing on June 21 and 22, 2010. The record on appeal does not reflect any objection by Moberg to the proposed hearing dates. Thereafter, the Office of Administrative Hearings set the hearing for June 21 and 22, 2010.

On June 7, 2010, the District's governing board adopted the supplemental charges supporting Moberg's dismissal.

## ***B. The Administrative Hearing***

### **1. Moberg's Motion for Dismissal**

When the ALJ heard motions in limine on the first day of the administrative hearing, June 21, 2010, Moberg made an oral motion for dismissal of the case and his reinstatement as a District employee on the ground that the hearing was untimely. Moberg argued that section 44932 requires commencement of a dismissal hearing for a permanent employee with 60 days, and that the 60-day limit should also apply to probationary employees. The District opposed the motion on the ground that the statutes governing the dismissal of probationary employees did not include a 60-day limit for commencement of the dismissal hearing.

After hearing the parties' arguments, the ALJ stated that she anticipated that the motion for dismissal would not be granted when she addressed the motion in her written decision. The ALJ then heard the parties' opening statements, which were followed by witness testimony.

### **2. Hearing Testimony**

#### ***Testimony of Leslie Marie Codianne***

Leslie Marie Codianne is employed by the District as the associate superintendent in student support services. When Codianne recommended Moberg for employment with the District, she was not aware that he had resigned his previous employment with the

San Mateo County Office of Education as a term of a settlement agreement. Since Moberg had stated on his application for District employment that he left his previous employment to seek better opportunities and to avoid budget and program cuts, Codianne believed that his application was dishonest.

The District has a policy concerning employee use of technology that each employee must sign as part of their contract. The policy provisions state that violation may result in legal or disciplinary actions, and also include rules for “network etiquette.” With respect to email, the network etiquette rules require employees to “be polite, never send or encourage others to send abusive messages,” “ ‘[r]emember that humor and satire is very often misinterpreted,’ ” and “ ‘[r]emember all users are human beings. Don’t attack correspondence. Persuade them with facts.’ ” Although the technology policy is given to all employees, Codianne did not know if Moberg had signed it.

In an email to Moberg dated October 30, 2009, Codianne instructed him as follows: “ ‘Eric, I’m going to ask you to stop this type of e-mail exchange with staff.’ ” The type of email that Codianne was referring to was the multiple emails that Moberg had been sending to Teresa Poirier, the District’s program manager for the moderate/severe program, and to Ann Mitchell-Kilty (Kilty), the District’s executive director of adult education and Moberg’s supervisor. In his emails, Moberg disagreed with their decisions and was “constantly referencing and questioning their decisionmaking.” Codianne further explained that the “ongoing constant back and forth in terms of the communication between [Moberg] and Miss Poirier was a constant breakdown in teamwork.” Moberg also sent emails accusing other employees of a conspiracy to defame him.

Moberg did not obey Codianne’s directive to stop sending emails to Poirier that questioned her decisionmaking as program manager. He also sent Codianne an email stating, “ ‘What are we going to do about Ann Kilty’s serially defamatory September 29, 2009, observation critique of my work?’ ” In Codianne’s view, Moberg’s email message

was not acceptable for an education professional and did not comply with her directive to stop sending that kind of email.

On November 15, 2009, Codianne sent an email to Moberg in which she stated that she thought he understood that she had requested that he “put an end to e-mail communications which are aimed at challenging authority figures and questioning program decisions.” Moberg had sent emails in which he accused both Poirier and Kilty of defaming him and Codianne of “knowingly covering for [Poirier’s] and [Kilty’s] false claims against him.”

Thereafter, Codianne sent an email to Moberg dated December 11, 2009, requesting that he send all questions, concerns, and requests to Heath Rocha, the District’s director of student support services. Moberg did not comply with this directive. For example, he sent a January 4, 2010 email to Kilty asking for keys to the multipurpose room and asking, “You do trust [teacher Lorraine Ramirez] and me, don’t you?”

Codianne also found that Moberg had failed to comply with a District directive that he have a District phone that he could access in emergency situations. One of the students in Moberg’s classroom was involved in an emergency situation while Moberg was off campus. The instructional assistant attempted to call Moberg, but could not get through to him on the Nextel cell phone provided by the District. The teacher in the classroom next door was unsuccessful in her attempt to contact Moberg on another District communications device, a Motorola radio.

As a result of that incident, Codianne issued a letter of reprimand to Moberg dated January 25, 2010. In the letter, Codianne noted that a prior incident had occurred in which Moberg could not be contacted because he had turned in his Nextel cell phone, and she had directed him to pick up his Nextel and use it for all communications with District administrators, staff, and families during school hours and community activities. The letter concluded, “I am once again instructing you to use the District Nextel as your primary source of communication with Administrators, staff and parents. When you are

working in the Community or [Monterey Peninsula College] you should always have your Nextel turn on to ensure you can be readily reached by District staff.”

Another safety-related incident involved Moberg using his personal vehicle to transport a medically fragile student who was wheelchair-bound off campus. Codianne directed Moberg to discontinue using his own vehicle to transport students off campus and to use either District vans or public transportation. In response, she received a January 4, 2010 email from Moberg that began, “I will certainly comply with your directive . . . .” and concluded, “Also, I am disappointed that neither you nor the person who brought my generosity and creativity to your ‘attention’ thanks me or lauds me for solving a problem that would otherwise require the Shepherd administration to solve, probably at a sizable expense.”

Codianne also observed Moberg in the classroom because he had questioned the ability of his direct supervisor. Her overall observation was that Moberg only partially met teaching standards, for several reasons: Failure to provide lesson plans; failure to align his one-on-one work with the student’s individual educational goals; the majority of instruction was given by the instructional assistant; the instructional assistants did not document the students’ actual performances; and the instructional assistants did not demonstrate any prior knowledge as to the skills acquisition targeted by each activity.

