

BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
AND THE OFFICE OF ADMINISTRATIVE HEARINGS
OF THE STATE OF CALIFORNIA

In the Matter of the Dismissal of:

JAMES KELLEY,
A Permanent Certificated Employee,

Respondent.

OAH No. 2012060614

DECISION

The Commission on Professional Competence (Commission) heard this matter on March 11 through 15 and 18 through 21, and September 18 through 20 and 24, 2013, in Signal Hill, California. The Commission consisted of Scott Chodorow, Doug Thompson, and Howard W. Cohen, Administrative Law Judge (ALJ) with the Office of Administrative Hearings, State of California. ALJ Cohen presided.

Anthony De Marco and Heather Dozier, Attorneys at Law with Atkinson, Andelson, Loya, Ruud & Romo, represented complainant Christopher Steinhauser, Superintendent of Human Resource Services for the Long Beach Unified School District (District), who at all relevant times acted through his designee, Ruth Perez Ashley, Assistant Superintendent of Human Resource Services for the District.

Richard J. Schwab, Attorney at Law with Trygstad, Schwab & Trygstad, represented respondent James Kelley, who was present.

Oral and documentary evidence was received and argument was heard. Respondent moved Exhibit BBB into evidence. The District objected, and the matter was taken under submission. The ALJ subsequently admitted Exhibit BBB.

The record was closed and the matter was submitted for decision on September 24, 2013.

The Commission considered the matter in executive session. After due consideration of the entire record herein, the Commission makes the following factual findings, legal conclusions, and order.

FACTUAL FINDINGS

1. Complainant brought the First Amended Accusation and First Amended Statement of Charges, through his designee, in his official capacity.
2. Respondent is a permanent certificated employee of the District, presently on paid leave status.
3. On May 10, 2012, complainant, through his designee, filed a Statement of Charges against respondent with the Board of Education of the Long Beach Unified School District (Board). The Board adopted a resolution finding that the charges constituted grounds for dismissal and ordering that respondent be given notice of dismissal, the dismissal to take effect 30 days from the date of service of the notice unless respondent timely requests a hearing.¹
4. On May 11, 2012, complainant's designee served respondent with a Notice of Intent to Dismiss, accompanied by, among other documents, the Statement of Charges.
5. On May 22, 2012, respondent's counsel objected in writing to the Statement of Charges and Notice of Intent to Dismiss and requested a hearing.
6. On May 31, 2012, the District filed and served on respondent a Notice of Accusation and Accusation. Respondent's counsel timely served a Notice of Defense.
7. On December 18, 2012, complainant, through his designee, filed a First Amended Statement of Charges (FASOC) with the Board. The Board adopted a resolution finding that the charges constituted grounds for dismissal and ordering that respondent be given notice of dismissal, the dismissal to take effect 30 days from the date of service of the notice unless respondent timely requests a hearing.
8. On December 19, 2012, complainant's designee served respondent with a Notice of Intent to Dismiss, accompanied by, among other documents, the FASOC.

¹ Respondent raised a jurisdictional challenge on the ground that there is insufficient evidence of the Board's adoption of the resolution in compliance with the law. Ashley, complainant's designee, testified that she was present in the closed session at the May 10, 2012, Board meeting, during which the Board adopted the resolution by a vote of five to none. The subsequent actions taken by the District and its Board, and complainant, are entirely consistent with Ashley's account. Nor is Ashley's testimony in any way contradicted by the Board minutes of May 10, 2012, as urged by respondent. Those minutes confirm a finding that the Board met in closed session on that date. Although the minutes state that "no reportable actions were taken in Closed Session" (Ex. BBB), action taken in a closed session to dismiss a public employee is not to be reported "until the first public meeting following the exhaustion of administrative remedies . . ." (Gov. Code, §§ 54957, 54957.1, subd. (a)(5).) Respondent's administrative remedies are not exhausted until this Decision issues.

9. On January 4, 2013, respondent, in writing, requested a hearing.

10. On January 8, 2013, the District filed and served on respondent a Notice of First Amended Accusation and First Amended Accusation. Respondent's counsel timely served a Notice of Defense.

