

BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
SAN YSIDRO SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Amended Accusation
Against:

Erik Ong,

Respondent.

OAH No. 2010050813

DECISION

The Commission on Professional Competence heard this matter in San Diego, California, on October 4 and 5, November 30 and December 10, 2010. The Commission included Davina Keiser, Kathleen McHeffey and Administrative Law Judge Vallera J. Johnson, State of California, Office of Administrative Hearings, who served as the chairperson.

Arthur M. Palkowitz, Esq., Stutz Artiano Shinoff & Holtz represented Jennifer Brown de Valle, Assistant Superintendent Human Resources, San Ysidro School District (Assistant Superintendent). Daniel R. Shinoff, Esq. represented the Assistant Superintendent on October 4 and 5, 2010. Jack Sleeth, Esq., represented the Assistant Superintendent on November 30, 2010.

Jon Y. Vanderpool, Esq., Tosdal, Smith, Steiner & Wax, represented Respondent Erik Ong, who was present during the hearing.

The matter was submitted on December 10, 2010.¹

FACTUAL FINDINGS

1. Jennifer Brown de Valle made and filed Accusation and Statement of Charges, dated June 15, 2010, and Amended Accusation, dated September 30, 2010, in her official capacity as Assistant Superintendent (Assistant Superintendent) of the San Ysidro School District (District).

¹ Respondent's Motion to Admit Exhibit 12 is denied.

Respondent requested a hearing in a timely manner.

2. Erik Ong (Respondent) is a certificated employee of the District, assigned to San Ysidro Middle School (SYMS).

3. On December 18, 2009, C■■■■B.², the mother of L■■■■³ (L■■■■), complained to David Torres (Torres), principal of SYMS, about an email that her son received.

On the date that he received the email, L■■■■ was a student at SYMS in Math, Science and AVID classes taught by Respondent.

On December 16, 2009⁴, L■■■■ received an email from Respondent's Hotmail account. The email stated "I will be in Kalamazoo from Dec. 21 to Jan. 3. I want to fuck. Me....32yo, 155 lbs., 5'9", hairless chest, thick dick, DDF. Interested? His [*sic*] me up. Erik" Two photos were attached, a professional portrait of Respondent in business attire and a photo of a naked adult male; the head was not visible. L■■■■ read the email on his Nintendo DSI, a game console. L■■■■ was shocked and surprised about the content and language (specifically the word "dick") of the email.

In addition to L■■■■, the email was sent to a craigslist advertiser.

The day after receiving the email, L■■■■ told his (17 year-old) sister who encouraged him to tell his mother. He did.

L■■■■' mother read the email and opened the attachments; she saw the photographs. At some point in time, she showed the email and photographs to her husband. C■■■■B. thought the email had been sent by mistake but was concerned after opening the photographs and therefore filed the complaint with the principal.

Insufficient evidence was offered to establish that L■■■■' sister read the e-mail. Neither L■■■■ nor his sister opened the attachments.

4. The evidence was evaluated to determine the impact, if any, of receipt of the email on L■■■■. The day after reading the email, L■■■■ returned to school and attended classes, including classes taught by Respondent. L■■■■ testified that, after Respondent was placed on administrative leave, he had substitute teachers the remainder of the year; the students missed Respondent because he was a better teacher than the substitute teachers. Prior to receiving the email, L■■■■ was a good student; there is no evidence that he was concerned about the incident or

² C■■■■B.'s first name and last initial are used to protect the privacy of her minor son.

³ The first name and last initial of L■■■■B., a minor, are used to protect his privacy.

⁴ There is a dispute regarding the date and time that the email was sent. L■■■■ testified that he opened the email on the evening following his return from a dance on December 16, 2009, told his sister the following day, and the day after his mother filed the complaint. Considering the foregoing, it is determined that the email was sent on December 16, 2009, at or about 6:30 P.M.

that his academic performance changed after he received the email. There is no evidence that L■■ received psychological or other counseling. Given the foregoing, it was not established that receipt of the email had a negative, if any, impact on L■■.