***Testimony of Ann Mitchell-Kilty***

Kilty is employed as the executive director of the adult education, workability, regional occupational program, and transition. She is also the site supervisor at the District’s adult school site, where Moberg’s classroom was located. Kilty’s duties included supervising Moberg and observing his performance as a probationary teacher.

During her observations of Moberg on September 29, 2009, Kilty saw, among other things, a lawnmower in his classroom that caused her to be concerned for student safety. At other times, Kilty observed a table saw in his classroom. Kilty made a number of suggestions in her written observations for improvement of Moberg’s performance.

In an evaluation dated February 5, 2010, Kilty reported that Moberg partially met the California standards for the teaching profession. She also stated, under the “Commendations/Recommendations” section of the evaluation, that “Mr. Moberg has had difficult and occasionally adversarial relationships with colleagues including peers and administration as evidenced in numerous email exchanges. [¶] Recommendation: [¶] Cease email or other communication that is not respectful of colleagues.” Kilty did not recommend Moberg for reemployment.

Although Kilty had previously complained to her supervisor about Moberg’s emails to her, she never asked him directly to change the tone of his emails.

#### ***Testimony of Teresa Poirier***

Teresa Poirier is employed by the District as a school psychologist and “program manager for the moderate/severe program.” Her responsibilities as program manager included overseeing the implementation of the program, which caused her to have regular interaction with Moberg with respect to adequate supplies, teacher training and development, and the completion of individual education programs (IEPS).

On November 23, 2009, Poirier sent an email to Moberg in which she requested a copy of his current CPR and First Aid cards because she needed “proof from everyone who did not attend the CPR/First Aid trainings that they are certified for our files.” Moberg responded as follows in a November 23, 2009 email: “It is in HR, and I do not waive my privacy rights for you to access my file.” Poirier replied in a November 30, 2009 email, “That’s fine, I just need the dates so we know when they expire.” Moberg never responded to that email and never provided any verification that he was currently certified.

In an email to Poirier dated December 11, 2009, regarding Moberg’s concern that Poirier had accessed student files in his classroom, Moberg wrote, among other things: “Lastly, aren’t you taking your job title of ‘psychologist/program manager’ a little too seriously? You’ve had a pupil personnel services credential for what, less than two

years?” Poirier found the email offensive and it made her uncomfortable that Moberg knew when she had received her pupil personnel services credential.

Poirier subsequently filed a January 6, 2010 formal written complaint to the District about Moberg’s conduct. The complaint stated in part, “Over the course of the school year, [Moberg’s] behavior towards me has become more and more disrespectful and he frequently refuses to work with me to complete the necessary tasks of the program. [Moberg’s] behavior has created a very hostile working environment and he has made me very uncomfortable on multiple occasions. [¶] Due to [Moberg’s] refusal to work with me and treat me respectfully, the Associate Superintendent of Student Support Services has directed the Director of Student Support Services to work with [Moberg] in my place. [Moberg’s] hostile behavior towards me has made it impossible for me to perform the duties of my job adequately and ensure the students are supported in a safe and productive manner.”

Poirier also provided a list of specific interactions with Moberg to support her complaint. Among other things, Poirier reported that Moberg had refused to listen when she asked him to remove the power tools from his classroom, spoke over her, and raised his voice to her in the presence of other staff. Poirier also received a confidential email from one of Moberg’s instructional assistants asking to be moved to another classroom because Moberg’s classroom was disorganized.

#### ***Testimony of Marilyn Shepherd***

Marilyn Shepherd is the District’s superintendent. She signed the statement of charges in support of Moberg’s dismissal. Regarding the accusation that Moberg had refused to allow Poirier to access his CPR card, Shepherd stated that Poirier’s request for the CPR card was appropriate because Poirier’s pupil personnel services credential authorized her to oversee the moderate/severe program. As to the accusation that Moberg had refused to recognize Poirier’s authority as program manager, Shepherd explained that Poirier also had the right to approve or disapprove program suggestions made by Moberg.

Among Moberg’s inappropriate emails referenced in the statement of charges was an exchange between Moberg and associate superintendent Codianne. On October 30, 2009, Codianne sent an email to Moberg that stated in part: “I am going to ask you to ‘STOP’ this type of e-mail exchange with staff. I do not see this method of communication a means to solve issues in a positive manner.” Moberg responded in a November 2, 2009 email that stated in part: “I look forward to the meeting I scheduled with you next week. I welcome the opportunity to respond directly to what is some sort of ‘Swift Boat’ operation against me. [¶] I am not certain what you mean by ‘this type of e-mail exchange,’ but I will do my best to comply. I would also point out that my e-mail is a polite response to a less than polite and less than positive e-mail from our program manager. . . . [¶] Additionally, to return to the Swift Boat analogy, I learned from John Kerry’s mistake of not responding when someone unfairly attacks you. I will not make that mistake.” Shepherd considered that to be a “very inappropriate response” that showed disrespect.

Shepherd helped write the Employee Procedural Handbook that covers the topic of email etiquette and was given to every employee.

### ***Testimony of Eric Moberg***

Regarding his reasons for leaving his prior employment with the San Mateo County Board of Education, Moberg asserted that his statement on his application to the District—that he left his prior employment “ ‘[t]o seek better opportunities and avoid budget and program cuts’ ”—was accurate. According to Moberg, the San Mateo County Board of Education initiated dismissal proceedings against him, but then abandoned the proceedings without dismissing him and never asked him to resign. Moberg sued the San Mateo County Board of Education because the new superintendent had retaliated against him for complaining about her cuts to the special education program at a board meeting.

As to Poirier’s request that he provide copies of his CPR and First Aid cards, Moberg stated that he did not give her permission to access the cards in his personnel file

due to “privacy” and because he “didn’t think that it was her place.” Moberg also stated that he had “told her what the dates were, and [he] didn’t think that it was serving any purpose.”