The District's Charges Against Respondent

11. In the First Amended Accusation and FASOC against respondent, the District alleged that it has cause to dismiss respondent from his employment as a permanent certificated employee of the District for:

- a. Unprofessional conduct, under Education Code section 44932, subdivision (a)(1);²
 - b. Unsatisfactory performance, under sections 44932, subdivision (a)(4);
 - c. Evident unfitness for service, under section 44932, subdivision (a)(5);
- and
- d. 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, under section 44932, subdivision (a)(7).

12. In its FASOC, the District charged respondent with misconduct based on more than 30 alleged separate acts and omissions from the 2008-2009 school year through the 2011-2012 school year.

Respondent's Background

13. At all relevant times, respondent taught graphic arts at Wilson Classical High School (Wilson High). Respondent has worked for the District in various capacities for over 30 years; he was first assigned to teach woodshop at Franklin Middle School in 1982. For the last 18 years, since 1995, respondent has worked for the District at Wilson High, teaching computer applications classes, computer diagnostics, graphic design, and printmaking. He has a master's degree from California State University, Long Beach, and has a clear single subject credential in industrial and technology education.

14. Respondent was under some personal stress due to his father's illness during the 2011-2012 school year; respondent took a bereavement leave in the second semester of that year, when his father died. No evidence was submitted of a prior history of discipline against respondent.

² All statutory references are to the Education Code, unless otherwise specified.

The 2008-2009 School Year

15. The District alleged (FASOC, ¶ 10) but did not establish that, late in the 2008-2009 school year, respondent seized a male student's skateboard and forcefully banged it against the wall of Building 500. Former Wilson High Principal Lew Kerns testified that he witnessed the alleged act. Kerns's testimony was not credible. He did not document the alleged incident until the second semester of the following school year, and only did so at the current principal's request. His testimony that he just happened upon the alleged incident as he turned a corner conflicts with respondent's more credible version of the event, in which he described using the skateboard to demonstrate to Kerns an action taken by a student.

The 2009-2010 School Year

16. The District alleged (FASOC, ¶ 11) and established that on January 25, 2010, respondent threw a skateboard belonging to student G.P.³ out of the classroom door. The evidence further established that respondent threw the skateboard only a short distance into a raised planter, and that he did not damage the skateboard or the planter or cause any injury to person or property.

The 2010-2011 School Year

17. The District alleged (FASOC, ¶ 12) and established that respondent used inappropriate force by grabbing the leg of a stool, which caused student A.M., who was perched on the stool, to fall on the floor and hit his head on a desk. More specifically, on December 13, 2010, during respondent's fourth period class, respondent noticed that A.M. had his head down on his desk and appeared to be sleeping. Respondent approached A.M., who was, in fact, asleep, and woke him by rapping on the desk with his hand. A.M. raised his head, but again put his head down to go to sleep. Respondent told A.M. to stand up, touching A.M.'s shirt as A.M. rose. Respondent directed A.M. to stand near the wall. A.M. did so, but then took a stool and sat on it. When respondent observed that A.M. was no longer standing, respondent approached A.M. and said that he had told A.M. to stand. Respondent grabbed two of the stool legs, causing A.M. to lose his balance and fall. Respondent testified that he did not pull the stool legs until he thought A.M. was standing up, and that he did not intend to cause A.M. to fall. The District did not establish the contrary—A.M. and other students testified about the incident but disagreed on so many important particulars concerning the event that they were not sufficiently credible to demonstrate any improper intent on respondent's part.

18. The District alleged (FASOC, ¶ 13) but did not establish that respondent violated the directives of Assistant Principal Debbie Broadway by failing to make himself available for telephone calls and by failing to provide adequate lesson plans while on paid administrative leave. Broadway called respondent at home and left him a voicemail message;

³ To maintain confidentiality, this decision identifies students and their parents by their initials.

respondent called back within a reasonable time. Respondent provided the requested lesson plans; the Board did not establish that they were inadequate. Although the substitute teacher responsible for respondent's classes requested explanation of some of the details of those plans, respondent was prohibited from contacting the substitute teacher to explain those details.

The 2011-2012 School Year

19. The District alleged (FASOC, ¶ 14) but did not establish that, on October 10, 2011, respondent responded inappropriately to a student's uniform violation. Respondent noticed that student J.M. was wearing his pants low, in violation of school policy. Respondent directed student J.M. outside, in order to address the issue without embarrassing the student. Respondent told student J.M. that he was not behaving at his grade level, not an improper derogatory comment, and had student J.M. tuck in his shirt, as the student was not wearing a belt and his pants kept slipping down. The District offered no testimony other than student J.M.'s, which was insufficient to establish that respondent did anything inappropriate in enforcing the school dress code.

