

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS AND A
COMMISSION ON PROFESSIONAL COMPETENCE FOR THE
LOS ANGELES UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Dismissal of:

HECTOR SCHMIDT (EN 602067),
a Permanent Certificated Employee,

Respondent.

OAH No. 2017010717

DECISION

This matter was heard by the Commission on Professional Competence (Commission) in Los Angeles, California, on September 11-15 and 18, 2017. The Commission consists of Tom Hood, Los Angeles Unified School District (retired);¹ Jay San Agustin, Los Angeles County Office of Education; and Administrative Law Judge Eric Sawyer, Office of Administrative Hearings (OAH), State of California, who presided.

Mampré R. Pomakian, Associate General Counsel, and Michael Voigt, Assistant General Counsel, represented complainant Los Angeles Unified School District (District).

Roshanne C. Katouzian, Esq., Trygstad, Schwab & Trygstad, represented Hector Schmidt (respondent), who was present on each day of hearing.

The record was closed and the case submitted for decision at the conclusion of the hearing on September 18, 2017. The Commission thereafter deliberated in executive session.

SUMMARY

The District seeks to terminate respondent's employment based on allegations of his ineffective teaching, improper behavior with other staff (including contacts perceived as threats and sending numerous, bizarre "mass e-mails"), disobeying administrator directives, and an unresolved mental illness determined by the Superior Court to render him unfit to teach.

¹ Mr. Hood's qualification to serve as a commissioner in this case, in light of his former employment, was discussed during the Prehearing Conference (PHC) held on April 3, 2017, and decided in the PHC Order issued on April 5, 2017.

Respondent contends he is a good teacher with many years of unblemished service for the District, who hit “a rough patch” of mental illness around 2011, but is now committed to getting better. Respondent denies ever intending to threaten any colleague. He contends his techniques in the classroom (e.g., heavily relying on internet videos and having students play games for grade points) were misunderstood by administrators and were not deficient. While he agrees there are grounds for employment discipline, he believes termination is unnecessary.

It was established by a preponderance of the evidence that respondent’s mental illness significantly impairs his ability to perform the duties of a teacher, renders him unfit to teach children, and warrants termination of his employment with the District.

FACTUAL FINDINGS

Parties and Jurisdiction

1. The Board of Education (Board) is the duly elected, qualified and acting governing board of the District, organized, existing and operating pursuant to the provisions of the California Education Code and other laws of the State of California.

2. Respondent was, and is, a permanent certificated employee of the District.

3. On or about December 16, 2016, Marjorie Josaphat and Jose R. Cantu, in their official capacities as the District’s Co-Lead Chief Human Resources Officers, signed a Statement of Charges against respondent, alleging factual and legal grounds for termination of his employment with the District. (Ex. 2.)

4. By a letter dated January 11, 2017, respondent was advised by Ms. Josephat and Mr. Cantu that the Statement of Charges had been filed with the Board, and that, during a closed session of a Board meeting held on January 10, 2017, the Board decided to dismiss respondent within 30 days, unless he demanded a hearing. (Ex. 1.) On or about January 18, 2017, respondent timely requested a hearing. (Ex. 3.)

5. On or about February 8, 2017, the District filed an Accusation with OAH and served it on respondent, including the allegations made in the Statement of Charges. (Ex. 4.) Respondent timely filed a Notice of Defense, which contained a request for the hearing that ensued. Respondent was timely provided with notice of the hearing before the Commission. (Ex. 6.)

Respondent’s Background Information

6. Personal. Respondent is a 51-year-old married man with three children. He grew up in Los Angeles and attended local colleges. In 1993, he graduated with a Bachelor of Arts degree in health sciences with a certificate in occupational safety. In 2000, respondent completed a credential program at California State University, Los Angeles.

7. Credential. Beginning in 1997, respondent was issued emergency teaching permits, which allowed him to teach while working on his credential. In 2000, after completing his credential program, respondent was issued a preliminary single subject teaching credential in health and biological sciences. His credential became clear upon reaching tenure at the District in 2002.

8. A. Teaching Experience. Respondent was hired with the District as a Teacher's Assistant on November 15, 1988, but then, for reason(s) not established, resigned from District service on September 31, 1996.

B. On July 15, 1997, respondent was rehired by the District as a secondary biological and health science teacher at Garfield High School (Garfield). On July 1, 2002, respondent gained permanent status with the District. Respondent continued teaching at Garfield for several years.