Additionally, Moberg did not agree that Poirier had any authority to direct him. In his view, they had “a minor personality conflict.” It was also Moberg’s view that Poirier was a psychologist and not an administrator, and only administrators are bosses. Moberg denied that he had ever raised his voice to Poirier. He also believed that all of his emails to Poirier involved professional and educational issues and were not either hostile and abusive or insulting and unprofessional. In Moberg’s view, his emails to Poirier did not constitute challenging an authority figure because he did not consider her to be an authority figure.

Regarding the accusation that he had failed to remove power tools from his classroom when Poirier asked him to do so, Moberg asserted that Poirier had said “ ‘That’s fine’ ” when he explained that the table saw was unplugged and had no blades. Moberg had intended to use the table saw for a greenhouse project. Moberg acknowledged that he kept his personal electric lawnmower in the classroom as part of a job training program, but explained that he never had the students practice using the lawnmower while it was engaged.

Moberg also stated that with respect to “having [an] adversarial relationship with administration, I would assert . . . that’s, not only my right, but my duty. I have a right to file a grievance, of course. I’ve done so. [¶] And I don’t see the challenging authority in here. [¶] As far as appropriate relationship with other District staff, I don’t know who they’re talking about, unless that refers only to [Poirier]. I wouldn’t call her staff.”

Moberg denied receiving a copy of the District’s email policy until he received the statement of charges. He also denied receiving any directives regarding his email communication from anyone other than Codianne. As to Codianne’s directive that he send all his email communications to Rocha, Moberg did not comply because he was

either responding to emails from Kilty, his immediate supervisor, or communicating appropriately with her as his boss.

Moberg also denied being told that he was to use a District Nextel cell phone exclusively. He asserted that he had communicated with his instructional assistant on his personal cell phone about the student who had an emergency in his classroom while he was off campus, and therefore the accusation that he had been unavailable at that time was inaccurate.

As to transporting a medically fragile student in his personal vehicle, Moberg denied that he had done so. In his view, Moberg did not have any “physically fragile” students in his class. The student in question rode horses and also rode in the school van every day, which is less safe, according to Moberg, than his personal vehicle.

Moberg felt that the District was discriminating against students who were severely handicapped, based on the position taken by Kilty and Poirier that those students were “too low” to be in the “workability” job training program.

At the conclusion of testimony, the parties offered further argument on Moberg’s motion for dismissal. The ALJ took the motion under submission and requested written closing arguments.

### ***C. The ALJ’s Proposed Decision***

Following the administrative hearing, the ALJ issued a proposed decision dated August 12, 2010, that set forth her factual findings and legal conclusions.

The ALJ concluded that cause to dismiss Moberg for dishonesty existed, pursuant to section 44932, subdivision (a)(3),<sup>2</sup> based on the findings that Moberg was dishonest in his application for employment with the District. The ALJ found that Moberg stated in his application that he had left his prior employment with the San Mateo County Board of

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<sup>2</sup> Section 44932, subdivision (a)(3) provides: “No permanent employee shall be dismissed except for one or more of the following causes: [¶] . . . [¶] Dishonesty.”

Education to seek better opportunities and avoid budget and program cuts, although the evidence showed that he had resigned his prior employment in settlement of a dismissal proceeding.

The ALJ also concluded that cause existed to dismiss Moberg for persistent violation of or refusal to obey school laws or regulations pursuant to section 44932, subdivision (a)(7),<sup>3</sup> based on her findings concerning the District’s Employee Procedural Handbook instruction to employees “to be respectful and thoughtful when using e-mail,” Codianne’s directives to Moberg regarding his email communications, and the content of the emails entered into evidence. However, the ALJ determined that the evidence regarding Moberg’s management of his classroom and ability to meet teaching standards did not constitute cause to dismiss for persistent violation of or refusal to obey school laws or regulations.

The ALJ further determined that cause to dismiss Moberg for evident unfitness for service (§ 55932, subd. (a)(5))<sup>4</sup> did not exist, since the evidence did not show that Moberg, although he was “a person challenging to work with,” had the requisite “temperamental defect.”

In her discussion section, the ALJ explained her conclusions: “Special education is an area where a team approach is not only desirable, but essential. The evidence demonstrated that during [Moberg’s] brief tenure with the District he was rude and/or disrespectful to various fellow staff members on numerous occasions. [Moberg’s] e-mail

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<sup>3</sup> Section 44932, subdivision (a)(7) provides: “No permanent employee shall be dismissed except for one or more of the following causes: [¶] . . . [¶] Persistent 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.”

<sup>4</sup> Section 44932, subdivision (a)(5) provides: “No permanent employee shall be dismissed except for one or more of the following causes: [¶] . . . [¶] Evident unfitness for service.”

messages convey the opposite of a good faith effort to be a contributing member of a team. The record contains three warnings from his superior to stop using e-mail in the manner that [Moberg] was using it. [Moberg], however, did not stop. In addition, it was proven that [Moberg] was dishonest, and he presented no real evidence of rehabilitation or even mitigation. By his testimony, [Moberg] conveyed an attitude consistent with that conveyed in his e-mail communications and consistent with the conclusion that he felt justified in both his persistent violation of directives and in claiming that his reason for leaving the employ of [San Mateo County Board of Education] was not related to a dismissal proceeding. Accordingly, it is concluded that the District's dismissal of [Moberg] was warranted."

The ALJ's proposed decision also included the following order: "[Moberg] is dismissed from his position as a probationary certificated employee with the [District]." No express ruling regarding Moberg's motion in limine for dismissal was included in the ALJ's decision.

On September 7, 2010, the District's Board of Education adopted a resolution to adopt the ALJ's proposed decision.