20. The District alleged (FASOC, ¶ 15) but did not establish that, on October 17, 2011, respondent treated a student with disrespect by failing to return the student's property in a timely manner. Respondent confiscated a skateboard from student B.L. during the lunch period, in accordance with the school's skateboard policy; respondent's uncontroverted testimony was that he saw a friend of student B.L.'s waving the skateboard in the air and slamming it down on a concrete planter. Respondent told B.L. he could retrieve the skateboard after school from school administration. Respondent stored the skateboard in his classroom until the end of the school day, when he attempted to turn it over to school administration. The administrators were in a meeting after school, so respondent stored the skateboard in his classroom overnight, rather than immediately turning the skateboard over to student B.L., as the student requested. The skateboard was returned to the student the next morning, within 24 hours of its confiscation, all in accordance with school policy.

21. The District alleged (FASOC, ¶ 16) and established that, on October 21, 2011, respondent made students uncomfortable by taking photographs of them at lunchtime without permission. The group of students was eating lunch outside; there was litter on the ground around them. Rather than ask for the students' names, respondent took photographs of the students, telling them that he would "send the pictures in" if they did not pick up the trash in the area.

22. The District alleged (FASOC, ¶ 17) but did not establish that, on November 9, 2011, respondent prevented his students from using the classroom computers. Only student J.B. testified that he was unable to use the computer that day, which, he claimed, resulted in his being unable to timely submit an assignment. The District alleged that respondent marked down the student's grade for turning the assignment in late, but the evidence did not establish that the student lost any points.

23. The District alleged (FASOC, ¶ 18) but did not establish that, on November 28, 2011, respondent threw student E.D.'s assignment on the floor. The District did establish that respondent called the assignment "garbage" because the assignment papers were unstapled.

24. The District alleged (FASOC, ¶ 19) but did not establish that, in November 2011, respondent deducted points from student J.B.'s grade for carrying his baseball equipment into his classroom.

25. The District alleged (FASOC, ¶ 20) and established that, on December 1, 2011, respondent responded to Principal of Instruction Gonzalo Moraga's e-mail request to meet regarding parent complaints with, "Does this crap ever end?"

26. The District alleged (FASOC, ¶ 21) and established that, on December 9, 2011, respondent told a parent during a meeting to discuss a student's grade that he did not want to continue to hold the meeting while Moraga was present. The District alleged but did not establish that respondent told the parent, "Mr. Moraga is out to get me," and, "I don't want to say anything because he is going to write me up."

27. The District alleged (FASOC, ¶ 22) but did not establish that, on February 29, 2012, there were deficiencies in respondent's classroom performance. The evidence did not establish that respondent failed to post an objective on the board, or that he failed to review the purpose, objective, or expectations for an assignment prior to directing students to work on the computers. The evidence did not establish that respondent failed to provide a deadline for completion or explain how the assignment would be graded. Several students were unable to access a computer, as 15 computers were out of commission, but the evidence did not establish that the students were unable to do their assignments; there were non-computer based elements to the assignment. The evidence did not establish that respondent failed to check for understanding; there was evidence that respondent was reviewing students' computer work while at his desk, on his computer, and that he also repeatedly walked around the classroom and checked students' work.

28. The District alleged (FASOC, ¶ 23) and established that, on March 12, 2012, respondent refused to follow a verbal directive from Moraga. Moraga called respondent's classroom and directed respondent to allow student S.B., whom respondent had sent to Moraga's office, back into the classroom with his baseball bat and equipment bag. Respondent refused, saying he would take a sick day instead. Moraga kept the baseball equipment in his office, and student S.B. returned to respondent's classroom. Two days later, on March 14, 2012, Moraga met with respondent and directed him not to confiscate sports equipment from students, send students out of his classroom for carrying sports equipment, or discipline students for carrying sports equipment into his class.

29. The District alleged (FASOC, ¶ 24) but did not establish that, on March 16, 2012, respondent willfully refused to follow Moraga's March 14, 2012, directive. Student S.B. brought his baseball bat and equipment bag into class again. Respondent told S.B. that he would have to store the bat in the office or an unobtrusive area of the classroom.

