

BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
BELLFLOWER UNIFIED SCHOOL DISTRICT
COUNTY OF LOS ANGELES
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

PAMELA McMACKIN,

Respondent.

Case No. 2012120342

DECISION

This matter came on regularly for hearing before the Commission on Professional Competence, Bellflower Unified School District, County of Los Angeles, State of California (Commission), in Bellflower, California, on September 4 and 5, 2013. The Commission consists of the following members:

Samuel D. Reyes, Chairperson
Administrative Law Judge
Office of Administrative Hearings

Teresa Merino, Member
Selected by the Governing Board

Ronita Scott, Member
Selected by Respondent

Eric Bathen, Attorney at Law, represented the Bellflower Unified School District (District).

Robert A. Bartosh, Attorney at Law, represented Pamela McMackin (Respondent), who was present throughout the proceedings.

The District suspended Respondent on grounds of immoral conduct and willful refusal to perform regular assignments, and seeks to dismiss her on grounds of immoral or unprofessional conduct, evident unfitness for service, and persistent refusal to obey school laws. Respondent disputed some of the factual allegations and argues that grounds for dismissal do not exist.

Oral and documentary evidence, and evidence by oral and written stipulation on the record, was received at the hearing and the matter was submitted for decision.

FACTUAL FINDINGS

Jurisdictional Findings

1. Respondent is a permanent certificated employee of the District.
2. On November 2, 2012, Superintendent Brian Jacobs, Ed.D. (Jacobs) recommended to the Governing Board of the District (Governing Board) Respondent's immediate suspension and termination pursuant to Education Code¹ sections 44932, 44934, 44936 and 44939. The Governing Board approved Superintendent Jacobs's recommendation, and on November 16, 2012, the District notified Respondent of the Governing Board's decision. On November 29, 2012, Respondent made a timely request for hearing.
3. On December 6, 2012, the District filed an Accusation seeking Respondent's immediate suspension and dismissal. On December 10, 2012, Respondent filed a Notice of Defense.
4. The parties stipulated that the hearing commenced on January 10, 2013.
5. All prehearing jurisdictional requirements have been met.

Respondent's Background and Employment With The District

6. Respondent holds a Bachelor of Science Degree in Agricultural Communication from California State University, Fresno, and a Master of Arts Degree in Educational Administration from California State University, Dominguez Hills. She holds teaching and administrative credentials. Respondent worked for the Long Beach Unified School District (LBUSD) for 11 years before her employment with the District. She worked primarily in alternative education, including adult education, and rose from part-time instructor to dean during her tenure at LBUSD.
7. Respondent was hired by the District in July 2006. She worked at Somerset Continuation High School (Somerset) as an assistant principal until March 2012. Her duties included the discipline of students, the preparation of reports, and other duties as assigned. In March 2012, she was assigned to be the program administrator of the Bellflower Alternative Education Center (BAE).

¹ All further statutory references are to the Education Code.

8. The student population at BAE fluctuated between 20 and 35 during Respondent's employment. Its students had been expelled from the traditional or continuation high schools or were unable to properly function in those schools. The students presented discipline problems, motivational challenges, and were often angry and defiant. Respondent sought to bring change to the students, focusing more on academics and trying to raise expectations. She sought to implement project learning, and formally incorporated self-esteem goals and specific positive reinforcement programs into the classes.

9. Respondent spent a significant portion of her day dealing with disciplinary issues. She was supported in the endeavor by campus security officer Vern Vander Sluis (Sluis), whom she shared with Somerset. She also had the support of a very experienced administrator, Caridad Ignarra (Ignarra), who was responsible for discipline over the entire District, and of her mentor, Somerset Principal Patrick Dixon (Dixon). Respondent's direct supervisor, Joseph Perry (Perry), also a long-time administrator, had extensive experience in disciplining difficult students.

October 4, 2012 Incident

10. The incident that led to Respondent's suspension and discharge occurred on October 4, 2012. In the late morning, one of the teachers in her staff, Ricardo Carlos (Carlos), reported to Respondent that a student, J.T.², had reported that another student, J.C.G., planned to sell her drugs.³

11. J.C.G. had been a student at BAE since July 2012. He was known to Respondent as defiant and disrespectful, prone to use the "f" word when addressing teachers. He had been referred to her office by all her staff members and he had been suspended nine times. Respondent suspected that J.C.G. was involved in drug activity, but searches had not revealed any drugs. Students entering BAE are routinely searched and can be the subject of additional random or for-cause searches during the school day.