C. In 2010, respondent was displaced from Garfield because the school was reconstituted and broken into smaller magnet schools. However, respondent believes his displacement from Garfield was related to his whistleblowing activity there and a "corrupt" administration at the school, a topic he would frequently and copiously complain about later.

D. In 2010, respondent was placed at South East High School (SEHS) and assigned to teach science and health classes.

9. Respondent generally received favorable evaluations while teaching at the District through the 2010-2011 school year. No evidence was presented indicating he had been subject to discipline prior to that time.

Preface I: the Events of 2011

10. In addition to working for the District, respondent also worked on Saturdays at a local YMCA in membership services. At a time not established, he began experiencing work-related problems at the YMCA.

11. On October 7, 2011, a male student stabbed and killed a female student (his ex-girlfriend) at SEHS, which had a profound impact on students, teachers (including respondent), and administrators at SEHS.

12. A. By mid-October 2011, respondent believed he was "under surveillance" at the YMCA. He was upset about the murder at SEHS. He was experiencing stress related to students who "occasionally challenged him," as respondent believed the students he encountered at SEHS were more aggressive than those at Garfield. (Ex. 23, p. 2.) He was still upset about his displacement from Garfield, a concern which he tried to share with the Los Angeles Times and the FBI. Thus, respondent began making cryptic comments to staff at SEHS about being under surveillance, being an FBI informant, and that "everyone would try to cover it up and soon they would know the truth." (*Ibid.*)

B. Respondent's strange comments caused concern among his colleagues and students, who advised SEHS administrators. By October 13, 2011, the administrators directed respondent not to attend the "Back to School Night" and removed him from the classroom at SEHS.

13. Soon thereafter, District Medical Director, Dr. Rosa Mercado, contacted clinical psychologist Paul J. Lane concerning respondent. Dr. Mercado indicated the District wanted respondent evaluated to determine his mental health and fitness for duty.

14. In October and November 2011, Dr. Lane met with respondent three times to perform evaluative testing, review relevant background information including his medical and mental health history, review records provided by the District, and formulate a final conclusion with recommendations.

15. Dr. Lane concluded that respondent presented with obsessive compulsive, paranoid, histrionic features, and questionable social judgment. Dr. Lane believed respondent probably had a Personality Disorder Not Otherwise Specified (NOS). Notwithstanding those findings, Dr. Lane determined respondent was still fit for duty as a teacher, but that he needed to consult with a mental health practitioner for individual psychological treatment. Dr. Lane also opined that, absent treatment, respondent's mental health may deteriorate. Dr. Lane communicated his findings to Dr. Mercado via telephone and sent her a written report dated November 7, 2011.

16. Dr. Lane also recommended that respondent be reassigned to another campus for his personal welfare. Respondent rejected Dr. Lane's recommendation and insisted on being returned to SEHS. Respondent received some mental health treatment at Kaiser Permanente (Kaiser) during 2011, but the specifics were not established. However, respondent was not prescribed any medication and he stopped his treatment that same year.

Preface II: the Events Subsequent to 2011

17. In 2012, respondent was arrested for domestic violence. It was not established whether criminal charges were filed or, if so, whether there was a conviction or formal disposition. However, as a result of his arrest, respondent was required to take 52 domestic violence classes, which he later successfully completed. During this time, he and his wife were separated for a period not established, and his children were temporarily placed in a foster home. (Ex. 94, p. 5.)

18. In June 2014, respondent filed a complaint against the District with the California Department of Fair Employment and Housing (DFEH). (Ex. 32.) He complained the District discriminated against him for various reasons.

19. In early 2015, respondent was laid off from his part-time job at the YMCA. He was told the layoff was due to a policy change requiring a greater number of work hours by part-time employees. However, respondent drew a connection between his layoff from

the YMCA and his domestic violence arrest, employment issues at the District, and his complaint to the FBI about the District. In many subsequent mass e-mails respondent would send to District administrators, fellow teachers, and outside parties (including the media and high-level officials in other government agencies), he commonly complained about a conspiracy against him involving the District, FBI, YMCA, and child welfare agencies involved in his domestic violence arrest.