Respondent did not confiscate the equipment, send S.B. out of the classroom, or discipline S.B. for carrying his baseball equipment into the classroom. The District also alleged but did not establish that respondent suspended S.B. to the Alternate Classroom Experience ("ACE") program and deducted 20 points from S.B.'s participation grade in defiance of Moraga's March 14 directive.

30. The District alleged two separate acts in this charging allegation. (FASOC, ¶ 25.)

a. The District alleged and established that, on April 2, 2012, respondent submitted lesson plans to Mr. Moraga with an inappropriate statement regarding his recent administrative leave. Although the lesson plans were shown only to Moraga, not to the students, respondent's written comment about his "foolish suspension" was inappropriate.

b. The District alleged but did not establish that respondent refused to submit additional lesson plans in defiance of Moraga's directives. Respondent was excused from submitting additional lesson plans, pending an investigation, and the evidence did not establish that respondent never submitted additional lesson plans.

31. The District alleged (FASOC, ¶ 26) but did not establish that, on April 2, 2012, respondent asked Moraga to leave his class because Mr. Moraga might "write him up." Respondent asked Moraga not to enter the classroom because the computer network was inoperative. The District also alleged but the evidence failed to establish that students were not working on any assignments while the network was down.

32. The District alleged (FASOC, ¶ 27) but did not establish that, on at least two occasions during the 2011-2012 school year, respondent forced students to sit at their desks the entire block period, not allowing them to log onto the computers to submit their assignments.

33. The District alleged (FASOC, ¶ 28) but did not establish that, during the 2011-2012 school year, respondent frequently insulted students and responded inappropriately to minor student issues or requests.

a. Respondent did not "belittle[] all of the students, telling them, they will be living on the streets, when they are 18." The alleged statement was taken out of context; respondent's actual statement was not belittling.

b. Parent T.C. reported to Moraga that respondent belittled her son; she never spoke to respondent about it, as Moraga had told her to do, and the evidence does not establish that respondent's criticism of student K.C.'s work was unjustified or improper.

c. L.S., parent of student Z.S., reported that respondent intimidated and insulted students and that respondent threatened her son with detention for asking a question. Student Z.S.'s testimony did not corroborate his mother's complaint.

34. The District alleged (FASOC, ¶ 29) but did not establish that, during the 2011-2012 school year, respondent deducted ten points from two students' participation grades for using Photoshop after completing an assignment and when he directed the students to sweep the classroom. With respect to this incident, the evidence was controverted and did not establish that respondent's actions were in any way inappropriate.

35. The District alleged (FASOC, ¶ 30) and established that, during the 2011-2012 school year, respondent told student J.R. that the work he had done on an assignment was "crap." The District alleged but did not establish that respondent intimidated and belittled students in his classes.

36. The District alleged (FASOC, ¶ 31) but did not establish that, during the 2011-2012 school year, respondent ordered student J.S. to "rip [his] paper in half in front of the class" because he had misread the assignment directions. The evidence did not establish either that respondent ripped up the assignment himself or told student J.S. to do so.

37. The District alleged (FASOC, ¶ 32) but did not establish that, during the 2011-2012 school year, respondent retaliated against students when they or their parents complained about respondent to administration or questioned his instruction. The allegation is based on the unsubstantiated and controverted statement of Parent J.R.

38. The District alleged (FASOC, ¶ 33) but did not establish that, during the 2011-2012 school year, respondent pushed a chair over in class. There was no evidence to support an unsubstantiated allegation about a chair being pushed over that was written by a student's parent who did not claim to have witnessed the alleged act.

39. The District alleged (FASOC, ¶ 34) but did not establish that, during the 2011-2012 school year, respondent failed to respond to parent concerns.

a. Contrary to the District's allegations, the evidence showed that respondent did respond to parents' concerns. Student B.R.'s claim that respondent told students that he would not listen to parent complaints was unsubstantiated and controverted.

b. Parent M.B. felt respondent was unwilling to help her son by meeting with him outside of class hours. The evidence showed that respondent had posted office hours when he was available to meet with students after school, and that he did meet with students after school. The evidence did not establish that respondent was required to make himself available at other times more convenient for M.B.'s son.

40. The District alleged (FASOC, ¶ 35) but did not establish that, during the 2011-2012 school year, respondent withheld the use of computers from all students as a form of discipline for one class period and informed the students that the three assignments due that day, each of which required use of a computer, would be recorded with scores of zero. There was insufficient evidence to show that respondent caused the computers to be unavailable as a form of discipline, or that the students were not given work to do during that class period.