² Initials have been used to protect the privacy of the students, who are minors.

³ The students did not testify at the hearing, and their hearsay statements are insufficient to form the basis of a finding. (Gov. Code, § 11513, subd. (d).) However, their statements have been used to the extent that the statements supplement or explain other evidence. The statements made by J.T. that were permitted at the hearing were limited to those made by her to Respondent because the District failed to provide J.T.'s contact information to Respondent to allow her attorney to inquire about other statements or information not known to Respondent.

12. J.T. was a 14-year-old female student who appeared older because of her physical appearance and street smarts. J.T. was in special education classes due to emotional difficulties. She also had difficulty with academics. J.T. was not a major disciplinary problem. However, she tended to get angry and have tantrums, and, because of these problems, spent time in the office under Respondent's direct supervision. Sluis had to break up two fights involving J.T. One of the fights, between J.T. and an 18-year-old girl, led to J.T.'s suspension.

13. Carlos brought J.T. into Respondent's office, and the student stated that she was going to buy Marijuana from J.C.G. and that she was going to give the drug to Respondent. Not sure that what she was hearing was true, Respondent asked J.T. why she was doing so. J.T. replied that J.C.G. had tried to sell her some bad drugs, laced with something bad. J.T. appeared to be insulted by J.C.G.'s attempt to sell her bad drugs. Concerned about students becoming sick, and wanting to remove drugs from campus, Respondent told J.T., "O.K., we can mark the bills." J.T. asked how she could mark the bills, and Respondent said that she could scribble something on the bills. J.T. demonstrated by marking a \$1 bill. J.T. appeared excited as she left Respondent's office.

14. After J.T. left, Carlos asked Respondent if allowing the sale was entrapment, and whether they should search J.C.G. Respondent replied that she did not think there was a need to search him again since security had done so in the morning, and told Carlos that, if he wanted, he (Carlos) could search J.C.G. at the beginning of the lunch period.

15. The conversation with J.T. occurred during the fifth period, shortly before lunch. Respondent's day had been a busy one, and it continued to be a busy day after the meeting. Soon after Carlos had left, another staff member, Nicholaas Turien (Turien), came into Respondent's office with J.C.G., who had allegedly threatened another student. Turien had searched the student and found \$29 but no prohibited items. Respondent told Turien, in private, that he could suspend J.C.G. Turien instead took J.C.G. back to class.

16. The lunch period arrived soon after the encounter with Turin and J.C.G. At approximately 12:30 p.m., Respondent went to supervise the students at lunch, as was her custom. She noticed that J.C.G. and J.T., who did not typically hang out together, walked toward each other and sat at a table. Items were surreptitiously passed back and forth, and the two left the table and went their own way.

17. Respondent believed that J.C.G. had sold Marijuana to J.T., but did not want to confront him in front of all the other students, fearing that J.C.G. would simply make a scene and run away.

18. Respondent returned to her office, where J.T. handed her the Marijuana she had just bought from J.C.G.

19. Respondent thereafter called Dixon for advice. Respondent told him that she had made a mistake, described some of the details of the incident, and expressed concern about her job. Respondent also testified that Dixon told her not to call the police. Dixon denied that he had made such a statement, and, absent corroboration, Respondent's testimony is insufficient to establish that Dixon told Respondent not to call the police.

20. Respondent asked Sluis to bring J.C.G. to the office before the end of the school day. When J.C.G. arrived, Respondent directed Sluis to search J.C.G. The student had the same \$29 in his possession, plus a crumpled \$5 bill. The bill had a scribbled mark on it, which Respondent assumed was J.T.'s mark. When asked about the source of the \$5, J.C.G. provided an answer that was not truthful. At a later point, Respondent showed the Marijuana to J.C.G., who admitted he had sold it. After the admission, Respondent told J.C.G. that she could call the police and that he could get expelled. J.C.G. begged her not to call the police and promised to behave.

21. Respondent decided to give J.C.G. a break and not call the police, believing that she could use her leniency to extract better behavior out of the student. Respondent nevertheless recommended expulsion of J.C.G. Expulsion from BAE, however, did not mean that the student would be expelled from the District, as BAE was the school to which expelled students were assigned.