***D. The Petition for a Writ of Mandate***

On November 4, 2010, Moberg filed a petition for a writ of mandate to set aside the Board of Education's decision. He challenged the decision to dismiss him on the following grounds: (1) his exemplary work history is evidence of mitigation; (2) the dismissal case demonstrated retaliation by the District and its attorneys for revealing "a policy and practice of discrimination against his students"; (3) there was no evidence of dishonesty; (4) he did not create a hostile work environment; (5) there was "ample evidence" of disparate treatment; and (6) disrespect is not grounds for dismissal. The District filed an answer to the petition on March 24, 2010.

### ***E. The Trial Court's Statement of Decision and Judgment***

The trial court issued a statement of intended decision on August 23, 2011. After conducting a independent review of the 10-volume administrative record, the trial court concluded that “the weight of evidence contained within the record as a whole supports the dismissal of [Moberg] pursuant to section 44932, subdivision (a)(5) (evident unfitness for service) and section 44932 (a)(7) (persistent refusal to obey school laws or regulations), but that section 44932, subdivision (a)(3) (dishonesty) lacks evidentiary support here as a ground for dismissal.”

The showing in support of the charge of dishonesty was insufficient, the trial court found, because it was based on a single incident—Moberg’s deceptive application for employment with the District— rather than a “*disposition* to deceive.”

Regarding the charge of Moberg’s refusal to follow school laws or regulations, the trial court found that “the emails, which led to a breakdown of the team dynamics essential for a successful special education program, in conjunction with [Moberg’s] other behavior toward staff and [his] deliberate, repeated neglect of his teaching duties and violation of the District’s rules support dismissal based on section 44932, subdivision (a)(7).”

The trial court specifically found that Moberg’s “emails were rude and disrespectful and eroded team dynamics; they constituted more than a mere difference of opinion over the direction of the special education class and questioning of authority. . . . [¶] [Moberg’s] use of email violated the [Employee Procedural Handbook]. [Moberg] used email in an abusive and condescending manner which was clearly calculated to antagonize. He used language which belittled the Special Education Program Manager. [Moberg’s] emails imply that he was angry when he wrote them, and they were certainly disrespectful. He often copied them to persons other than the addressee.”

The trial court further found that “[Moberg] also violated a provision of the District Master Contract, persistently. Provision IX.B.5 of the District Master Contract

provided: ‘Each employee shall maintain appropriate and effective professional relations with staff, students, parents, and the community.’ In addition to the emails, [Moberg] raised his voice and attempted to ‘talk over’ the Program Manager [Poirier] when she attempted to speak with him. The ALJ specifically found that Poirier’s testimony that this occurred on two occasions was more credible than [Moberg’s] denial that it occurred. This conduct adversely affected fellow staff (see, for example, the complaint sent by Poirier dated 1/4/10 . . .), and thereby the students’ learning environment.”

The trial court’s finding that the evidence supported the charge of refusal to follow school laws or regulations was also based on the evidence showing that Moberg had failed to use a communication device issued to District staff to enable them to communicate in emergencies, including his failure to comply with the requirement after promising to do so.

Regarding the charge of evident unfitness to teach, the trial court determined that the ALJ had erred in concluding that the evidence did not support Moberg’s dismissal on that charge. The court found that Moberg’s conduct satisfied the test for unfitness articulated in *Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429 because it demonstrated “a defect in temperament—his inability to work collaboratively with a team, which is essential to special education.”

The trial court rejected Moberg’s defense of retaliation, in which he argued that he was dismissed in retaliation for his “protected disclosures . . . of racial discrimination, mismanagement of the Workability program, and failure to provide a light or fan in the bathroom.” The court determined that “the administrative record does not demonstrate by a preponderance of the evidence that the protected activities were a contributing factor in the alleged retaliation.” Additionally, the court found that the defense of retaliation was not raised during the administrative hearing, and, in any event, Moberg had failed to

produce any evidence that “the alleged discrimination was on account of the alleged disclosure.”

The trial court also rejected Moberg’s claim of disparate treatment on the grounds that he had not raised disparate treatment as a defense during the administrative hearing, and the evidence suggested that the District “was motivated to dismiss [Moberg] due to his inability to work with others as a contributing team member, which is essential to special education.”

Finally, the trial court rejected Moberg’s claim that the District violated his right to a hearing within 60 days pursuant to section 44932. The Court determined that Moberg had waived this claim by failing to timely object to the available dates for a hearing, which were chosen by the Office of Administrative Hearings.

Moberg filed a notice of intention to file a motion to vacate the judgment on September 7, 2011. The judgment entered on September 15, 2011, adopted the trial court’s intended statement of decision and denied Moberg’s writ petition with prejudice. On October 5, 2011, Moberg filed a motion to vacate the judgment, which the trial court denied on December 21, 2011. Moberg filed a timely notice of appeal from the judgment on December 1, 2011.

#### **IV. DISCUSSION**

##### ***A. Standard of Review***

Before addressing Moberg’s contentions on appeal, we will outline the applicable standard of review. Where, as here, the superior court has exercised “its 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.]” (*Pasadena Unified School Dist. v. Commission on Professional Competence* (1977) 20 Cal.3d 309, 314 (*Pasadena*).

Under the substantial evidence standard of review, “[i]n reviewing the evidence, an appellate court must resolve all conflicts in favor of the party prevailing in superior

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

[Citation.]” (*Pasadena, supra*, 20 Cal.3d at p. 314; *Governing Bd. of Ripon Unified School Dist. v. Commission on Professional Competence* (2009) 177 Cal.App.4th 1379, 1384.)

Accordingly, if there is substantial evidence to support one of the grounds upon which the superior court based its determination of cause to dismiss a teacher, we will affirm the judgment. (See *San Dieguito Union High School Dist. v. Commission on Professional Competence* (1985) 174 Cal.App.3d 1176, 1180.) As we will discuss, we determine from our review of the administrative record that substantial evidence supports the trial court’s finding that cause exists to dismiss Moberg for persistent violation of or refusal to obey school laws and regulations (§ 44932, subd. (a)(7)).