41. The District alleged (FASOC, ¶ 36) but did not establish that, during the 2011-2012 school year, respondent acted improperly when he spent 45 minutes trying to operate a malfunctioning TV/VCR. The District alleged that, while respondent was attempting to operate the TV/VCR, students were not engaged in guided instruction or working independently on assignments, and that students were required to but could not complete an assignment based on the video respondent was attempting to play because the video was not shown in its entirety. The evidence did not establish any misconduct on respondent's part. The evidence established that the students were occupied with assignments during the class period; as for the video assignment, the average score received by students in the class was approximately 76 percent, and some students received an A grade.

42. The District alleged (FASOC, ¶ 37) but did not establish that, during the 2011-2012 school year, respondent improperly refused to lend relevant texts, such as Art Talk, to students or make copies of the texts for students to study. The evidence demonstrated that the texts in question were not relevant, were not assigned, and in any event were available for use by students in the classroom after class.

43. The District alleged (FASOC, ¶ 38) but did not establish that, during the 2011-2012 school year, respondent acted improperly when he informed a student that his assignment, "look[ed] like something my 7 year old would draw." (See Factual Finding 33(b).)

44. The District alleged (FASOC, ¶ 39) but did not establish that, during the 2011-2012 school year, respondent failed to effectively communicate grading policies and assignment expectations to students and parents, that he assigned students zero scores on assignments based on content respondent failed to teach, and that he deducted points from student work in a manner that did not comport with the assignment evaluation information provided to students. The evidence was insufficient to establish that respondent failed to post his grading policy, that the policy was unclear, or that grades were based on untaught content or reflected improper point deductions.

45. The District alleged (FASOC, ¶ 40) but did not establish that, during the 2011-2012 school year, respondent failed to provide a class agenda or assignment criteria to students and parents, that he was inconsistent in providing handouts on key concepts, grading criteria, and expectations, and that he was inflexible about assignment due dates. The evidence showed that respondent did provide handouts and posted the necessary information on the school website, and that respondent was flexible and did extend due dates for assignments.

46. The District alleged (FASOC, ¶ 41) but did not establish that, during the 2011-2012 school year, respondent added a "participation" category into student grades for the purpose of punishing students. The evidence did not show that the category was intended to punish or did, in fact, constitute punishment.

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Notices and Warnings Issued to Respondent

47. Respondent was provided with:

- a. A Notice of Unprofessional Conduct and Unsatisfactory Performance on May 19, 2011, which included a Performance Improvement Plan with nine directives;
- b. A written summary of an October 27, 2011 conference between respondent, Gonzalo Moraga, Chris Callopy, Assistant Executive Director of the Teachers Association of Long Beach (TALB), and Bill Salas, dated October 28, 2011, in which respondent was warned regarding his alleged unsatisfactory performance and unprofessional conduct, and which included nine directives; and
- c. A Notice of Unprofessional Conduct and Unsatisfactory Performance on March 2, 2012, which included a Performance Improvement Plan with eighteen directives.

These notices and warnings were inadequate means for helping respondent remediate or understand any deficiencies. Administration essentially issued commands to respondent; it did not work with respondent, develop a meaningful plan, or provide resources to help respondent achieve specified directives.

48. On April 26, 2012, Moraga prepared an evaluation rating respondent's performance as unsatisfactory. The evaluation was based on Moraga's observations of respondent's classroom instruction on December 8, 2011, and February 29, 2012. Moraga wrote that respondent "is not recommended for continued service." (Ex. 2, Tab 27.)

LEGAL CONCLUSIONS

Jurisdiction

1. The Commission has jurisdiction to proceed in this matter under section 44944. (Factual Findings 1 through 10.)

Burden of Proof

2. The District has the burden of proof in this matter, since it is seeking to dismiss respondent from employment as a certificated employee. The District must prove its case by a preponderance of the evidence. (*Gardiner v. Commission on Prof. Competence* (1985) 164 Cal.App.3d 1035, 1040.)

Statutory Grounds for Dismissal

3. The governing board of a school district may dismiss a permanent certificated employee if one or more of the causes enumerated in section 44932, subdivision (a), are established. In the First Amended Accusation and FASOC, the District alleged four of those

enumerated causes: unprofessional conduct, unsatisfactory performance, evident unfitness for service, and persistent violation of school laws or regulations. (Factual Finding 11.)

