
6C

Information

Professional Practices Committee

Analysis of Law and Regulation for Pursuing Those Who Fail to Report

Executive Summary: This agenda item provides information to the Commission related to California Code of Regulations, Title 5 §80303. This item also discusses the statutory requirements that must be met for the Commission to have jurisdiction to pursue those who fail to report.

Recommended Action: For information only

Presenter: Michael G. Barth, Assistant Chief Counsel, Division of Professional Practices

Strategic Plan Goal: 1

Promote educational excellence through the preparation and certification of professional educators

- ◆ Evaluate and monitor the moral fitness of credential applicants and holders and take appropriate action

August 2012

Analysis of Law and Regulation for Pursuing Those Who Fail to Report

Introduction

This agenda item presents an analysis of Title 5 California Code of Regulations (CCR), §80303 (the regulation).¹ The regulation requires notification to the Commission when a credential holder, working in a position requiring a credential is dismissed, resigns, is suspended for more than 10 days, retires or is terminated as the result of an allegation of misconduct or while an allegation of misconduct is pending. The regulation further requires that the superintendent of the employing school district report the change in employment status to the Commission not later than 30 days after the employment action(s). This analysis includes an overview of both the regulation and the statutory requirement that must be met for the Committee of Credentials (Committee) to commence an investigation of a superintendent who fails to report as required by the regulation.

The Regulation

The regulation requires notification to the Commission when a credential holder, working in a position requiring a credential is dismissed, resigns, is suspended for more than 10 days, retires or is terminated as the result of an allegation of misconduct or while an allegation of misconduct is pending. The regulation further requires that the superintendent of the employing school district report the change in employment status of credential holders to the Commission not later than 30 days after the employment actions.

Subdivision (d) of the regulation states: “Failure to make a report required under this section constitutes unprofessional conduct. The Committee may investigate any superintendent who holds a credential who fails to file reports required by this section.”

History of the Regulation

The regulation has been in place since October 1997. As initially drafted and promulgated by the Commission, the regulation contained a broader reporting requirement. Until 1999, *both* the educator and the superintendent were required to report a substantial change in employment status to the Commission.

On April 26, 1999, the California Teachers Association filed a legal challenge in Superior Court, questioning the legality of the regulation. The Court found that two parts of the regulation were unauthorized in its scope and penalties. The court looked at relevant statutory provisions of Education Code §44242.5, which specifically sets forth the circumstances when the Commission may initiate an investigation of a credential holder. The first challenged part of the regulation, formally designated as subdivision (a) (5) of the regulation, requiring the holder of a credential, working in a position requiring a credential, to report a change in employment status to the Commission. The second challenged the provision related to subdivision (d) of the regulation,

¹ A copy of the regulation is included as Attachment A.

which stated failure to self-report was unprofessional conduct. As a result of that challenge, both provisions were deemed void by the Court. The Commission then formally deleted these provisions from the regulation. No other portions of the regulation were changed. (Sacramento Superior Court Case No. 98AS03278, Judgment Granting In Part Request For Declaratory Relief, filed April 26, 1999.)

It is important to note that the provisions relating to the duties of a superintendent were not included in this lawsuit. Therefore, those provisions were not considered by the court and remain valid.

In October 2004 the regulation was again amended by the Commission to strike the requirement that the Committee *shall* investigate any superintendent who fails to report a substantial change in employment status to the Commission. The notice of public hearing states in the relevant part:

Section 80303 requires the Committee to investigate any superintendent who fails to file reports under this section. This language has been revised to allow the Committee of Credentials to investigate the more egregious violations and not mandate the investigation of technical violations, such as failing to file reports within 30 days.

Since this change the regulation states that the Committee *may* investigate. Commission staff has used the regulation as a training tool and to provide notice to superintendents of their responsibilities to report. As of the beginning of this year, in each instance where Commission staff has information that a report has not been made a personal letter has been sent to the responsible superintendent reminding them of their obligation to report under the regulation.

Requirements to Obtain Jurisdiction

Although the regulation states that the Committee may investigate any superintendent who holds a credential and fails to file reports not later than 30 days after the employment action, there is a statutory condition precedent. Education Code §44242.5, subdivision (b)² sets the legal *minimum* requirements for the Committee to commence an investigation.

Meeting any one of the six requirements presented in this statute allows the Committee to open an investigation. The Committee is not authorized to open an investigation without meeting one of the criteria presented below. The Committee may commence initial review upon receipt of any of the following:

- (1) Official records of the Department of Justice, of a law enforcement agency, of a state or federal court, and of any other agency of this state or another state.
- (2) An affidavit or declaration signed by a person or persons with personal knowledge of the acts alleged to constitute misconduct.