## **B. Analysis**

### **1. Dismissal for Persistent Violation of or Refusal to Obey School Laws or Regulations**

The trial court determined that the evidence in the administrative record supported Moberg’s dismissal for cause on the ground of persistent violation of or refusal to obey school laws or regulations (§ 44932, subd. (a)(7)), based on Moberg’s (1) abusive, rude, disrespectful, and condescending emails, which violated the District’s email policy as set forth in the Employee Procedural Handbook; (2) repeated neglect of his teaching duties; (3) persistent violation of Provision IX.B.5 of the District Master Contract, which requires employees to maintain appropriate and effective professional relations with staff, students, parents, and the community; and (4) failure to use a communication device issued to District staff to enable them to communicate in emergencies, which included his failure to comply with the requirement after promising to do so.

On appeal, Moberg argues there is not substantial evidence to support the finding that he persistently refused to obey school laws or regulations by repeatedly sending rude and disrespectful emails to District personnel, and the allegedly disrespectful emails did not affect students. He further argues that he could not be dismissed for sending emails “about discrimination against his students and, then, retaliation against himself. Punishing him for making such complaints would chill his and other teachers’ desire to complain of wrongdoing by superiors, contrary to public good.” We also understand Moberg to argue that the District’s policy that employees’ email communication should be “polite” is impermissibly vague, constitutes an impermissible prior restraint on speech, and violates a teacher’s right to freedom of expression.

The District responds that Moberg failed to timely raise these arguments at the administrative hearing, and, in any event, there is substantial evidence to support the trial court’s findings. We agree.

### ***First Amendment Issue***

To the extent Moberg argues that the trial court’s finding of persistent violation of or refusal to obey school laws or regulations cannot be sustained on the basis of the email evidence because that would violate his First Amendment right to free speech, we determine that he has forfeited the issue.

“Appellate courts generally will not consider matters presented for the first time on appeal. [Citations.]” (*Franz v. Board of Medical Quality Assurance* (1982) 31 Cal.3d 124, 143.) An argument raised for the first time on appeal is generally deemed forfeited. (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2006) 136 Cal.App.4th 212, 226.) Moreover, “[t]he general rule that a legal theory may not be raised for the first time on appeal is to be stringently applied when the new theory depends on controverted factual questions whose relevance thereto was not made to appear at trial. [Citation.]” (*Bogacki v. Board of Supervisors* (1971) 5 Cal.3d 771, 780; see also *Fox v. State Personnel Bd.* (1996) 49 Cal.App.4th 1034, 1039 (*Fox*) [failure to

raise issue in writ proceeding waives issue on appeal unless issue involves pure question of law on undisputed facts].)

In the present case, the requisite First Amendment analysis precludes this court from addressing Moberg's First Amendment claim for the first time on appeal. "In determining whether a discharge impermissibly infringed upon the employee's First Amendment rights, the threshold question is whether the employee's speech related to a matter of public concern. [Citations.] This question is 'determined by the content, form and context of a given statement, as revealed by the whole record.' [Citation.]"

(*Southern Cal. Rapid Transit Dist. v. Superior Court* (1994) 30 Cal.App.4th 713, 727-728 (*Southern Cal.*).

"If it is determined that speech, which an employee alleged caused his termination, did concern matters of public concern, the court must then 'balance . . . the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, promoting the efficiency of the public services it performs through its employees.' [Citation.] In applying this test, the court must consider facts concerning 'the manner, time and place of the employee's expression . . . the context in which the dispute arose . . . . [Citations.] . . . [And] whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise.' [Citations.]" (*Southern Cal., supra*, 30 Cal.App.4th at pp. 728-729.)

Even assuming that Moberg's email correspondence concerned matters of public concern, we would still find that he has forfeited the First Amendment issue. Since Moberg did not raise his First Amendment issue in the trial court or in the administrative

proceedings (except very briefly in his closing argument),<sup>5</sup> no factual findings were made concerning “ ‘the manner, time and place’ ” of Moberg’s emails, the context, or whether the emails interfered with the regular operation of the District. (*Southern Cal.*, *supra*, 30 Cal.App.4th at p. 729.) We therefore cannot determine that the material facts for purposes of First Amendment analysis were undisputed.

Moreover, our record does not reflect that Moberg raised a First Amendment issue in the trial court during the writ proceedings. Moberg has therefore forfeited his First Amendment issue unless he has shown that the issue falls within the exception set forth in *Fox* because it “is one of public interest or the due administration of justice, and involves a pure question of law on undisputed facts.” (*Fox*, *supra*, 49 Cal.App.4th at p. 1039.) However, Moberg has not, and cannot, show that the *Fox* exception applies because, as we have discussed, the record of the administrative proceedings is insufficient for a determination on appeal that the material facts for purposes of First Amendment analysis were undisputed. We therefore determine that Moberg has forfeited his claim that his dismissal violates his First Amendment right to free speech.

### ***Substantial Evidence***

As we will discuss, substantial evidence supports the trial court’s finding that Moberg was properly dismissed for cause on the ground of persistent violation of or refusal to obey school laws or regulations (§ 44932, subd. (a)(7)), based, among other things, on Moberg’s abusive, rude, disrespectful and condescending emails, which

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<sup>5</sup> In his written closing argument to the ALJ, Moberg argued that Codianne’s directive to “put an end to e-mail communications which are aimed at challenging authority figures and questioning program decisions” violated his “First Amendment right to Freedom of Speech” under *Tinker v. Des Moines School Dist.* (1969) 393 U.S. 503. He asserted that “[a] directive which purports to stop communications aimed at ‘challenging authority figures’ or ‘questioning program decisions’ is unconstitutional on its face.”

violated the District's email rules and policy as set forth in the Employee Procedural Handbook, as well as the District's "Employee Use Of Technology" policy.

Section 44932, subdivision (a)(7) provides: "No permanent employee shall be dismissed except for one or more of the following causes: [¶] . . . [¶] Persistent 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."