Charges Related to Respondent's Classroom and School Behaviors

20. A. (Charge 1). From August 13, 2014, through December 17, 2014, respondent used hard-tipped darts and an electronic dartboard in his classroom to determine, in part, students' grades. Respondent divided students into various teams. Toward the end of class, if respondent determined students had behaved well in class, a student from each team would throw a dart at the dartboard. Respondent would keep track of the scores in an Excel spreadsheet that was typically projected on the back wall of the classroom. While the students were throwing darts, the rest of the class would usually talk among themselves and not engage in coursework. Students in teams scoring higher than other teams would earn more grade points; respondent would lower their grades if their team scored fewer points than other teams. A student who did not throw darts at the dartboard received a lower grade.

B. In using the dartboard game as he did, respondent did not use appropriate means or established standards to determine students' grades. By so doing, respondent also failed to adhere to District Bulletin 1353.1 (Marking Practices and Procedures in Secondary Schools) because using the game to determine students' grades had no bearing on individual student achievement and impermissibly compared students' achievements against other students. This conduct also violated California Standards for the Teaching Profession (CSTP) Standard 5 (Assessing Students for Learning) because respondent was not using proper assessment data to establish learning goals and to plan, differentiate or modify instruction.

21. (Charge 2). From August 13, 2014, through at least January 17, 2015, respondent used a basketball and basketball hoop to determine points for students' grades, similar to the dartboard game involved in Charge 1. In doing so, respondent did not use appropriate means or established standards to determine students' grades. For the same reasons explained above regarding Charge 1, respondent also failed to adhere to District Bulletin 1353.1 and CSTP Standard 5 in using the basketball and hoop.

22. (Charge 3). From August 13, 2014, through December 17, 2014, respondent required students to access materials and homework through the internet and periodically requested them to respond to him by e-mail. Respondent testified that most of his students had access to the internet and that those who did not could be given alternate modes of communicating. Other than a curt written complaint from student L ■ C. and a sentence from Principal Jesus Nunez during his testimony, there was no other evidence provided on this charge. Primarily, none of the conference memos presented in this case contained warnings or directives advising respondent to discontinue this practice. Under these

circumstances, it was not established that respondent failed to provide his students with equal opportunities to complete their school work by having them access the internet to complete on-line assignments. For the same reasons, it was not established that respondent's conduct violated District Bulletin 1353.1 and/or CSTP Standard 5.

23. (Charge 4). On August 27, 2014, Assistant Principal Maribel Flores conducted a classroom observation of respondent's fourth period health class. She observed that respondent did not use instructional time effectively and the learning activities he used were not academically challenging, as follows:

a. From approximately 11:45 a.m. to 11:56 a.m., he showed an internet video on strokes. He told the students to take notes. He said, "Okay guys, let's take the notes. Remember, if you want double wins (referring to the dartboard game), everyone takes notes."

b. At approximately 11:59 a.m., he said, "We're going to watch the video one more time. Then I'll collect your notes. Then you're gonna [sic] show me what you know about it."

c. The class watched the section on strokes again and he collected the notes, which he wanted done in the Cornell format.

d. At approximately 12:16 p.m., he turned on an electronic dartboard for a game. One by one he called students from each group to throw a hard-tipped dart at the dartboard. He then typed the points into an Excel spreadsheet he displayed on the wall.

e. When the game ended, at approximately 12:26 p.m., a student asked, "Mister. Can we play another game?" Respondent did not respond to the question. Instead, he said, "Ok, let's review [the video] one more time." He played the video for a third time as students sat and watched. He did not provide direction or an assignment for students as they watched the video. Students did not take notes or discuss the video.

24. A. (Charge 5). On or about October 8, 2014, Assistant Principal Flores conducted a classroom observation of respondent's first period biology class, and observed that respondent did not create a classroom environment that supported student learning. The classroom was not safe. There were physical hazards in respondent's classroom that endangered student safety. No student work was posted. Other than two commercially produced posters, there was no graphic evidence that this was a science room. In fact, respondent had not followed through on Assistant Principal Flores's prior directive that he make his classroom more attractive for student learning. She saw the electronic dartboard mounted on one of the whiteboards that respondent and students used with hard-tipped darts, as described above. She also saw the basketball hoop on a stand located just inside one of the doors to the classroom. Assistant Principal Flores believed those objects were safety hazards.

B. Assistant Principal Flores had not previously given respondent clear directives on these topics, other than that he must make his classroom more conducive to student learning. This observation occurred very early in the school year, which did not provide respondent enough time to decorate his classroom. Under these circumstances, it was not established that respondent's conduct violated the District's Code of Ethics, Code of Conduct with Students, or Bulletin 1353.1. However, respondent's failure to comply with Assistant Principal Flores's directive to make his environment conducive to student learning was in violation of CSTP Standards 2.2 (creating physical or virtual learning environments that promote student learning) and 2.5 (developing, communicating, and maintaining high standards for individual and group learning).