4. The District's First Amended Accusation and FASOC charged respondent with numerous acts. The First Amended Accusation and FASOC set forth specifically, for only some but not all of the factual allegations, which allegations relate to which of the alleged bases for dismissal under section 44932, subdivision (a) (that is, unprofessional conduct, unsatisfactory performance, evident unfitness for service, or refusal to obey the school laws or regulations). The District alleged in the FASOC, however, that the alleged acts and omissions support one or more of the four bases for discipline and support respondent's dismissal

5. The Commission has examined each charge to determine whether it was proven, and for those proven has determined, as set forth below, whether the charges were a violation of one or more of the statutory bases for dismissal as alleged.

Unprofessional Conduct

6. "Unprofessional conduct," as used in section 44932, subdivision (a)(1), may be defined as conduct that violates the rules or ethical code of a profession or that is unbecoming a member of a profession in good standing. (*Board of Ed. v. Swan* (1953) 41 Cal.2d 546, 553, overruled on other grounds in *Bekiaris v. Board of Ed.* (1972) 6 Cal.3d 575, 588, fn. 7.)

7. Of the charged acts found by the Commission to have been committed by respondent, eight constitute unprofessional conduct within the meaning of section 44932, subdivision (a)(1), as set forth in Factual Findings 16, 17, 21, 23, 25, 28, 30, and 35.⁴

Unsatisfactory Performance

8. "Unsatisfactory performance," which is not defined in the Education Code or in case law, means something other than unprofessional conduct. (See § 44938, subd. (c); *In re Maes* (2010) 185 Cal.App.4th 1094, 1110.) Cause for discipline may be established if a certificated employee performs unsatisfactorily in the opinion of his or her employing school district. An employing school district cannot, however, arbitrarily or capriciously decide that a certificated employee has performed unsatisfactorily. (*Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist.* (2006) 145 Cal.App.4th 1260, 1293, fn. 20, citing 56 Cal.Jur.3d (2003) Schools, § 411, p. 757) (purpose of statute giving tenure to teachers is to ensure efficient permanent teaching staff whose members are not dependent on caprice for their positions).

⁴ The Commission determined that the action of respondent set forth at Factual Finding 26 was not an instance of unprofessional conduct or of any other statutory ground for dismissal.

9. The evidence did not establish most of the alleged acts that, according to the District, constituted unsatisfactory performance and for which the District provided respondent notice (see Factual Findings 47 and 48). Those alleged but mostly unsubstantiated acts related to respondent's assignments and grading system, his presentation of lessons and supervision of students, and his statements to students in the classroom and responses to parents. (Factual Findings 11-48.)

10. Nor do the acts that the Commission found respondent, in fact, committed (Factual Findings 16, 17, 21, 23, 25, 26, 28, 30, and 35) constitute unsatisfactory performance within the meaning of section 44932, subdivision (a)(4). The Commission found that respondent threw a skateboard into a planter, grabbed the legs of a stool a student was sitting on and caused the student to fall, took photographs of some students, called an unstapled assignment "garbage," wrote "Does this crap ever end" about inquiries from Moraga concerning parent complaints, requested that Moraga not be present for a parent meeting, refused to comply with a verbal directive about a student with a baseball bat, characterized his suspension as "foolish" on a draft lesson plan submitted to Moraga, and told a student that the work he had done on an assignment was "crap." The Commission has already found that most of those acts constitute unprofessional conduct. The evidence did not support an additional finding that Moraga's dissatisfaction with respondent established the charge of unsatisfactory performance. Respondent and Moraga were frequently at odds during Moraga's first year as principal at Wilson High, the 2011-2012 school year. The fact that the evidence did not substantiate most of the acts alleged in Moraga's notices of unsatisfactory performance suggests that the administration's expressions of dissatisfaction with respondent's conduct were, at least to some degree, the result of a personal dispute between respondent and the principal, rather than respondent's failure to meet the District's reasonable, non-arbitrary expectations. The District's failure to work constructively with respondent to correct perceived deficiencies lends support to that suggestion. (Factual Finding 47.)