5. After Torres received the complaint from L■■' mother, the District conducted an investigation.

On December 18, 2009, during his interview of Respondent about the complaint, Torres asked Respondent if there was anything else that he needed to know. At that time, Respondent informed Torres about a manuscript that was on his classroom computer.

Following a preliminary investigation of the complaint, on December 18, 2009, the District removed Respondent from the classroom and placed him on administrative leave.

6. The District's attorney hired Robert Price (Price), a private investigator, ESI International, Inc., to investigate the matter further.

Among other things, Price interviewed Torres and Respondent. In addition he performed a forensic examination of the computer in Respondent's classroom. Upon completion of his investigation, Price issued a report (Exhibit 12).

Price's deposition was taken, and he testified as a witness. As a witness, he described his education, training and experience to conduct the investigation. He graduated from San Diego State University with a Bachelor's of Science degree in Accounting in 1974; he has had training/classes in computers. Between 1978 and 1986, he was a Federal Bureau of Investigations (FBI) special agent in accounting; while with the FBI, he investigated general criminal matters and white-collar crime, including computer-related crimes. Since 1986 he has managed the private investigator's firm. Prior to this case, Price had been involved in more than 200 forensic computer cases.

7. The email messages at issue were sent from a home computer owned by Respondent. As of December 16, 2009, Respondent had 60 email addresses of students maintained in his Hotmail contacts. L■■' email address was included among them. These email addresses had been compiled over five to six years and were email addresses of students who had been in his classes. Respondent used his Hotmail account to communicate with parents and students about school matters.

Respondent had a password for his Hotmail account. It was the same password that he used for other personal accounts that were password protected. There is no evidence that Respondent voluntarily gave anyone the password for his Hotmail account.

8. For the past six years, Respondent has shared a home with Francisco Orrantia (Orrantia), his domestic partner. As a result, Orrantia had access to Respondent's personal computer.

9. On December 16, 2009, Orrantia sent the email to L [REDACTED] from Respondent's home computer, using Respondent's Hotmail account, without Respondent's knowledge or consent. Orrantia determined Respondent's password by watching Respondent type his password. At another time, in Respondent's absence, Orrantia used the password to get into Respondent's email account.

Orrantia accessed "Craigslist.org" for Kalamazoo, MI and used Respondent's Hotmail account to respond to four "men seeking men" advertisements on that website. Orrantia copied the email address from Craigslist and pasted it to Respondent's Hotmail account. However, the Hotmail service had a function that automatically called up full email addresses from the contact list after a few characters were entered. Orrantia intended to direct the email to Craigslist recipients. He attached the two photographs of Respondent.

Orrantia believes that as he was looking for bars in Kalamazoo in another open window on the computer screen that he had the cursor still on the address box of the message. When he typed "bar", the student's address was automatically included on the email message. Until informed by Respondent, Orrantia did not realize that he sent the message to L [REDACTED]; he did not know that L [REDACTED] was one of Respondent's students. There is no evidence that he intended to send the email to L [REDACTED].

Orrantia's motivation for sending the email was jealousy.

10. The Assistant Superintendent contends that Respondent violated Board Policy 4040, subdivision (a) that states, in pertinent part "The Board expects all employees to learn to use the available technological resources that will assist them in the performance of their job responsibilities."⁵

Prior to December 16, 2009, the District assigned Respondent a Microsoft Outlook (Outlook) email address that was password protected. He used the Outlook account but it was not the only account he used to communicate with students regarding educational matters; he found the Hotmail account to be more convenient because he had used it longer, before he was assigned a District Outlook email address. Respondent denied that he was uncomfortable using the Outlook account. There is insufficient evidence to establish that Respondent failed to learn to use the Outlook account or any other technological resource that would assist in the performance of his job duties.

It was not established that Respondent violated Board Policy 4040, subdivision (a).