25. (Charge 6). On November 17, 2014, respondent sent an e-mail to his fellow teachers, Kayla Bakos and Paul Butterfield, which had no District or instructional purpose. Neither teacher understood the e-mail and both deleted it quickly without reading it fully. Respondent's conduct violated the District's Responsible Use Policy, because using the District's data system in this manner was not responsible, efficient, or in support of the District's business and education objectives. However, given the nebulous nature of the e-mail and that the recipients did not read all of it, it was not established that any other District policy was violated.

26. (Charge 7). On November 18, 2014, during a professional development meeting as part of SEHS's professional learning community (PLC), respondent was agitated because Ms. Bakos and Mr. Butterfield had not responded to his November 17, 2014 e-mail. He instructed Ms. Bakos to respond to the e-mail and told her he knew she "was telling bad things about him to students." Respondent told Mr. Butterfield he was documenting that Mr. Butterfield had not responded to the e-mail and that Mr. Butterfield needed to "watch out because you are messing with my career." Ms. Bakos was threatened by respondent's behavior. Mr. Butterfield, who knew and liked respondent, was upset that respondent behaved that way toward him, but he did not feel threatened. Respondent's conduct violated the District's Respectful Treatment of All Persons Resolution, and section A.2. (Create an Environment of Trust, Respect and Non-Discrimination) of the District's Code of Ethics.

27. (Charge 8). On October 24, 2014, respondent received a written directive from Assistant Principal Flores to stop using the dartboard in his classroom. On December 11, 2014, Assistant Principal Flores also issued a conference memorandum containing directives to stop using the dartboard in his classroom. In fact, respondent had received a similar directive by the principal at Garfield before respondent was displaced from that school. Respondent willfully refused to comply with Assistant Principal Flores's directives. For example, on December 15, 2014, respondent sent Principal Nunez an e-mail with the following message, "I have to respectfully and professionally decline your directive of the removal of the dartboard game based on the district reasons of safety." On December 17, 2014, Peer Assistance and Review (PAR) Consulting Teacher Charlotte Sampson-Holm reported to Principal Nunez that she observed respondent facilitating students' use of the dartboard in his classroom earlier that day. After receiving that report, Principal Nunez visited respondent in his classroom and told respondent to stop using the dartboard.

28. (Charge 9). On December 17, 2014, respondent acted unprofessionally toward a District Administrator and again willfully refused to follow directives given to him by site administration. Specifically, Principal Nunez had advised his District superiors that respondent was refusing to comply with directives to stop using the dartboard in his classroom. Local District Operations Administrator, Dr. James Noble, and Operations Coordinator, Erick Juarez, decided to come to SEHS to investigate. They met with Principal Nunez. The three of them went to respondent's classroom during the lunch break and took possession of the dartboard and darts while the classroom was empty. Respondent entered the classroom as the three administrators were leaving. Dr. Noble informed respondent that he could not use the dartboard because previously he had been directed by site administration to stop using it. In response, respondent attempted twice to forcibly grab the dartboard from Dr. Noble. Dr. Noble deflected respondent's efforts and told him to stop. He then instructed respondent to retrieve the dartboard from Principal Nunez's office after school and reiterated the directive to stop using the dartboard in class. Because the classroom door was open, the incident was visible to the students present in the hallway at the time.

29. (Charge 10). On January 17, 2015, while his class was being observed by Assistant Principal Flores, respondent told students they would play basketball in class with a Nerf ball the following day. Prior to this, Assistant Principal Flores had directed him to remove the basketball hoop. Respondent intended to use the basketball and hoop as a replacement for the removed dartboard, but he knew this was not acceptable to his administrators, given the dartboard had been forcibly removed and Assistant Principal Flores's directive prohibiting the basketball hoop.

30. (Charge 13).² On or about April 22, 2015, respondent did not interact with a student in a way that projected respect or created a supportive learning environment, when, after he noticed that student was sitting and passively watching a video, respondent directed that student to, "Take notes, please. I will change your teams and give you more work." This was not supportive because it threatened punitive action against the student. Respondent's conduct, in this regard, violated the District's Respectful Treatment of All Persons Resolution, section A.2. of the Code of Ethics, and CSTP Standard 2. While the other events described in this charge occurred as alleged, respondent could have just as easily been trying to garner student engagement, which would not have been problematic.

