

BEFORE THE  
COMMISSION ON PROFESSIONAL COMPETENCE  
STATE OF CALIFORNIA

In the Matter of the Dismissal of:

OAH No. 2010070629

LINDA PALMER,

Respondent.

**DECISION**

On January 18 and 19, 2011, Daniel Juárez, Administrative Law Judge (ALJ), Office of Administrative Hearings, heard this matter, together with Christine Aguilar and Nancy Glenn at Santa Ana, California.

Eric Bathen, Esq., represented Petitioner Santa Ana Unified School District (SAUSD).

Reich, Adell & Cvitan, and Carlos R. Perez, represented Linda Palmer (Respondent). Respondent was present on both days of hearing.

The record was left open until January 26, 2011, to allow the parties to file written briefs. The parties filed briefs timely and each brief was marked for identification.

The parties submitted the matter for decision on January 26, 2011.

**STATEMENT OF THE CASE**

SAUSD seeks the dismissal of Respondent, contending she presented herself at the elementary school where she teaches in a state of alcohol intoxication on one occasion in May 2010. Thereafter in the same month, SAUSD contends Respondent twice returned to SAUSD for meetings; wherein at the first meeting, she denied having previously driven to work intoxicated, and at the second meeting, Respondent presented herself, having recently consumed alcohol and exhibiting signs of intoxication. Based on these alleged acts, SAUSD argues that Respondent willfully refused to perform her regular teaching assignment and engaged in immoral conduct.

Respondent concedes she was intoxicated on the first occasion in May 2010, but argues that she has taken adequate steps toward sobriety. She explained her actions at the two later meetings, and argued that she should be allowed to continue her rehabilitation and not be dismissed.

## SAUSD's MOTION TO AMEND THE STATEMENT OF CHARGES

SAUSD sought to amend the Statement of Charges at the conclusion of its case-in-chief, to add a new ground for dismissal: Education Code section 44932, subdivision (a)(5). Under this provision, SAUSD sought to dismiss Respondent on the additional ground that, by her actions in May 2010, she displayed an evident unfitness for service. SAUSD cited Government Code section 11507 as its authority to amend.

Respondent objected, citing mostly *Board of Education v. Commission on Professional Competence* (1976) 61 Cal.App.3d 664, wherein the Court of Appeal held that the panel in that case did not have the jurisdiction to hear a charge of evident unfitness for service where the school district in that case did not comply with the statutory regulations relating to dismissals.

At hearing, the ALJ allowed SAUSD's motion to amend, pursuant to Government Code section 11507.

However, after further review and further consideration of the briefs submitted by both parties, the ALJ finds that Respondent's argument has merit and SAUSD's motion to amend the Statement of Charges should not have been granted. As Respondent correctly argued, the right to amend pursuant to Government Code section 11507, a provision of the Administrative Procedure Act (APA) is not binding here, where a more specific statute applies. (*Powers v. Commission on Professional Competence* (1984) 157 Cal.App.3d 560-581; *Stewart v. San Mateo Junior College District* (1974) 37 Cal.App.3d 345, 347-348.) In this matter, the more specific provisions are Education Code sections 44934 and 44932. SAUSD failed to comply with those provisions to properly amend the Statement of Charges, as Education Code section 44934 requires the SAUSD Board to approve any charges by a majority of the Board. There was no evidence that this occurred. Therefore, while the Statement of Charges was allowed to be amended, cause for dismissal under the charge of evident unfitness for service, pursuant to Education Code section 44932, subdivision (a)(5), is not found, based on SAUSD's failure to comply with the statutory requirements for charging Respondent with evident unfitness for service, pursuant to Education Code section 44934, leaving this panel of the Commission on Professional Competence with no jurisdiction to consider this charge.

## FACTUAL FINDINGS

1. SAUSD filed the Statement of Charges on or about June 9, 2010, and the Accusation on or about June 25, 2010.
2. SAUSD provided Respondent with a Notice of Intention to Dismiss and a Notice of Intention to Suspend, dated June 9, 2010.

3. Respondent filed two notices of defense, dated June 15, and July 30, 2010.

4. Respondent is a permanent, certificated employee of SAUSD. She teaches kindergarten at Jackson Elementary School. She has been a kindergarten teacher in SAUSD for approximately 12 years.