11. As part of his investigation, Price performed a forensic evaluation of Respondent's classroom computer. Among other things, Price performed an internet history search on this computer. The search revealed that an internet history that contained 30 graphic images of a sexual nature. Some of the images were inappropriate for viewing by middle school students. An analysis of the structure determined "User X" was logged into the computer on January 26, 2009 at 1:19 to 1:22 P.M. at the time the images were viewed. There is no evidence that the images were viewed on any other occasion.

⁵ Exhibit 43

Initially Respondent denied that he was present at school and in the classroom on January 26, 2009. He testified that he did not remember if he was in the classroom on that date and relied on Price's report to make that determination; further, once he was placed on administrative leave he did not have access to his classroom computer or his substitute lesson plans to confirm his schedule on that date; as a result, he testified accordingly in his deposition on September 20, 2010. However, during the first two days of hearing, after listening to the evidence, he remembered that, indeed, he was in the classroom on January 26, 2009. Further, he was researching an issue related to Orrantia's mother's menstruation problems when the images appeared. He testified that there were no students present at the time. There is no evidence to the contrary. Further, there is no evidence that the photographs were saved to Respondent's classroom computer.

12. Respondent authorized students to use his classroom computer under his supervision. He did so when the students had projects, were studying for final examinations or needed to print from flash drives. He instructed his substitute teachers not to allow students to use the classroom computer. Respondent testified that he rarely allowed students in the classroom during his lunchtime. It is unclear from the evidence whether the students used the classroom computer on a regular basis.

13. There is no evidence that any student accessed or viewed any of the 30 images that Respondent viewed on January 26, 2009.

14. During a search of email and internet history of Respondent's classroom computer, using the word "hairless", Price located a 259 page manuscript⁶ entitled "Normal Miguel". Respondent wrote the manuscript. In or about October 2007, Respondent transferred the manuscript from his home computer because he was concerned that his home computer would crash. During the time that the manuscript was on the computer in Respondent's classroom, Respondent modified the manuscript approximately 20 times. The manuscript has been published as a book. The book is a story of a homosexual teacher in a small town and contains sexually explicit homosexual relations between two school age boys, both 14 years old. Respondent testified that all the characters are fictional, not modeled after any current or former students.

15. The following are two excerpts from the manuscript. From page 22:

"Miguel watched the boys, their awkward bodies making up in agility what they lacked in grace. Most had a year or two to go before puberty would meet them, but some of the older of the noisy bunch had traces of musculature and body hair indicative of manhood. Some had round protruding bellies and rolls of fat, while others had undeniable physique and enviable curvature. Those who had any testicles to speak of had them already ascended into the warmth of their bodies. This left their little penises dangling like dead worms in birds' beaks. Miguel's glance veered away when the boys looked at him as if they suspected, as if they knew. But in reality, he found them to be not absent of sexuality, for no one

⁶ Exhibit 40

could deny their humanness, but utterly unappealing. On the contrary, he felt their innocence to be sacred. Even the most mischievous and devious of them was only a child surviving, pure at heart, susceptible to impulse, and naïve to adult wickedness. Corrupting that innocence was not within him, though he worried they might believe it was. He was attracted to men in all senses of the words.”

From page 65:

“They would crowd together in Giovanni’s single bed. Before too long, Giovanni wouldn’t resist any more and he’d begin his nightly ritual. Then one night he said, ‘You want to touch it?’ Miguel never responded with words but his enthusiasm said enough. Before much longer, he went a step further. ‘Put your mouth on it. I swear I won’t tell anyone.’

To anyone else, it may have been normal adolescent sexual exploration. For Miguel, it was his first true love.

He took a chance for the first time one night in the darkness of the bedroom, in the heat of the sheets. ‘I want to kiss you.’ He said.

‘Are you serious? That’s gross,’ came Giovanni’s reply.

‘No, I mean, I’ve never kissed anyone before like that. It’s just to try it,’ he said.

‘Well, I guess just to practice, then.’