31. During the 2014-2015 school year, Assistant Principal Flores conducted a total of four formal classroom observations of respondent teaching his various classes. She was dissatisfied with respondent's performance in each lesson she observed. Assistant Principal Flores tried to provide respondent with support and guidance to help him improve his performance when she met with him after each observation, which she confirmed with conference summary memoranda. (Exs. 33, 36, 47 & 55.) Assistant Principal Flores's support consisted of detailed instruction, guidance, and reference materials, as well as directives which were easy to follow. Respondent failed to use her suggestions, guidance or materials, and his performance did not improve.

² Charges 11 and 12 are discussed in the next section.

Charges Related to Respondent's Mass E-Mails

32. On December 2, 2014, Principal Nunez directed respondent orally, and again in writing on December 4, 2014, to maintain professional decorum when communicating with colleagues; not engage in any activity that directly or indirectly makes his colleagues feel threatened; and adhere to the District's Code of Ethics, Responsible Use Policy, and Respectful Treatment of All Persons Resolution. Those directives were also generally covered during the required yearly training provided to all certificated teachers. These directives came on the heels of respondent sending e-mails to numerous District teachers and others which discussed respondent's conspiracy theories involving the District, FBI, YMCA and others, and were disjointed, rambling, and bizarre. (See, e.g., exs. 34, 35, & 38.) Because the e-mails had so many recipients, they became known as "mass e-mails."

33. A. (Charge 11). On or about March 2, 2015, respondent sent an e-mail to approximately 152 recipients. The majority of those recipients were faculty and staff members of SEHS. The e-mail contained a chain of about 16 older e-mails and included at least eight internet links, six of which were YouTube videos. The e-mails were rambling, incoherent, and discussed respondent's concerns about the FBI, YMCA, and his personal conflict with the District. The e-mail had no District or instructional purpose.

B. (Charge 12). When respondent engaged in the conduct described in Charge 11, he willfully refused to follow the above-described administrative directives previously given to him.

34. (Charge 14). On April 26, 2015, respondent sent an unauthorized e-mail to approximately 158 recipients. The majority of those recipients were faculty and staff members at SEHS. The e-mail contained approximately 13 segments and included at least 11 internet links to YouTube videos. The e-mail was rambling, incoherent, and discussed respondent's children, Dr. Mercado, and respondent's experience at Garfield. There were many other topics and segments, which were disjointed and unconnected. The e-mail had no District or instructional purpose.

35. A. (Charge 15). On or about April 28, 2015, respondent sent an e-mail to Principal Nunez, which included a Star Wars video titled, "Execute Order 66" and instructed his students to watch the video and answer the following questions: (1) Who in the film clip represents the administrators? (2) Who in the film clip represents the teachers? (3) Who in the film clip represents the students? (4) Who in the film clip represents respondent?

B. Respondent and other teachers at SEHS knew Principal Nunez was an avid Star Wars fan. Respondent knew Principal Nunez would understand the reference of the video, which depicted violence by the forces of dark against the forces of good. In light of the circumstances, respondent knew or reasonably should have known that Principal Nunez would have taken the e-mail with the embedded video as a threat, which is how Principal Nunez in fact interpreted the e-mail. As a result of seeing the e-mail, Principal Nunez became worried that respondent might jeopardize his personal safety and security. During

the hearing, respondent explained he had innocent intentions in sending the e-mail to Principal Nunez. However, respondent's explanation was convoluted, fantastic, and unbelievable.

36. (Charge 16). On April 29, 2015, respondent sent an unauthorized e-mail to approximately 148 recipients. The majority of those recipients were faculty and staff members of SEHS. The e-mail contained approximately four segments and included at least one internet link to a YouTube video and the contents of the above-described e-mail sent on April 26, 2015. Respondent referred to his labor union, prayers, divine intervention, Dr. Mercado, his complaint to the DFEH, and his experience with the YMCA. The e-mail had no District or instructional purpose. In fact, by respondent's own admission, he sent the e-mail hoping that one of the recipients would intervene on his behalf.