5. On the evening of May 4, 2010, while at a restaurant with friends, Respondent drank a bottle of sake and four beers and stayed out until approximately 12:30 a.m. She then went home; she did not drive. Once home, she had an argument with her husband and drank more, consuming three cocktails that Respondent described as “strong.” She stopped drinking and went to bed at approximately 3:00 a.m. on May 5, 2010. Respondent woke later that morning and prepared to go to work.

6. Before Respondent left her home for work, Respondent’s husband told her that she was “breathing fire.” At hearing, Respondent asserted that she understood this comment to solely mean she had bad breath. However, during her cross-examination, she was shown her deposition, dated December 20, 2010, wherein she conceded that she understood that comment to mean her breath smelled like alcohol. Respondent did not reconcile this inconsistency at hearing. Respondent’s assertion at hearing was an untruthful statement.

7. Respondent drove to her school site, arriving at Jackson Elementary sometime between approximately 7:30 and 7:50 a.m. Students and parent drivers entering the school premises were present at this time. While driving to Jackson Elementary, Respondent intended to teach her class. Once she parked her car at the school, she felt sick, and went to the school office to inform staff that she did not feel well. Respondent did not believe she was intoxicated, but instead believed she was “hung over” from her earlier drinking. The school staff observed Respondent looking ill and unsteady in her gait, and referred her to the school nurse.

8. The school nurse met with Respondent, checked some of her vital signs, and after speaking to her and observing her actions and appearance, and smelling her breath, the school nurse opined that Respondent was intoxicated. While with the school nurse, Respondent was flush, had slurred speech and was rambling; Respondent’s breath smelled of alcohol, and she exhibited mood swings ranging from happiness and excitement to sadness and somberness. A number of school personnel corroborated Respondent’s appearance, including the principal (although the principal did not smell alcohol on Respondent’s breath), the school’s office manager, and two office assistants, among others. While speaking to the principal, Respondent commented that she wondered why other drivers in the street were honking at her while she was driving to the school that morning.

9. Once Respondent understood that she was in no condition to teach her class, and while still with the school nurse, Respondent wanted to go to her class to speak to the substitute teacher; however, school staff told her that she would not be allowed to do so. The assistant principal covered Respondent's class until a substitute was brought in. During the time Respondent was in the nurse's office, she apologized to the principal, further commenting that she should have stayed home that morning. SAUSD staff placed paper on the windows in the nurse's office area where Respondent remained, to temporarily privatize the area and bar students and adults passing by from seeing Respondent.

10. The SAUSD police were called. The police officers noted that Respondent had the odor of alcohol on her breath and appeared intoxicated. The police administered two breathalyzer tests that produced a blood alcohol level of 0.135 percent at 9:38 a.m., and 0.147 percent at 9:42 a.m.

11. The police noted that they had to administer the breathalyzer tests several times because Respondent was not blowing into the testing apparatus sufficiently. At hearing, SAUSD argued implicitly that this was evidence that Respondent was attempting to "beat the test," a comment originally made by the SAUSD police. However, during the administration of these tests, Respondent was crying, and Respondent credibly explained that she was having trouble blowing into the testing apparatus due to her crying.

12. With Respondent's consent, the police searched Respondent's car and found an empty eight ounce bottle of alcohol, labeled "Smirnoff Ice," along with a receipt for its purchase, dated April 9, 2010. There was no evidence that she had consumed alcohol from that bottle on May 5, 2010.

13. Upon the police officers' questioning, Respondent asserted to the police that she last consumed alcohol at 12:30 a.m. and described the sake and beer she had consumed. She did not disclose to the police that she had consumed three cocktails later that morning. Respondent did not reconcile this inconsistency at hearing. Nevertheless, the police opined that because Respondent's blood alcohol level rose between the two administered tests, that Respondent had been drinking more recently than that disclosed by Respondent. Respondent was taken by van to a hospital until the effects of the alcohol had worn off. Respondent's statement to the SAUSD police disclosing only part of her alcohol consumption on May 5, 2010 was an untruthful statement.

14. While at the hospital setting (the East Edinger Industrial Urgent Care), Respondent's blood alcohol level was tested again, at 11:00 a.m. on the same day (May 5, 2010). Respondent's blood alcohol level was found to be above 0.08 percent.