Decisions construing section 44932, subdivision (a)(7) have determined that a pattern of refusal to obey rules is required to uphold a teacher's dismissal on that charge. "Persistence, in the sense intended, is referable to past conduct. The Legislature undoubtedly intended that opportunity for correction be available and refrained from providing for dismissal for a single violation of regulations, or until repeated violations could be considered persistent." (*Midway School Dist. v. Griffeth* (1946) 29 Cal.2d 13, 18 (*Midway*) [construing former § 13521]; see also *Governing Board of the Oakdale Union School Dist. v. Seaman* (1972) 28 Cal.App.3d 77, 84 [construing former § 13403, subd. (g), now § 44932, subd. (a)(7)]; *Board of Education. v. Mathews* (1957) 149 Cal.App.2d 265, 272.) The California Supreme Court in *Midway* further instructed that "[a] teacher who is 'continually insubordinate . . . may seriously affect the discipline in a school, impair its efficiency, and teach children lessons they should not learn.' [Citation.] The emphasis is on 'persistent' and 'continually.'" (*Midway, supra*, at pp. 18-19.)

In the present case, the District's email rules, on which the charge against Moberg of persistent violation of or refusal to obey school rules was partially based, were admitted into evidence at the administrative hearing. The pertinent rules are included in the District's Employee Procedural Handbook and the "Network Etiquette" provision of the "Employee Use Of Technology" policy.

The Employee Procedural Handbook includes the following email policy:

“**10.1 E-MAIL PROTOCOLS** ¶ E-mail is for sharing information, not for communication. If the content of your e-mail is something you would not like to see printed in a newspaper or distributed publicly, it should not be sent by e-mail. ¶ **Before you write, ask yourself** ¶ -Is this the best way to send this information? (E-mail is a permanent record and **NOT** confidential. It can be used in court and could be in the headlines of a local newspaper.) ¶ -What is the purpose? (Do you need a reply or is it information only?) ¶ -Should I calm down first? (Sometimes we write an e-mail response while we are still upset by the topic. Perhaps a phone or face-to-face conversation would be better after you cool down.) ¶ -To whom is it going? (Is the message for one person or for a group? Check the tone of your message and the spelling of names and e-mail addresses.) ¶ -Can you keep it brief (2-3 sentences) or will it require a lot of explanation? ¶ -Would a phone call or face-to-face be better? (Sometimes it is faster and conveys your tone better.) ¶ **E-mail Etiquette and Format.** ¶ -Make your subject line clear about whether action is needed and the topic you are writing about. ¶ -Keep the message brief and to the point. ¶ -Sign it. Include your first and last name and contact info at the end of your message. ¶ -E-mail etiquette suggests that full caps should not be used as it gives the impression that a person is shouting.”

The “Network Etiquette” provision of the “Employee Use Of Technology” policy, which Superintendent Shepherd testified was “part of the Board’s policy and also part of each employee[’]s contractual obligation” states in pertinent part: “You are expected to abide by the generally accepted rules of network etiquette. These rules include (but are not limited to): ¶ a. Be Polite. Never send, or encourage others to send, abusive messages. ¶ . . . ¶ e. Other Etiquette Considerations: ¶ \*Be brief. Few people will [b]other to read a long message. ¶ . . . ¶ \*Remember that humor and satire is very

often misinterpreted. [¶] . . . [¶] \*Remember, all users are human beings. Don't attack correspondents; persuade them with facts.”

The trial court found that Moberg's emails violated the District's rules regarding email communications because his emails “were rude and disrespectful and eroded team dynamics; they constitute more than a mere difference of opinion over the direction of the special education class and questioning of authority. . . . [¶] [Moberg's] use of email violated the handbook policy . . . [He] used email in an abusive and condescending manner which was clearly calculated to antagonize. He used language which belittled the Special Education Program Manager. [His] emails imply that he was angry when he wrote them, and they were certainly disrespectful. He often copied them to persons other than the addressee.”

Having reviewed the administrative record in its entirety, we determine that substantial evidence supports the trial court's findings regarding Moberg's emails. The evidence in the administrative record includes a number of Moberg's email exchanges with District staff, as well as Codianne's directions to Moberg regarding his use of email.

On September 24, 2009, shortly after he was hired, Moberg sent an email to Rocha, which he copied to Kilty, Poirier, and Codianne, that included this final paragraph: “I chose [the District] as a place to work over several other offers largely because I had the impression when I met you and [Codianne] that you were the most competent, compassionate, and organized leadership team I had encountered. I also had the impression that you all were above petty personality conflicts and counterproductive power battles. I hope I was right.”

On October 29, 2009, Moberg responded to an email from Poirier in which she stated, among other things, “I thought it was understood that we were not going forward with new projects until all other elements of the program were fulfilled. In addition, we don't have money in our budget to put towards this project which I don't feel . . . is aligned with the goals of our program. . . . [¶] . . . Apparently we are having a

communication break down and need to meet with [Kilty] and [Codianne] so we are all clear as to the direction of our program and determine how you and I will work together effectively to provide the students with the best program possible. [¶] Do either of these dates [October 30, 2009, or November 4, 2009] work for everyone to meet?” Moberg responded in an email the same day, which stated in part, “[D]id you miss the part about the project making a profit, not costing money? [¶] Lastly, are you actually suggesting that this is such an important matter that we all need to meet on less than 24 hours notice?”

Codianne sent an email to Moberg on October 30, 2009, that stated, “Eric, I am going to ask you to ‘STOP’ this type of e-mail exchange with staff. I do not see this method of communication a means to solve issues in a positive manner. . . .” However, Moberg did not comply with this directive to, in essence, comply with District rules and policy regarding email etiquette and network etiquette. He responded in a November 2, 2009 email that stated in part: “I look forward to the meeting I scheduled with you next week. I welcome the opportunity to respond directly to what is some sort of ‘Swift Boat’ operation against me. [¶] I am not certain what you mean by ‘this type of e-mail exchange,’ but I will do my best to comply. I would also point out that my e-mail is a polite response to a less than polite and less than positive e-mail from our program manager. . . . [¶] Additionally, to return to the Swift Boat analogy, I learned from John Kerry’s mistake of not responding when someone unfairly attacks you. I will not make that mistake.”