² A copy of Education Code §44242.5 is included as Attachment B

- (3) A statement from an employer notifying the Commission that, as a result of, or while an allegation of misconduct is pending, a credential holder has been dismissed, nonreelected, suspended for more than 10 days, or placed pursuant to a final adverse employment action on unpaid administrative leave for more than 10 days, or has resigned or otherwise left employment.
- (4) A notice from an employer that a complaint was filed with the school district alleging sexual misconduct by a credential holder. Results of an investigation by the Committee based on this paragraph shall not be considered for action by the Committee unless there is evidence presented to the Committee in the form of a written or oral declaration under penalty of perjury that confirms the personal knowledge of the declarant regarding the acts alleged to constitute misconduct.
- (5) A notice from a school district, employer, public agency, or testing administrator in violation of section 44420 (failure to fulfill contract), 44421.1 (inappropriate use of school records for a business purpose), 44421.5 (reporting false fiscal expenditure) or 44439 (subverting examinations).
- (6) An affirmative response on an application submitted to the Commission as to any conviction, adverse action on, or denial of a license, or pending investigation into a criminal allegation or pending investigation of a noncriminal allegation of misconduct by a governmental licensing entity.

The Committee may commence an investigation into an alleged violation of Title 5, CCR section 80303 if it receives the allegation in one of the six ways listed in the statute. So, for example, if a newspaper reported that a Superintendent failed to file a report in a timely manner with the Commission, the Committee could not investigate because the information does not fit within one of the six statutory requirements.

Conclusion

When the Committee obtains jurisdiction to commence initial review it may investigate any superintendent who holds a credential and fails to meet the reporting requirement of the regulation. The Committee will open an investigation in all matters that meet the requirements presented above.

Unless a final adverse action is taken against a credential holder no information may be released regarding the subject of investigations initiated by the Committee (Education Code §§44230 and 44245). Any disclosure by the Commission, the Committee or its staff may be subject to criminal penalties (Education Code §44248).

ATTACHMENT A

Title 5 California Code of Regulations § 80303. Reports of Change in Employment Status.

- (a) Whenever a credential holder, working in a position requiring a credential:
- (1) is dismissed or nonreelected;
 - (2) resigns;
 - (3) is suspended or placed on unpaid administrative leave as a final adverse employment action for more than 10 days;
 - (4) retires; or
 - (5) is otherwise terminated by a decision not to employ or re-employ; as a result of an allegation of misconduct or while an allegation of misconduct is pending, the superintendent of the employing school district shall report the change in employment status to the Commission not later than 30 days after the employment action.
- (b) The report shall contain all known information about each alleged act of misconduct.
- (c) The report shall be made to the Commission regardless of any proposed or actual agreement, settlement, or stipulation not to make such a report. The report shall also be made if allegations served on the holder are withdrawn in consideration of the holder's resignation, retirement or other failure to contest the truth of the allegations.
- (d) Failure to make a report required under this section constitutes unprofessional conduct. The Committee may investigate any superintendent who holds a credential who fails to file reports required by this section.
- (e) The superintendent of an employing school district shall, in writing, inform a credential holder of the content of this regulation whenever that credential holder, working in a position requiring a credential, is dismissed, nonreelected, resigns, is suspended or placed on unpaid administrative leave as a final adverse employment action for more than ten days, retires or is otherwise terminated by a decision not to employ or re-employ as a result of an allegation of misconduct or while an allegation of misconduct is pending. Failure to comply with this subdivision by a superintendent of schools constitutes unprofessional conduct which shall be investigated by the Committee of Credentials.

Note: Authority cited: Section 44225(q), Education Code. Reference: Section 44242.5(b)(3), Education Code; and California Teachers Association v. California Commission on Teacher Credentialing, (Sacramento Superior Court Case No. 98AS03278, Judgment Granting In Part Request For Declaratory Relief, filed April 26, 1999.)

ATTACHMENT B

Education Code section 44242.5

(a) Each allegation of an act or omission by an applicant for, or holder of, a credential for which he or she may be subject to an adverse action shall be presented to the Committee of Credentials.

(b) The committee has jurisdiction to commence an initial review upon receipt of any of the following:

(1) (A) Official records of the Department of Justice, of a law enforcement agency, of a state or federal court, and of any other agency of this state or another state.

(B) For purposes of subparagraph (A), "agency of this state" has the same meaning as that of "state agency" as set forth in Section 11000 of the Government Code.

(2) An affidavit or declaration signed by person or persons with personal knowledge of the acts alleged to constitute misconduct.

(3) (A) A statement from an employer notifying the commission that, as a result of, or while an allegation of misconduct is pending, a credential holder has been dismissed, nonreelected, suspended for more than 10 days, or placed pursuant to a final adverse employment action on unpaid administrative leave for more than 10 days, or has resigned or otherwise left employment.