22. Respondent testified that she believed that she had the discretion not to call the police. Her belief is not a reasonable one in light of State law and District policy to the contrary, with which provisions she should have been familiar.

23. Respondent realized she had made decisions she was not comfortable with, and left campus for a while to think about the situation. Upon her return, Respondent was informed by Perry that he wanted to talk to her about the incident. Respondent was called to a meeting with Perry, Ignarra and Human Resources Manager Lisa Azevedo, and asked about the incident involving J.T. and J.C.G. Respondent was forthcoming about her actions during the meeting. As requested, she thereafter prepared a written statement in which she stated "I know I have made a terrible mistake and have most likely wrecked my career." (Exh. 15, at p. 2.)

24. Respondent testified that in failing to stop the drug sale she was motivated by getting drugs off campus, and did not believe that J.T. was placed at risk. Later in the day, Respondent realized that she had made a bad decision in not stopping the sale to J.T.

25. Respondent has learned from the experience and vows not to repeat her mistakes.

Respondent's Fitness to Teach

26. Respondent's conduct shows unfitness to teach.⁴ In terms of the pertinent *Morrison* factors, allowing a drug sale to proceed placed J.T. in harm's way, and Respondent's conduct was likely to have adversely affected J.T., even if J.T. was not actually harmed. The degree of such adversity is not known, as no evidence was presented that J.C.G. had gang ties or was particularly violent. The conduct occurred in the recent past. Respondent holds a teaching certificate. There are no extenuating or aggravating circumstances. Respondent asserts that her motives were praiseworthy, but this factor is neutral at best. While she did not intend to harm J.T., her judgment was poor and misguided. In her favor, the conduct is not likely to recur, as Respondent has not been involved in any other incident, recognized her error early on, cooperated with the District's investigation, and appears to have learned her lesson. The last factor, 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, is not applicable. On balance, therefore, the conduct shows unfitness to teach.

27. Respondent's conduct, however, does not show such unfitness to teach as to warrant dismissal from the District. While serious, Respondent's lapse in judgment is isolated and not likely to recur. Except for the incident on October 4, 2012, Respondent discharged her duties for the District in a competent manner, and had embarked on a plan to improve the educational experience of students on their last educational placement. Respondent quickly recognized her lapse in judgment and cooperated with the District's investigation.

⁴ Courts require evaluation of a teacher's alleged misconduct in terms of its impact on fitness for service utilizing the following criteria first enunciated by the Supreme Court in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214 (*Morrison*): 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 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. Not all factors may apply in each case and only the pertinent ones need to be examined. (*West Valley-Mission Community College District v. Conception* (1993) 16 Cal.App.4th 1766, 1777; *Governing Board v. Haar* (1994) 28 Cal.App.4th 369, 384 (*Haar*).) The determination of fitness for service required by *Morrison* is a factual one. (*Board of Education v. Jack M.* (1977) 19 Cal.3d 691, 698, fn. 3 (*Jack M.*); *Fontana Unified School District v. Burman* (1988) 45 Cal.3d. 208, 220-221 (*Fontana*); *Haar* (1994), *supra*, 28 Cal.App.4th at p. 384).

CONCLUSIONS OF LAW

1. Section 44932, subdivision (a)(1), permits dismissal of a permanent employee for “immoral or unprofessional conduct.” The term “immoral conduct” as a basis for dismissal of teachers has long been included in section 44932, subdivision (a)(1), and in its predecessors. The term was first discussed in the context of a teacher dismissal proceeding in *Board of Education v. Weiland* (1960) 179 Cal.App.2d 808 (*Weiland*), and the court’s definition in that case has often been cited by other courts. (See, e.g., *Palo Verde v. Hensey* (1970) 9 Cal.App.3d 967 (*Hensey*).) The *Weiland* 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.” (*Weiland, supra*, 179 Cal.App.2d at p. 811.) Further, whether immoral conduct can form the basis of dismissal must be evaluated in terms of the teacher’s fitness for service under the *Morrison* factors. (*Jack M., supra*, 19 Cal.3d at pp. 696-697.)

In this case, Respondent’s failure to stop the drug sale to J.T. is conduct hostile to the welfare of the general public and contrary to good morals. As set forth in factual finding numbers 13, 21, 22, and 26, her conduct calls into question her fitness to teach pursuant to the *Morrison* factors.