Evident Unfitness for Service

11. "Evident unfitness for service," within the meaning of section 44932, subdivision (a)(5), means clearly not fit or suitable for teaching, ordinarily by reason of a temperamental defect or inadequacy. (*Woodland Joint Unified School Dist. v. Commission on Prof. Competence* (1992) 2 Cal.App.4th 1429, 1444-1445.) Evident unfitness for service requires that unfitness be attributable to a defect in temperament that "connotes a fixed character trait, presumably not remedial upon receipt of notice that one's conduct fails to meet the expectations of the employing school district." (*Id.* at p. 1444.)

12. Of the charged acts found by the Commission to have been committed by respondent (Factual Findings 16, 17, 21, 23, 25, 26, 28, 30, and 35), none constitutes evident unfitness for service.

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13. The evidence did not establish that respondent's acts of unprofessional conduct reflect an irremediable character trait rendering respondent unfit to teach. The Commission determined, therefore, that cause does not exist to dismiss respondent for evident unfitness for service under section 44932, subdivision (a)(5).

Persistent Violation of School Laws or Regulations

14. Under section 44932, subdivision (a)(7), a permanent employee may be dismissed from employment for persistent violation of school laws or reasonable regulations prescribed by the government of public schools by the State Board of Education or by the governing board of the school district employing him. The violation or refusal to obey reasonable regulations must be persistent or "motivated by an attitude of continuous insubordination." (*Governing Bd. of the Oakdale Union School Dist. v. Seaman* (1972) 28 Cal.App.3d 77, 81-82.) Isolated events or incidents involving an issue unresolved over a period of time are generally not considered persistent. (*Bourland v. Commission on Prof. Competence* (1985) 174 Cal.App.3d 317, 320 (absent violation of school rules, lengthy private debate between teacher and principal does not indicate continual insubordination seriously affecting school discipline).) Cause for discipline may be based on the violation of school rules, but requires a showing of intentional and continual refusal to cooperate. (*San Dieguito Union High School Dist. v. Commission on Prof. Competence* (1985) 174 Cal.App.3d 1176, 1180-1181.)

15. The charged acts found by the Commission to have been committed by respondent (Factual Findings 16, 17, 21, 23, 25, 26, 28, 30, and 35), do not constitute a persistent violation of laws or regulations. While the act established at Factual Finding 28 violated a directive from Moraga, for instance, complainant did not establish anything more than isolated incidents, and did not establish that respondent persistently violated school rules, the District code of conduct, or any other directive, policy, law, or rule set by the District or the State Board of Education.

Analysis of the Morrison Factors

16. In *Morrison v. State Bd. of Education* (1969) 1 Cal.3d 214, 235 (*Morrison*), the California Supreme Court held that "an individual can be removed from the teaching profession only upon a showing that his retention in the profession poses a significant danger of harm to either students, school employees, or others who might be affected by his actions as a teacher." The Court concluded that a teacher's conduct cannot abstractly be characterized as "unprofessional" unless the conduct indicated that a teacher is unfit to teach. (*Id.* at p. 229.) The court set forth factors to consider in determining whether the conduct in question indicated unfitness. As it has been determined in this case that most of the alleged conduct did not occur, it is only necessary to discuss the "*Morrison* factors" as they relate to

acts that the Commission has found did occur and constituted unprofessional conduct.⁵ That conduct is set forth in Factual Findings 16, 17, 21, 23, 25, 28, 30, and 35.

17. The *Morrison* factors for the trier of fact to analyze in determining whether a teacher is unfit to teach are: (1) the likelihood of the conduct adversely affecting students or fellow teachers and the degree of such adversity; (2) the proximity or remoteness in time of the conduct; (3) the type of teaching certificate held by the teacher; (4) the existence of extenuating or aggravating circumstances and publicity, if any, surrounding the conduct; (5) the praiseworthiness or blameworthiness of the motives resulting in the conduct; (6) the likelihood of recurrence of the questioned conduct; and (7) the extent that the discipline may adversely impact or have a chilling effect on the constitutional rights of the teacher.

18. Not all *Morrison* factors need be present for the *Morrison* test to be satisfied. (*Governing Bd. of ABC School Dist. v. Haar* (1994) 28 Cal.App.4th 369, 384.) Moreover, the *Morrison* analysis need not be conducted on each individual fact established; it can, rather, be applied to the accumulated facts established collectively. (*Woodland Joint Unified School Dist. v. Commission on Prof. Competence* (1992) 2 Cal.App.4th 1429, 1457.)