15. SAUSD placed Respondent on paid administrative leave, effective May 5, 2010.

16. SAUSD's board policy number BP 4020, subdivision (a), provides that all SAUSD employees shall not use or be under the influence of alcohol on school premises before, during, or after school hours. The policy further states that the school board "may take appropriate disciplinary action, up to and including termination, or require the employee to satisfactorily participate in and complete a drug assistance or rehabilitation program."

17. Respondent met with Chad Hammitt, SAUSD's Executive Director of Human Resources, on May 18, 2010. The purpose of the meeting was for SAUSD to hear Respondent's account of what occurred on May 5, 2010. Respondent, Respondent's union representative, and Hammitt were present. At this meeting, Respondent denied driving to school intoxicated on May 5, 2010. Her denial was an untruthful statement.

18. Respondent met again with Hammitt on May 26, 2010, at approximately 3:00 p.m. Respondent's union representative was present again. Upon greeting each other, Respondent stroked Hammitt's arm up and down and was overly friendly. Hammitt found this odd, given the professional nature and the subject matter of the meeting. Hammitt smelled alcohol on Respondent's breath. At hearing, Hammitt described Respondent as "uninhibited," and as exhibiting mood swings ranging from excitement to sadness.

19. Immediately after meeting with Hammitt, on May 26, 2010, Respondent met with Juan Lopez, SAUSD's Associate Superintendent of Human Resources. Respondent's union representative was also present. As with Hammitt, Respondent stroked Lopez's arm up and down in an overly friendly manner. Lopez also smelled alcohol on Respondent's breath. At hearing, Lopez described the smell of alcohol as "fairly strong." Lopez asked Respondent if she had been drinking alcohol that day. Respondent denied drinking. Respondent's denial was an untruthful statement. Lopez then told her he could smell alcohol on her breath. Thereafter, Respondent admitted she had consumed a glass of wine with lunch. At hearing, Respondent explained that she was nervous and conceded that it was an error to initially deny her drinking to Lopez.

20. Respondent explained at hearing that she had lunch at a restaurant on May 26, 2010, with a friend, mistakenly believing this second meeting with SAUSD was scheduled for a different day. She asserted that she consumed most of one glass of wine with her lunch. While at this lunch, she was telephoned and reminded that the meeting at SAUSD was that same day. At that time, she had just about finished her lunch and immediately paid her bill and left for SAUSD. According to Respondent at hearing, she did not completely consume the contents of the one glass of wine before she left the restaurant for SAUSD that day.

21. On cross-examination, Respondent noted that she had previously stated she finished her glass of wine on May 26, 2010, when asked at her deposition, dated

December 20, 2010. Respondent did not reconcile this inconsistency at hearing. Respondent's assertion that she had not completely consumed the contents of her wine glass was an untruthful statement.

22. Respondent's assertion at hearing that she consumed less than one glass of wine was not believable. First, as she drank wine with her lunch meal, it is more likely that she consumed a greater quantity of wine, given both Hammitt and Lopez could smell alcohol on her breath, and that Lopez credibly described the smell of alcohol as "strong." Second, Respondent's instances of dishonesty in May 2010 (Factual Findings 13, 17, 19), and at hearing (Factual Finding 6), lessened her credibility.

23. Respondent denied ever stroking the arms of Hammitt and Lopez. She explained that she tends to use both hands to shake hands and implicitly reasoned that perhaps this act by her was mistaken for the stroking asserted and testified to by Hammitt and Lopez. The evidence established that Respondent stroked the arms of Hammitt and Lopez in an overly friendly manner on May 26, 2010. There was, however, no evidence that Respondent was intoxicated on May 26, 2010.

24. Respondent admitted that she is a recovering alcoholic.

25. Respondent entered an alcohol recovery program at the Hoag Memorial Hospital Chemical Dependency Recovery Center on June 3, 2010. She remained in the program through July 2, 2010. Respondent completed the program successfully.

26. Respondent also began attending Alcoholics Anonymous (AA) meetings as part of her recovery. She continues to attend AA meetings presently. Respondent finds these meetings helpful to her recovery. She concedes that she was in denial of her alcoholism before entering the Hoag Hospital recovery program. She credits the program and her continuing AA meeting attendance for her sobriety. Up to the dates of hearing, Respondent has maintained her sobriety. She asserted that her last alcoholic drink was on May 26, 2010. She understands that for her, one drink is one drink too many, and that consuming alcohol affected her life negatively.