2. Unprofessional conduct has been defined as conduct, measured by the *Morrison* factors, which indicates unfitness to teach. (*Jack M., supra*, at 19 Cal.3d 691 at pp. 696-697; *Perez v. Commission on Professional Competence* (1983) 149 Cal.App.3d 1167, 1173-74.) However, section 44938 requires written notice of unprofessional conduct before an employee can be terminated for unprofessional conduct. Even if it is assumed that Respondent’s conduct is unprofessional, cause does not exist to dismiss her for unprofessional conduct because she did not receive the notice required by section 44938.

3. Section 44932, subdivision (a)(5), permits dismissal of a permanent employee for “evident unfitness for service.” Evident unfitness for service under this provision is established by conduct demonstrating that the teacher is “clearly not fit, not adapted or suitable for teaching, ordinarily by reason of temperamental defects or inadequacies.” (*Woodland Joint Unified School District v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444 (*Woodland*).) As a threshold matter, the *Morrison* criteria must be examined to ascertain whether the conduct in question indicates unfitness for service. “If the *Morrison* criteria are satisfied, the next step is to determine whether the ‘unfitness’ is ‘evident’; i.e., whether the offensive conduct is caused by a defect in temperament.” (*Id.* at p. 1445.)

Respondent's conduct, as set forth in factual finding numbers 13, 21, 22, and 26, indicates unfitness to teach pursuant to the *Morrison* factors. However, neither the nature of the conduct nor the number of incidents is sufficient to establish that Respondent is "clearly not fit," "adapted," or "suitable" for teaching or that any existing deficiencies are the result of "temperamental defects or inadequacies." The teacher in *Woodland, supra*, for instance, engaged in repeated acts of contempt for fellow teachers and school administrators over an extended period. Accordingly, cause for dismissal has not been established pursuant to section 44932, subdivision (a)(5).

4. Section 44932, subdivision (a)(7), permits dismissal of a permanent employee for "persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him or her."

A violation of section 44932, subdivision (a)(7), must also be established by reference to the *Morrison* factors. If unfitness to teach is shown, then the District must further establish that Respondent's refusal to follow the laws or regulations was "persistent," i.e., "stubborn and continuing." (*San Dieguito Union High School District v. Commission on Professional Competence* (1985) 174 Cal.App.3d 1176, 1183; *Governing Board of the Oakdale Union High School District v. Seaman* (1972) 28 Cal.App.3d 77, 82 (*Seaman*).) Isolated incidents or incidents involving an issue unresolved over a period of time are not generally considered "persistent." (See, e.g., *Bourland v. Commission on Professional Competence* (1985) 174 Cal.App.3d 317; *Seaman, supra*). Respondent's failure to notify the police about the Marijuana sale as required by State law and school policy occurred on a single day and involved a single issue and, therefore, is not "persistent, stubborn or continuing" to constitute grounds for dismissal pursuant to section 44932, subdivision (a)(7).

5. All evidence presented in support of and against dismissal, as well as that presented in mitigation and rehabilitation, has been considered. As found above, Respondent engaged in immoral conduct. However, her conduct did not demonstrate "such unfitness to teach as to warrant terminating the teacher's employment." (*Fontana, supra*, 45 Cal.3d at p. 220).⁵ Dismissal, therefore, is not warranted and the District's decision to terminate Respondent's employment is reversed.⁶

⁵ In *Fontana*, the Supreme Court upheld the exercise of discretion by a commission on professional competence in analogous circumstances. In that case, despite its finding that grounds for the dismissal of a school principal existed on the basis of dishonest conduct, the commission found that the principal's misconduct was isolated and unlikely to be repeated, and declined to uphold her dismissal.

⁶ Member Merino concurs in Factual Findings numbers 1 through 26 and Conclusion of Law numbers 1 through 4, but would uphold the District's dismissal of Respondent based

ORDER

Respondent Pamela McMackin shall be retained as a permanent certificated employee of the Bellflower Unified School District, and shall be made whole for any loss of salary or benefits suffered as a result of the District's actions.

DATED: _____

COMMISSION ON PROFESSIONAL COMPETENCE

SAMUEL D. REYES, Chairperson
Administrative Law Judge
Office of Administrative Hearings

RONITA SCOTT, Member

on section 44939 and Respondent's refusal to perform her assignment as prescribed by rules and regulations and her failure to follow proper procedures.