19. Applying the *Morrison* factors in this case, the Commission finds as follows:

a. Complainant failed to establish the likelihood that the conduct set forth in Factual Findings 16, 17, 21, 23, 25, 28, 30, and 35 will adversely affect students or fellow teachers to any significant degree, if at all. Respondent's misconduct had no general effect; it only affected those students involved, usually minimally, and did not and will not adversely affect fellow teachers. A good deal of respondent's supervisor's time was consumed in managing issues concerning respondent, but most of those issues were not well-founded. Although respondent made some poor choices, as reflected in the Commission's findings, respondent had cause to feel that administration was not working with him to correct any perceived deficiencies. It cannot be concluded that respondent's relationship with his supervisor provides grounds for a finding of unfitness to teach.

b. Although some of the misconduct is relatively proximate in time, in that it occurred two to three years ago, it is not so recent that, given the limited number of students affected, it can be established as grounds for a finding of unfitness to teach.

c. The evidence did not establish respondent's unfitness to teach classes in the subject matter for which he is credentialed. (See Factual Findings 13, 18, 22, 27, 30, 32-37, 39-46.)

d. The evidence did not establish the existence of aggravating circumstances surrounding respondent's conduct. There was some evidence of mitigating

⁵ The *Morrison* analysis does not apply to causes for dismissal for unsatisfactory performance or for persistent violation of laws and regulations. (*Morrison, supra*, 1 Cal.3d at pp. 227-230.) It is presumed that such conduct is related to fitness to teach.

circumstances during the 2011-2012 school year, when respondent's father was ill. (Factual Finding 14.)

e. For most of the acts of unprofessional conduct set forth in Factual Findings 16, 17, 21, 23, 25, 28, 30, and 35, respondent did not have a motive sufficiently praiseworthy to excuse the conduct.

f. For some of the acts of unprofessional conduct (Factual Findings 16, 17, 21), there is little likelihood of recurrence of the questioned conduct. For other acts, including some of those involving respondent's interactions with Moraga (Factual Findings 25, 28), though not all (Factual Finding 30), and others involving students (Factual Findings 23, 35), there is some likelihood of recurrence.

g. The Commission did not find that discipline is likely to cause an adverse impact or chilling effect upon the constitutional rights of respondent or other teachers.

Disposition

20. Even where cause for dismissal has been established, the Commission has broad discretion to determine whether such discipline is actually warranted. (*Fontana Unified School Dist. v. Burman (Fontana)* (1988) 45 Cal.3d 208, 220-222.) "The Commission has broad discretion in determining what constitutes unfitness to teach . . . , and whether dismissal or suspension is the appropriate sanction. [Citing *Fontana, supra*, 45 Cal.3d at pp. 220-222.] '[A] disciplinary discharge often involves complex facts and may require a sensitive evaluation of the nature and seriousness of the misconduct and whether it warrants the grave sanction of dismissal.' [Citation]." (*California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 343-344.)


21. In this case, the District did not establish that respondent's dismissal is warranted. (Factual Findings 11-49 and Legal Conclusions 1-20.) The Commission members agree unanimously. Respondent's conduct in this case was not unsatisfactory or illegal. The Commission finds that respondent engaged in acts that in some but not all cases constitute unprofessional conduct but that do not, separately or in the aggregate, suggest that he is unfit to serve as a teacher. Respondent has no other disciplinary history with the District. The Commission does not believe that dismissal is necessary to protect students, school employees, or others or to further deter him from engaging in similar conduct in the future.⁶

⁶ Because the Commission has decided that respondent's dismissal is not warranted, the substantive, procedural, and evidentiary issues raised by respondent regarding a grievance procedure and collective bargaining agreement need not be decided here.

ORDER

The First Amended Accusation against respondent James Kelley is dismissed.


DATED: December 3, 2013



HOWARD W. COHEN
Administrative Law Judge
Office of Administrative Hearings

I concur with the Decision and Order set forth above:

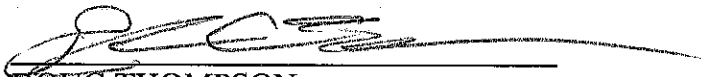
DATED: December 5, 2013



SCOTT CHODOROW
Commission Member

I concur with the Decision and Order set forth above:

DATED: December 9, 2013



DOUG THOMPSON
Commission Member