Then, in a November 4, 2009 email to Codianne, Kilty, and Rocha regarding Poirier’s November 4, 2009 email indicating her concerns about Moberg’s purchase order spending at Target and the completion of IEPs, Moberg stated: “I have never spent one penny at Target. [¶] Can any of you stop [Poirier] from repeatedly defaming me? [¶] Can any of you stop [Poirier] from continuing to pretend she is my supervisor and bossing me around? I have written over 300 IEPs in my career and acted as

Administrative Designee on 100 more. [Poirier] has had her PPS [pupil personnel services] credential for a little over a year.”

Thereafter, on November 6, 2009, Moberg sent an email to Codianne that stated, among other things, “What are we going to do about Ann Kilty’s serially defamatory September 29, 2009 observation critique of my work. In other words, do we want such an inaccurate document in my personnel file and subject to subpoena at a Due Process hearing? Wouldn’t this leave our attorney with the dilemma of either a) allowing the document to impeach my competence or b) questioning Ann Kilty in front of the Administrative Law Judge to impeach her honesty?”

Codianne’s subsequent email to Moberg on November 15, 2009, stated, “I thought you understood that I have requested that you put an end to e-mail communications which are aimed at ‘challenging’ authority figures and questioning program decisions. I hope this is very clear!” Moberg responded in a lengthy email that included comments such as the following: “The real issue here is honesty—do we have a credentialed psychologist who is consistently dishonest? [¶] I accepted the job thinking I would be working with Heath and you primarily. Instead, I find myself in an extremely hostile work environment with [Poirier] and [Kilty] regularly sabotaging my hard work, and making false statements to me and about me. I suggest you direct some of your passionate indignation toward those two ‘team’ members.”

Codianne’s response, in a November 16, 2009 email to Moberg, stated: “I am very uncomfortable with the tone and intent of this e-mail. I have asked you to stop the ‘challenging’ e-mails to all staff including Ms. Kilty. . . .” Again, Moberg did not comply with Codianne’s email directive. For example, on December 11, 2009, he sent an email to Poirier that stated in part: “Lastly, aren’t you taking your job title of ‘psychologist/program manager’ a little too seriously? You’ve had a pupil personnel services credential for what, less than two years? I’ve held all sorts of job titles . . . .”

Codianne then directed Moberg, in a December 11, 2009 email, “I am requesting that ALL questions, concerns, requests, etc. for your classroom and students go directly and immediately to Heath Rocha.” Yet again, Moberg did not comply. On January 4, 2010, he sent an email to Kilty asking for the keys to the multipurpose room and commenting, “You do trust [teacher Lorraine Ramirez] and me, don’t you?” Later, Ramirez sent a February 10, 2010 email to Codianne that stated: “Staff have been bombarded with emails from [Moberg] and have been distracted by the going ons [*sic*] of Mr. Moberg. Staff are complaining that he is sending it not only to their groupwise accounts but to their personal email addresses. Even after staff have asked to be taken off his list, he has persisted.”

We find that these emails demonstrate Moberg’s repeated sending of abusive and attacking email communications to District staff during his employment with the District and constitute evidence demonstrating his persistent violation of or refusal to obey school rules regarding email etiquette and network etiquette as stated in the Employee Procedural Handbook and the “Employee Use Of Technology” policy. Accordingly, we conclude that the trial court’s ruling that Moberg was properly dismissed for cause on the ground of persistent violation of or refusal to obey school laws or regulations (§ 44932, subd. (a)(7)) due to his repeated violation of the District’s email rules and policy is supported by substantial evidence.

Having reached this conclusion, we need not consider Moberg’s additional claims that the trial court erred in finding that the weight of evidence supported his dismissal for evident unfitness for service (§ 44932, subd. (a)(5)).

## **2. Right to Hearing Within 60 Days**

Without any citation to authority, Moberg contends that the dismissal hearing before the ALJ was improperly held more than 60 days after his demand for a hearing. The trial court determined that Moberg had waived this claim by failing to timely object to the available dates for the hearing, which were chosen by the Office of Administrative

Hearings. The District agrees and also responds that the 60-day time limit provided by section 44944, subdivision (a)(1) applies only to a hearing requested by a permanent employee, not a probationary employee such as Moberg.

Section 44944, subdivision (a)(1) provides in part: “In a dismissal or suspension proceeding *initiated pursuant to Section 44934*, if a hearing is requested by the employee, the hearing shall be commenced within 60 days from the date of the employee’s demand for a hearing. . . . If any continuance is granted pursuant to Section 11524 of the Government Code, the time limitation for commencement of the hearing as provided in this subdivision shall be extended for a period of time equal to the continuance. However, the extension shall not include that period of time attributable to an unlawful refusal by either party to allow the discovery provided for in this section.” (Italics added.) Section 44934 concerns the proceedings for “the dismissal or suspension of a permanent employee of the district . . . .”

Thus, as the District points out, and Moberg does not dispute, section 44944, subdivision (a)(1) expressly applies a 60-day time limit only to a permanent employee’s dismissal hearing. Moberg does not refer us to a comparable provision in the Education Code requiring a probationary employee’s dismissal hearing to be held within 60 days of the employee’s demand for a hearing. Moreover, even if we assume, without deciding, that section 44944, subdivision (a)(1) should be interpreted to apply the 60-day time limit to a probationary employee’s dismissal hearing, that interpretation would not aid Moberg, for two reasons.