After nine months, they had tried it all and practiced and practiced and practiced. They found hiding places during the daytime on neighborhood playgrounds and in restaurant bathrooms. They found reasons to be together every night. They drew the suspicion of their parents, who would surprise them with mid-evening door openings and third degree interrogations. There was no stopping them. They had teenage jealousy fights and anger fits, they wrote letters from their cross town classrooms, and they gifted tokens to one another—very best friends.

It was a time of bliss for Miguel who, for every milligram of extroversion that Giovanni had, matched him with introspection. He saw himself in the mirror, a year older and slightly hairier, matured and practically married to this boy, his best friend. And there was no denying the truth.

‘Giovani,’ he said one night after a steamy session, ‘I am more and more certain that I’m gay.’”

16. The District argued that Respondent repeatedly violated its Employee Use of Technology Policy, BP 4040, subdivision (a),⁷ that states:

“... Employees shall be responsible for the appropriate use of technology and shall use the district’s technological resources *primarily* for purposes related to their employment... Inappropriate use *may* result in a cancellation of the employee’s user privileges, disciplinary action and/or legal action in accordance with the law, Board policy, and administrative regulation.”
[Emphasis added]

By the terms of this policy, the District expected its employees, including Respondent, to use classroom computers *primarily* for purposes of teaching; inappropriate use *may* result in a variety of penalties, in accordance with law, Board policy and administrative regulation. In this case, Respondent had more than 7,000 files on his classroom computer; he placed the manuscript on his classroom computer, modified it 20 times, had 54 personal files on the classroom computer and accessed 30 images. Given the foregoing, according to the evidence in the record, Respondent used his classroom computer *primarily* for purposes related to his employment and therefore did not violate this policy.

17. On March 8, 2008, Respondent executed the District’s Confidential Information and Technology Acceptable Use Agreement (Agreement)⁸. The Agreement states, in pertinent part:

“... an employee of the San Ysidro School District, you may have access to confidential information. These materials include, but are ... limited to, ... student related data such as test scores, addresses, and demographic information.

I understand that I am personally responsible for maintaining the confidential nature of these materials by carefully observing the security measures listed below:

1. Permit no other person to have access to confidential information or materials and **do not** discuss any aspect of the data/information or other confidential personnel-related matters with any other persons unless they are staff members:
 - a. who need the information to perform their work;
 - b. directly involved in matters that require the information to perform their work;
 - c. authorized by your supervisor

⁷ Exhibit 43

⁸ Exhibit 16

2. Lock up or secure all confidential materials when you are not directly working with them.
3. Do not retain any copies or make personal file copies of confidential materials unless necessary. Any extra copies of confidential materials should be destroyed by shredding when they are no longer necessary.
4. Notify your supervisor or an appropriate administrator immediately if any circumstances cause you to believe that the confidential nature of any material or process has not been maintained.
5. If you have any questions about the confidentiality of any of the information to which you have access, you should assume the information is confidential and handle it as such until you are informed otherwise by your supervisor.”

The District asserts that Respondent violated the Agreement in that Orrantia, not a District employee, obtained access to L■■■■’ email address, retained by Respondent on the Hotmail server. In addition, Orrantia provided L■■■■’ email address to the Craigslist advertiser.

Considering the evidence in the record, there is no dispute that addresses are considered confidential student information. However, there is some question about whether a student’s email address constitutes confidential information in that the Agreement does not specifically identify email addresses as such.

Respondent took reasonable steps to safeguard sensitive and confidential information entrusted to him in the performance of his duties as a certificated employee of the District. There is no evidence that Respondent maintained/stored student email addresses, mailing addresses, student records and other student information on his personal computer. There is no evidence that Respondent maintained/stored mailing addresses, student records and/or other student information on the Hotmail server. Student email addresses were maintained/stored on the Hotmail server. The Hotmail account that Respondent used was password protected. There is no evidence that Respondent gave the password to his Hotmail account or otherwise authorized/allowed Orrantia access to student email addresses; rather, his domestic partner obtained the password by means of deception, i.e., watching Respondent as he used the computer and trying the password later when Respondent was not present. Considering the foregoing, insufficient evidence was offered that Respondent permitted Orrantia access to confidential student information.