(B) The employer shall provide the notice described in subparagraph (A) to the commission not later than 30 days after the dismissal, nonreelection, suspension, placement on unpaid administrative leave, resignation, or departure from employment of the employee.

(4) A notice from an employer that a complaint was filed with the school district alleging sexual misconduct by a credential holder. Results of an investigation by the committee based on this paragraph shall not be considered for action by the committee unless there is evidence presented to the committee in the form of a written or oral declaration under penalty of perjury that confirms the personal knowledge of the declarant regarding the acts alleged to constitute misconduct.

(5) A notice from a school district, employer, public agency, or testing administrator of a violation of Section 44420, 44421.1, 44421.5, or 44439.

(6) (A) An affirmative response on an application submitted to the commission as to any conviction, adverse action on, or denial of, a license, or pending investigation into a criminal allegation or pending investigation of a noncriminal allegation of misconduct by a governmental licensing entity.

(B) Failure to disclose any matter set forth in subparagraph (A).

(c) An initial review commences on the date that the written notice is mailed to the applicant or credential holder that his or her fitness to hold a credential is under review. Upon commencement of a formal review pursuant to Section 44244, the committee shall investigate all alleged misconduct and the circumstances in mitigation and aggravation. The investigation shall include, but not be limited to, all of the following:

- (1) Investigation of the fitness and competence of the applicant or credential holder to perform the duties authorized by the credential for which he or she has applied or that he or she presently holds.
- (2) Preparation of a summary of the applicable law, a summary of the facts, contested and uncontested, and a summary of any circumstances in aggravation or mitigation of the allegation.
- (3) Determination of probable cause for an adverse action on the credential. If the allegation is for unprofessional or immoral conduct, the committee, in any formal review conducted pursuant to Section 44244 to determine probable cause, shall permit the employer of the credential holder to be present while testimony is taken. If the allegation of unprofessional or immoral conduct involves sexual abuse, the employer shall be examined in the meeting for any relevant evidence relating to the sexual abuse.

(A) If the committee determines that probable cause for an adverse action does not exist, the committee shall terminate the investigation.

(B) If the committee determines that probable cause for an adverse action on the credential exists, upon receipt of a request from an applicant or a credential holder pursuant to Section 44244.1, the commission shall initiate an adjudicatory hearing, as prescribed by Chapter 5 (commencing with Section 11500) of Division 3 of Title 2 of the Government Code, by filing an accusation or statement of issues.

(d) The committee has jurisdiction to commence a formal review pursuant to Section 44244 upon receipt of any of the following:

- (1) (A) Official records of a state or federal court that reflect a conviction or plea, including a plea of nolo contendere, to a criminal offense or official records of a state court that adjudge a juvenile to be a dependent of the court pursuant to Section 300 of the Welfare and Institutions Code due to allegations of sexual misconduct or physical abuse by a credential holder or applicant.

(B) Nothing in subparagraph (A) shall be construed to relieve the commission from the confidentiality provisions, notice, and due process requirements set forth in Section 827 of the Welfare and Institutions Code.

- (2) An affidavit or declaration signed by a person or persons with personal knowledge of the acts alleged to constitute misconduct.
 - (3) A statement described in paragraph (3) of subdivision (b)
 - (4) Official records of a governmental licensing entity that reflect an administrative proceeding or investigation, otherwise authorized by law or regulation, which has become final.
 - (5) A notice described in paragraph (5) of subdivision (b).
 - (6) A response or failure to disclose, as described in paragraph (6) of subdivision (b).
- (e) (1) Upon completion of its investigation, the committee shall report its actions and recommendations to the commission, including its findings as to probable cause, and if probable cause exists, its recommendations as to the appropriate adverse action.
- (2) The findings shall be available, upon its request, to the employing or last known employing school district, or, if adverse action is recommended by the committee and the credential holder has not filed a timely appeal of the recommendation of the committee pursuant to Section 44244.1, upon a request made within five years of the date of the committee's recommendations to a school district providing verification that the credential holder has applied for employment in the district. The findings, for all purposes, shall remain confidential and limited to school district personnel in a direct supervisory capacity in relation to the person investigated. Any person who otherwise releases findings received from the committee or the commission, absent a verified release signed by the person who is the subject of the investigation, shall be guilty of a misdemeanor.
- (3) The findings shall not contain any information that reveals the identity of persons other than the person who is the subject of the investigation.
- (f) (1) Except as provided in paragraph (2) and, notwithstanding subdivision (b), for purposes of determining whether jurisdiction exists under subdivision (b), the commission, in accordance with Section 44341, may make inquiries and requests for production of information and records only from the Department of Justice, a law enforcement agency, a state or federal court, and a licensing agency of this state or a licensing agency of another state.
- (2) For purposes of determining whether jurisdiction exists, paragraph (1) does not apply to release of personnel records.