First, the 60-day time limit set forth in section 44944, subdivision (a)(1) is not jurisdictional. In *Wilmot v. Commission on Professional Competence* (1998) 64 Cal.App.4th 1130 (*Wilmot*), the appellate court rejected a dismissed teacher’s argument that “under no circumstance can the [dismissal] hearing take place more than 60 days after the employee has demanded the hearing . . . .” (*Id.* at p. 1140 [construing former § 44944, subd. (a)].) The *Wilmot* court determined that the 60-day time limit is not

jurisdictional because the statute expressly provides that in some instances the hearing may commence more than 60 days after the employee has requested a hearing. (*Id.* at p. 1142.)

Second, we find that Moberg forfeited his claim by failing to object to the hearing date as untimely prior to the first day of the dismissal hearing. The administrative record reflects that Moberg did not object to the June 21 and 22, 2010 hearing dates set by the Office of Administrative Hearings until the first day of the hearing. His attorney made an oral motion for dismissal, during argument on motions in limine, on the ground that the 60-day time limit provided by section 44944, subdivision (a)(1) had been exceeded. The fact that the hearing had already commenced when Moberg objected to the hearing's timeliness is fatal to Moberg's claim on appeal under the forfeiture rule established in *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184, fn. 1 (*Doers*).

In *Doers*, the California Supreme Court instructed that “ ‘[a]n appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been but was not presented to the lower court by some appropriate method . . . . The circumstances may involve such intentional acts or acquiescence as to be appropriately classified under the headings of estoppel or waiver . . . . Often, however, the explanation is simply that it is *unfair to the trial judge and to the adverse party* to take advantage of an error on appeal when it could easily have been corrected at the trial. ’ [Citation.] [Italics added.] ” (*Doers, supra*, 23 Cal.3d at p. 184, fn. 1.)

Our Supreme Court has also stated: “ ‘ “No procedural principle is more familiar to this Court than that a constitutional right,” or a right of any other sort, “may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. ” [Citation.]’ [Citation.]” (*People v. Saunders* (1993) 5 Cal.4th 580, 590, fn. omitted; see also *Samaan v. Trustees of Cal. State University & Colleges* (1983) 150 Cal.App.3d 646, 656 [appellant's choice

to proceed waived a hearing in strict conformance with State Personnel Board procedures].) “As many courts have noted, any other rule would permit a party to trifle with the courts by standing silently by, thus permitting the proceedings to reach a conclusion in which the party could acquiesce if favorable and avoid if unfavorable.” (*In re Urayna L.* (1999) 75 Cal.App.4th 883, 886.)

For these reasons, we find no merit in Moberg’s contention the dismissal hearing before the ALJ was improperly held more than 60 days after his demand for a hearing.

### **3. Other Issues on Appeal**

We understand Moberg to also contend on appeal that the District’s dismissal constitutes unlawful retaliation for his complaints that the District discriminated against his students; he was subject to disparate treatment because a co-worker was not disciplined for sending a disrespectful letter about him; his exemplary work history constitutes mitigation; and the District wrongly withheld his pay. As we will discuss, we determine that Moberg has forfeited these issues on appeal.

It is well established that “issues not presented at an administrative hearing cannot be raised on review. [Citations.]” (*Niles Freeman Equipment v. Joseph* (2008) 161 Cal.App.4th 765, 787-788; see also *Duea v. County of San Diego* (2012) 204 Cal.App.4th 691, 701; *Schaeffer Land Trust v. San Jose City Council* (1989) 215 Cal.App.3d 612, 624, fn. 9.) “ ‘ “It was never contemplated that a party to an administrative hearing should withhold any defense then available to [him or her] or make only a perfunctory or ‘skeleton’ showing in the hearing and thereafter obtain an unlimited trial de novo, *on expanded issues*, in the reviewing court. [Citation.] The rule compelling a party to present all legitimate issues before the administrative tribunal is required in order to preserve the integrity of the proceedings before that body and to endow them with a dignity beyond that of mere shadow-play.” ’ (Third italics added.)” (*Pegues v. Civil Service Com.* (1998) 67 Cal.App.4th 95, 104 (*Pegues*)). Thus, our appellate review is

limited to “issues in the record at the administrative level.” (*City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012, 1019 (*City of Walnut Creek*).

As the trial court noted in its statement of decision, Moberg failed to raise the defenses of retaliatory dismissal and disparate treatment during the administrative proceedings before the ALJ. He has therefore forfeited those two issues on appeal. (*City of Walnut Creek, supra*, 101 Cal.App.3d at p. 1019.) Additionally, Moberg has forfeited his claim that the District wrongly withheld his pay, since he also failed to raise that claim during the administrative proceedings before the ALJ.

As to Moberg’s contention on appeal that his exemplary work history constitutes mitigation, the administrative record indicates that Moberg did not assert a mitigation defense until he submitted a petition for reconsideration to the District’s Board of Education via email on October 7, 2010, following the Board’s adoption of the ALJ’s decision to uphold his dismissal on September 7, 2010. Without any citation to the evidence presented to the ALJ during the administrative hearing, Moberg asserted in his petition for reconsideration that he had “a long and distinguished career in education since 1984,” his prior performance evaluations were positive, and his supervisor, Kilty, had acknowledge that he met the standards for the teaching profession. However, because Moberg did not present any evidence or argument pertaining to a mitigation defense during the proceedings before the ALJ, he has forfeited the issue on appeal. (*Pegues, supra*, 67 Cal.App.4th at p. 104; *City of Walnut Creek, supra*, 101 Cal.App.3d at p. 1019.)

Having concluded for the reasons stated above that none of Moberg’s contentions on appeal have merit, we need not address his contention that he is entitled to an award of attorney fees.

## **V. DISPOSITION**

The judgment is affirmed. Costs on appeal are award to respondent Monterey Peninsula Unified School District Board of Education.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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PREMO, ACTING P.J.

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GROVER, J.