37. (Charge 17). On or about April 30, 2015, respondent sent an unauthorized e-mail to approximately 148 recipients. The majority of those recipients were faculty and staff members of SEHS. The e-mail contained approximately four segments and included at least two internet links to a YouTube video and an ESPN video, as well as the contents of the above-described e-mail sent on April 29, 2015. Respondent discussed his children, the FBI, homicides, and his conflict with the District. The e-mail had no District or instructional purpose. Like the e-mail involved in Charge 16, respondent sent this e-mail hoping others would intervene on his behalf.

38. A. (Charge 18). Principal Nunez gave respondent the administrative directives described in Factual Finding 32 above orally on March 12, 2015, and in writing on March 13, 2015.

B. Respondent willfully refused to follow the administrative directives previously given to him and described above when he sent the above-described e-mails on April 26, 2015, April 28, 2015, April 29, 2015, and April 30, 2015.

C. In doing so, respondent also failed to adhere to the following District rules and regulations:

(i) Code of Ethics. Respondent did not respect his colleagues' time and privacy. When some people asked to be removed from his e-mail list, respondent initially refused, unless they answered his inquiry why they wanted to be removed.

(ii) Responsible Use Policy. By obtaining many e-mail addresses from District e-mail lists and sending e-mails to District employees' using District e-mail addresses, respondent accessed District data systems and networks in a way that was not respectful of employees' time and privacy.

D. However, it was not established that respondent did anything prohibited by the Respectful Treatment of All Persons Resolution.

39. During the 2014-2015 school year, Principal Nunez conferenced with respondent at least five times and counseled him on various topics. On two such occasions, Principal Nunez advised respondent that his mass e-mails had no instructional purpose, violated several District rules and regulations, and SEHS staff had complained to him about them. During those conferences, Principal Nunez directed respondent to stop sending mass e-mails to District staff which had no instructional purpose. (Exs. 68 & 80.) As discussed above, respondent failed to comply with Principal Nunez's directives.

Charges Related to Respondent's Mental Health

40. After receiving a series of bizarre e-mails from respondent, Principal Nunez contacted Dr. Rosa Mercado, the District's Medical Director, to request that respondent be "evaluated." (Ex. 75.) By this time, Ailleth Thom, a District threat assessment coordinator, had also contacted Dr. Mercado over concerns about respondent's mental health which SEHS administrators had brought to her. (Ex. 169, Mercado Declar., pp. 2-3.) Dr. Mercado had also received a number of respondent's mass e-mails, which she described as "unsolicited, random, difficult to understand, disjointed. . . ." (*Ibid.*)

41. Based on the above, Dr. Mercado became concerned about respondent. She decided respondent should again be evaluated. Dr. Mercado contacted respondent, who agreed to be evaluated again by Dr. Lane. (Ex. 169, Mercado Declar., pp. 2-4.) Since Dr. Lane had previously found respondent fit for duty, and respondent did not believe he had any mental health problems, he believed Dr. Lane would again find him fit for duty.

42. A. (Charge 19). On May 13 and 15, 2015, respondent met with Dr. Lane for a psychological evaluation and an examination of his fitness for duty. As described below, Dr. Lane concluded and communicated to Dr. Mercado that respondent was no longer fit for duty.

B. On May 15, 2015, Dr. Mercado contacted respondent and relayed Dr. Lane's findings that respondent was not fit for duty as a teacher. Respondent advised Dr. Mercado that he was fit for duty and wanted to be evaluated by a panel of psychiatrists.

C. On May 27, 2015, Dr. Lane issued and transmitted a report to the District, wherein he concluded respondent was not fit for duty and should not return to duty in light of his psychiatric condition and how it adversely impacted his ability to work as a teacher in the classroom. [REDACTED]

[REDACTED] Dr. Lane reiterated these findings and conclusions in a more comprehensive written report he issued and transmitted to the District.

D. On June 9, 2015, the District's Board took action by placing respondent on a mandatory sick leave of absence pursuant to Education Code section 44942, based on, among other things, findings that respondent was unfit to continue teaching.

43. A. (Charge 20). On July 7, 2015, respondent was evaluated by a panel of three psychiatrists pursuant to Education Code section 44942. The panel was composed of psychiatrists Timothy Hayes, Richard Sandor, and Marta Pariewski. The panel conducted a complete and detailed examination of respondent, which included: history of present illness, past and current psychiatric history, family psychiatric history, past medical history, social, educational, and occupational history, and mental status. The panel also reviewed with respondent his past fitness for duty evaluations with Dr. Lane in 2011 and 2015, and Dr. Lane's recommendation after the 2011 consultation that he be transferred to another school location.