27. Marie Wood, a retired teacher from SAUSD who taught at Jackson Elementary from approximately 1986 to 2009, testified on behalf of Respondent. According to Wood, Respondent has the reputation of a good teacher who is dedicated to her students.

## LEGAL CONCLUSIONS

1. The District has the burden of proof to prove its allegations by a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1038-1039.)

2. Education Code section 44932, subdivision (a)(1) states, in part, that “no permanent employee shall be dismissed except for one or more of the following causes . . . [i]mmoral . . . conduct.”

3. “Immoral conduct,” means conduct that is hostile to the public welfare and contrary to good morals. It includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, and dissoluteness. It can be conduct that is willful, flagrant, or shameless, or conduct showing moral indifference to the opinions of respectable members of the community or as an inconsiderate attitude toward good order and the public welfare. (*Board of Education v. Weiland* (1960) 179 Cal.App.2d 808, 811.)

4. On May 5, 2010, by driving to her school site intoxicated, Respondent endangered the lives of students arriving at school, students’ parents dropping off students, and other drivers in the street, in addition to her own life. She was in no condition to teach. She was untruthful to the SAUSD police when she failed to disclose that she drank cocktails at home until 3:00 a.m. Respondent failed to take responsibility for her actions, when on May 18, 2010, in her meeting with Hammitt, she denied driving to school while intoxicated on May 5, 2010. Further, she failed to comprehend the gravity of her actions of May 5, 2010, when she arrived at the May 26, 2010 meeting, having consumed alcohol. These actions are inconsistent with rectitude, they are indicative of indecency, are willful, show a moral indifference to the opinions of respectable members of the community, and show an inconsiderate attitude toward good order and the public welfare. Thus, Respondent’s actions constitute immoral conduct. (*Board of Education v. Weiland, supra*, 179 Cal.App.2d at 811.)

5. In *Morrison v. State Board of Education*, (1969), 1 Cal.3d 214, the California Supreme Court held that for purposes of teacher dismissal, conduct characterized as “immoral,” “unprofessional,” or “involving moral turpitude” must be limited to conduct indicating that a teacher is “unfit to teach”; otherwise, these terms would be unconstitutionally vague and overbroad. (*Morrison v. State Bd. of Ed., supra*, at 229.) The *Morrison* Court listed factors relevant to determining whether a teacher’s conduct indicates unfitness to teach:

[T]he 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 praiseworthiness or blameworthiness of the motives resulting in 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.

(*Id.* at 229-230.)

6(a). These *Morrison* factors are analyzed below considering each factor in the same order that each is presented in the preceding paragraph.

*The likelihood that the conduct may have adversely affected students or fellow teachers*

6(b). Respondent's conduct adversely affected students and fellow teachers in that she was unable to teach her class, the school nurse and principal had to attend to her, and the assistant principal was required to substitute in her stead for a time.

*The degree of such adversity anticipated*

6(c). The degree of such adversity was great, in that Respondent was significantly intoxicated at school on the morning of May 5, 2010. The school nurse and other school staff were unable to attend to their other tasks that morning in order to see to Respondent's care while at school. Respondent's state of intoxication at school could not have been, nor should it have been anticipated by SAUSD staff.

*The proximity or remoteness in time of the conduct*

6(d). Respondent's acts of May 5, 18, and 26, 2010, occurred approximately ten months ago; these acts are relatively recent.

*The type of teaching certificate held by the party involved*

6(e). Respondent holds a teaching credential and was employed to teach a kindergarten class at the time of her transgressions.

*The extenuating or aggravating circumstances, if any, surrounding the conduct*

6(f). Aggravating circumstances exist in that Respondent exhibited several instances of dishonesty. First, Respondent was untruthful to the SAUSD police by failing to disclose her later alcohol consumption on May 5, 2010. Second, she was not forthright with school personnel when, on May 18, 2010, she denied having driven to school while intoxicated on May 5, 2010. Third, she was untruthful at the instant hearing when she failed to admit that her husband's comment that she was "breathing fire" meant her breath smelled like alcohol. Fourth, she was untruthful at the instant hearing when she testified that she drank less than one glass of wine before her May 26, 2010 meeting with Hammitt and Lopez. Fifth, she was initially untruthful with Lopez, on May 26, 2010, when she initially denied having consumed alcohol on that same day. In mitigation, it is noted that Respondent had never previously appeared at school intoxicated. She now admits to her alcoholism and has



taken commendable steps toward sobriety. Additionally, Respondent has a good reputation as a teacher with over 12 years of service with SAUSD.