It was not established that Respondent violated the Agreement.

18. Respondent provided evidence of his educational background, teaching history, additional site responsibilities, awards and evaluations.

Respondent holds a Bachelor of Arts degree in Psychology and a Master of Science degree in Counseling from California State University – Hayward. He worked as a school counselor in the Oakland Unified School District. Thereafter, he studied through the International Programs Department of the California State University system in a joint credentialing program in Mexico City and San Diego. He holds a Pupil Personnel Credential and BCLAD Multiple-Subjects teaching credential.

In December 2009, the District had employed Respondent for 11 years, assigned to SYMS the majority of the time. He served as a counselor at SYMS for two years (2000-2002). During the 2008/2009 and 2009/2010 school years, Respondent was assigned to teach Algebra, Science and Avid to eighth grade students.

At his site, in addition to his duties as a teacher, Respondent has undertaken numerous additional responsibilities outside the classroom, including but not limited to coordinating the science laboratory, coordinating the awards program, and promotional ceremony; in addition, he is a BTSA support provider; finally, he participates in training/staff development throughout the school year.

Since 2007 there have been four Algebra teachers (including Respondent) at SYMS. The STAR test results for Algebra I students at the site have improved, both in terms of Algebra proficiency and in the advanced range. The school's principal gave credit to the Algebra teachers (including Respondent) at SYMS. He testified that the teachers (including Respondent) "did a great job of focusing on improving student achievement and teaching proficiency. They just needed guidance."

Respondent has been recognized for his efforts. He was elected SYMS teacher of the year (2007-2008) and the District's teacher of the year (2008 – 2009). His biannual evaluations attest to his consistent professional competence and indicate a level of work performance at or above expectations based on the California Standards for the Teaching Profession.

There is no evidence or prior discipline or complaint against Respondent as a teacher or counselor.

19. The email sent to L ■■■ was inappropriate to send to a student. However, Respondent did not send the email. Respondent understood and agreed that C ■■■ B. had an obligation to complain about her son's receipt of the email and that the District had a responsibility to investigate the incident. Almost from the moment that he learned that the email had been sent from his Hotmail account, Respondent requested an opportunity to apologize to L ■■■ and his family. Respondent testified that, despite his efforts to communicate with his students and protect confidential information that he intends to make additional effort to protect their email addresses and he described the safeguards that he would follow if not dismissed by the District, such as having more complex email addresses and using only the District's email account for communication with students.

Respondent had materials on his classroom computer that were not job related. Some, if not all, of the images were inappropriate for viewing by students. Overall, the manuscript was inappropriate for reading by students. There is no evidence that any inappropriate images were viewed or any portion of the manuscript was read by any student.

LEGAL CONCLUSIONS

1. The standard of proof in a teacher dismissal proceeding is a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1039-1040.)

2. The District argues that, based on the facts and the law, Respondent engaged in conduct that constitutes immoral conduct, evident unfitness for service and persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of public schools by the State Board of Education or by the governing board of the school district employing him (Cal. Educ. Code, § 44932, subds. (a)(1), (a)(5) and (a)(7)). Therefore he should be dismissed.

Respondent asserts that the facts of this case do not constitute violations of the Education Code and therefore do not justify dismissal.

3. A particular act or omission may constitute more than one cause for removal under Education Code section 44932. (*Tarquin v. Commission on Professional Competence* (1978) 84 Cal.App.3d 251.) It follows that the same acts or omissions may constitute grounds for dismissal for immoral conduct, evident unfitness for service and persistent violation of the District's policies.

4. As used in the Education Code, the term "immoral conduct" is to be construed according to its common and approved usage having regard for the context in which the Legislature used it. (*Board of Education v. Swan* (1953) 41 Cal.2d 546, 553.)