B. On July 8, 2015, the panel issued a written report wherein it concluded respondent was suffering from mental illness to such a degree as to render him incompetent to perform his duties as a teacher. The report noted respondent demonstrated a complete lack of insight into his psychiatric condition, did not believe he had a psychiatric disorder, and thus he had no motivation to seek treatment.

C. On July 14, 2015, the District sent respondent a letter advising him that, effective July 15, 2015, as a result of action taken by the Board, and the examination by the panel on July 7, 2015, respondent was placed on mandatory sick leave of absence in accordance with Education Code section 44942.

D. Respondent did not believe he suffered from a mental health disability. He disagreed with the panel's findings and the District's decision to place him on mandatory sick leave of absence.

44. A. (Charge 21). On July 20, 2015, respondent requested that the District initiate a Declaratory Relief action in the Superior Court of the State of California, pursuant to Education Code section 44942, for purposes of reviewing the Board's action placing him on mandatory sick leave of absence.

B. On July 29, 2015, the District filed a Complaint for Declaratory Relief in the Superior Court of the State of California, County of Los Angeles.

C. On June 3, 2016, the District filed a motion for summary judgment on the grounds that no triable issue existed in the Declaratory Relief action and that all evidence and undisputed material facts supported a finding that respondent was unfit for duty as a teacher at the time the Board placed him on mandatory sick leave of absence.

D. On September 28, 2016, Superior Court Judge Fredrick C. Shaller considered and granted the District's motion, concluding that, at the relevant times, respondent was incompetent to perform his assigned duties and should have been placed on mandatory sick leave of absence. The judgment was not appealed and is final.

E. Since being placed on leave in July 2015, respondent has not provided verification from a mental health provider or expert that he is fit for duty as a teacher.

45. (Charge 22). On November 28, 2016, respondent was again evaluated by the same panel of three psychiatrists, at his request and pursuant to Education Code section 44942. The panel determined respondent still suffered from mental illness to such a degree as to render him unfit to perform his duties as a teacher.

Other Relevant Findings

46. As mentioned above in Factual Finding 27, respondent was provided a PAR coach at least during the 2014-2015 school year. Due to the confidential nature of the PAR program, respondent's administrators were not advised how respondent was progressing.

47. Respondent made a number of comments in class about his personal situation with the YMCA, FBI, and the District, which made some students uneasy, particularly his comments alluding to being affiliated with the FBI. It was improper for respondent to raise such personal concerns with students. In fact, in May 2015, respondent assigned his students the task of writing letters of recommendation for him if he submitted an application to the FBI. (Ex. 87.) When he was questioned about that assignment during his deposition before the hearing, respondent admitted he did it "for students to save him." The assignment, and respondent's motivation in giving it to students, improperly crossed over professional boundaries between respondent and his students.

48. Two of respondent's fellow teachers from SEHS testified during the hearing, Paul Butterfield and David Sievers. It was clear from their testimony that they liked respondent and initially respected him as a teacher. However, it was equally clear that whatever respect they had for respondent had fully eroded by fall 2014. Several other faculty members sent written complaints to Principal Nunez about respondent's behavior during lunch breaks or at staff meetings, and/or the tone of his mass e-mails. Many expressed feeling anxious for their security. By fall 2014, many of the SEHS staff tried to avoid respondent. Ms. Bakos was so upset after her interactions with respondent that she began keeping pepper-spray in her desk at school. As discussed above, Principal Nunez was also concerned for his safety after receiving respondent's Star Wars e-mail. Finally, Principal Nunez credibly testified the professional community at SEHS has improved since respondent was removed.

49. A. Dr. Hayes testified during the hearing. He was the lead psychiatrist in the panel that evaluated respondent's fitness for duty as a teacher in 2015 and 2016. Dr. Hayes is well credentialed and qualified. His testimony was clear and persuasive.

B. [REDACTED]

C. [REDACTED]

[REDACTED] For example, respondent's poor insight and lack of boundaries manifested in his telling students about his personal problems during class. Respondent's obsessive and intense focus on using the dartboard game, even in the midst of directives to stop doing so, disrupted the learning process, caused anxiety among some students, frustration in others, and deprived the class as a whole of actual learning. His poor judgement and failure to observe boundaries interfered with his ability to have a collaborative relationship with peers at SEHS and his administrators. Dr. Hayes persuasively opined respondent is not fit to teach.