*The praiseworthiness or blameworthiness of the motives resulting in the conduct*

6(g). There is no praiseworthiness involved in the motives that led to Respondent's conduct. Respondent is fully responsible for her conduct.

*The likelihood of the recurrence of the questioned conduct*

6(h). As Respondent was less than truthful with the SAUSD police, SAUSD personnel, and saliently, in her testimony at hearing, it cannot be concluded that Respondent has taken full responsibility for her actions or accepted the gravity of her misconduct. Thus, the likelihood that Respondent could continue to consume alcohol and present herself at school in such a state remains high.

*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*

6(i). At hearing, Respondent raised no concern with the infringement of any of her constitutional rights related to this matter. Dismissal of Respondent for her actions, as set forth herein, will not inflict an adverse impact or chilling effect on Respondent's constitutional rights or the constitutional rights of other teachers.

7. The *Morrison* factors establish that Respondent is unfit to teach in light of her conduct.

8. There was no persuasive evidence that Respondent has requisite traits of honesty, truthfulness, or integrity.

9. Pursuant to its policy number BP 2010, subdivision (a), SAUSD can require Respondent to participate in a recovery program for alcoholism. The policy, however, also provides that SAUSD can seek Respondent's dismissal.

10. Considering the seriousness of Respondent's actions in May 2010, together with the significant evidence of Respondent's untruthfulness, and no persuasive evidence of her character or integrity, the welfare of the SAUSD student body cannot be assured if Respondent were to continue to teach her kindergarten class.

11. Cause for dismissal exists under Education Code section 44932, subdivisions (a)(1), for immoral conduct, pursuant to Factual Findings 1-27, and Legal Conclusions 1-10.

12. Education Code section 44939 states in part:

Upon the filing of written charges . . . or upon a written statement of charges . . . charging a permanent employee of the district with . . . willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing school district . . . the governing board may, if it deems such action necessary, immediately suspend the employee from his duties and give notice to him of his suspension, and that 30 days after service of the notice, he will be dismissed, unless he demands a hearing.

13. For the reasons set forth in Legal Conclusions 1-12, pursuant to Factual Findings 1-27, Respondent is deemed to have willfully refused to perform her regular teaching assignment without reasonable cause on May 5, 2010.

14. Cause for dismissal exists under Education Code section 44939, for willful refusal to perform regular assignments without reasonable cause, pursuant to Factual Findings 1-27 and Legal Conclusions 1-13.

15. For the reasons set forth at page two, *ante*, in the section entitled, “SAUSD’s Motion to Amend the Statement of Charges,” cause for dismissal does not exist under Education Code section 44932, subdivision (a)(5), for evident unfitness for service.

## ORDER

The Accusation and Statement of Charges are sustained. Respondent Linda Palmer is dismissed from employment with the Santa Ana Unified School District.

Date: \_\_\_\_\_

\_\_\_\_\_  
Christine Aguilar, Commission Member

Date: \_\_\_\_\_

\_\_\_\_\_  
Daniel Juárez, Commission Member

## DISSENT

Commission Member Glenn respectfully dissents from the majority. Commission Member Glenn joins in all of the factual findings herein, but would conclude that Respondent did not willfully refuse to perform her regular teaching assignment, that Respondent's instances of dishonesty (Factual Findings 6, 13, 17, 19, and 20 and 21) could be addressed in a recovery and rehabilitation program, and that Respondent should be credited for presenting herself to the school's front office and school nurse, when realizing she could not teach that day, to call for a substitute teacher instead of going directly to her classroom, on May 5, 2010. Additionally, Commission Member Glenn is concerned that dismissing Respondent, without offering assistance or treatment, may have a chilling effect on other teachers, as other SAUSD employees who admit to a drug or alcohol problem may not come forward for help for fear dismissal. For these reasons, and with general reference to *Fontana Unified School District v. Burman* (1988) 45 Cal.3d 208, Commission Member Glenn would deny SAUSD's Accusation and Statement of Charges, and not dismiss Respondent from employment with the Santa Ana Unified School District.

Date: \_\_\_\_\_

\_\_\_\_\_  
Nancy Glenn, Commission Member