The meaning of the term "immoral conduct" in the context of a teacher dismissal was discussed at length in *Board of Education v. Weiland* (1960) 179 Cal.App.2d 808, and the *Weiland* court's definition has often been cited by other courts. See, e.g., *Palo Verde etc. School District v. Hensey* (1970) 9 Cal.App.3d 967. In *Weiland*, the Court stated:

The term 'immoral' has been defined generally as that which is hostile to the welfare of the general public and contrary to good morals. Immorality has not been confined to sexual matters, but includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, dissoluteness; or as wilful, 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.

In *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, the Supreme Court of California recognized the amorphous nature of the term “immoral” and that it is innately a relative concept dependent on contemporary moral values, the motivation of the actor, and the degree of its inimical quality. Allegations of “immoral” conduct are unconstitutionally vague in the context of teacher-dismissal cases unless the alleged “immoral” conduct is evaluated by reference to a fitness-to-teach standard. (*Id.* at 233.)

Morrison supplied a number of factors relevant in determining the teacher’s fitness to teach: the likelihood that the conduct may have adversely affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the likelihood of the recurrence of the questioned conduct, and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. These factors assist the Board in determining whether the teacher’s classroom performance and overall impact on his students are likely to meet the District’s standards.

5. Under *Woodland v. Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1442-1443, it was determined that “evident unfitness for service” cannot be based upon the *Morrison* factors alone; it must be shown that the teacher’s conduct is the result of a “defect in temperament.” *Woodland* interprets the phrase “evident unfitness for service” to mean “clearly not fit, not adapted or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies.” The phrase “evident unfitness for service” connotes 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.

6. The word “persistent” is defined by lexicographers as “refusing to relent; continuing, especially in the face of opposition . . . stubborn; persevering . . . constantly repeated.” And in the judicial decisions of this, as well as other states, the word has been interpreted to mean “continuing or constant.” (*Governing Board of the Oakdale Union School District v. Seaman* (1972) 28 Cal.App.3d 77, 82.) A single violation of a school board’s rules is not of itself cause for the dismissal of a permanent teacher. The subdivision pertains to unintentional as well as intentional transgressions, and hence the Legislature has decreed that a single violation is not sufficient to warrant dismissal, apparently to allow for correction; “it is the persistent disregard” of school rules that the subdivision is designed to regulate. (*Governing Board of the Oakdale Union School District v. Seaman, supra*, 28 Cal.App.3d at p. 84.)

7. Respondent’s conduct is not “immoral” within the meaning of Education Code section 44932, subdivision (a)(1). There is no evidence that his conduct adversely impacted any student or teacher. His employment history as an educator demonstrates that his future classroom performance and overall impact on his students are likely to meet the District’s standards. His conduct has no permanent or material effect on Respondent’s fitness to teach.

8. The facts do not support a finding of “evident unfitness for service” within the meaning of Education Code section 44932, subdivision (a)(5) in that no evidence was offered to establish that Respondent has a “fixed character trait” that renders him unfit to teach.

9. It was not established by a preponderance of the evidence that Respondent persistently violated or refused to obey the school laws of the State or reasonable regulations prescribed for the government of public schools by the State Board of Education or by the District.

10. Based on the facts and the law, cause to terminate Respondent’s employment with the San Ysidro School District does not exist pursuant to Education Code section 44932, subdivision (a)(1) (immoral conduct), (a)(5) (evident unfitness to teach) or (a)(7) persistent violation.

ORDER

1. The Amended Accusation against Erik Ong is dismissed.
2. The San Ysidro School District shall retain Erik Ong as a permanent certificated employee.

DATED: _____

VALLERA J. JOHNSON
Administrative Law Judge
Office of Administrative Hearings

DATED: _____

DAVINA KEISER
Commission Member

DATED: _____

KATHLEEN MCHEFFEY
Commission Member