D. [REDACTED]

50. [REDACTED]

[REDACTED] Based on the totality of the evidence, however, the Commission is not convinced respondent in the future would voluntarily participate in counseling, treatment, or take psychiatric medication. The Commission is convinced respondent does not believe he has a mental illness and that he sees no need to receive mental health treatment in order to return to the classroom.

LEGAL CONCLUSIONS

Burden and Standard of Proof on the Accusation

1. The District has the burden of proving the charges by a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1038-1039.) Preponderance of the evidence means "the evidence on one side outweighs, preponderates over, is more than, the evidence on the other side." (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 325.)

///

Cause for Termination

2. The governing board of a school district may dismiss a permanent certificated employee if one or more of the causes enumerated in Education Code sections 44932, subdivision (a), 44939, and 44942³ are established by a preponderance of the evidence.

3. A. A certificated employee may be subject to dismissal for unprofessional conduct pursuant to section 44932, subdivision (a)(2).

B. Unprofessional conduct in the teaching profession has been defined as that which violates the rules or ethical code of the profession or is unbecoming a member of the profession in good standing. (*Board of Educ. of Los Angeles v. Swan* (1953) 41 Cal.2d 546, 553, overruled, on another ground, by *Bekiaris v. Board of Education* (1972) 6 Cal.3d 575, 588, fn. 7.)

C. In this case, it was established by a preponderance of the evidence that respondent engaged in unprofessional conduct within the meaning of section 44932, subdivision (a)(2). As discovered during Assistant Principal Flores's classroom observations of respondent teaching his various classes, respondent failed to create a rigorous and positive learning environment in his classroom that properly assessed student learning. Respondent's persistent use of the dartboard game, and later the basketball game, to determine students' grades had no bearing on individual student achievement and violated District policies on marking and comparing students' achievements against other students. His numerous mass e-mails showed a constant failure to follow District policies on conduct, and demonstrated that respondent was not respectful of colleagues' time and privacy. The tone of the Star Wars e-mail respondent sent to Principal Nunez was threatening. Respondent also refused to follow multiple directives from Assistant Principal Flores and Principal Nunez regarding removal of the dartboard and basketball hoop from his classroom. Respondent continued sending mass e-mails to colleagues after being directed not to do so by administrators. Respondent's interaction with Dr. Noble in trying to grab the dartboard away from him was unprofessional and modeled poor behavior in front of students in the hallway. (Factual Findings 20-21, 23-25, 27-29, 32-39.)

4. A. A certificated employee may be subject to dismissal for unsatisfactory performance pursuant to section 44932, subdivision (a)(5).

B. The term "unsatisfactory performance" is not specifically defined in the Education Code or case law. Inasmuch as there is separate cause for dismissal for unprofessional conduct in section 44932, as discussed above, and it is not to be presumed that the Legislature intended to enact completely duplicative statutes (*In re Maes* (2010) 185 Cal.App.4th 1094, 1110), unsatisfactory performance must mean something different from unprofessional conduct. In fact, section 44938, subdivision (c), specifies that "unsatisfactory performance" does not include any other cause for dismissal specified in section 44932.

³ Further undesignated statutory references are to the Education Code.

C. While unprofessional conduct can be determined by analyzing a teacher's conduct relative to the broader educational community, unsatisfactory performance must be analyzed with an eye toward the teacher's performance as evaluated by his or her employing school district. Section 44938 requires a charge of unsatisfactory performance to be preceded by a written notice of unsatisfactory performance. Section 44938 refers to section 44660 et seq., which in turn establishes guidelines for how school districts should evaluate and assess the performance of their certificated employees. Thus, cause for discipline may be established if a certificated employee performs in a manner unsatisfactory to his employing school district.

D. However, it has been observed that the purpose of the statute giving tenure to teachers is to insure an efficient permanent staff of teachers whose members are not dependent on caprice for their positions as long as they conduct themselves properly and perform their duties efficiently and well. (*Bakersfield Elementary Teachers Ass'n v. Bakersfield City School Dist.* (2006) 145 Cal.App.4th 1260, 1293, fn 20, citing 56 Cal.Jur.3d (2003) Schools, § 411, p. 757.) Therefore, an employing school district cannot be arbitrary or capricious in making decisions regarding whether a certificated employee has performed in an unsatisfactory manner.

E. In this case, it was established by a preponderance of the evidence that respondent's performance was unsatisfactory pursuant to section 44932, subdivision (a)(5). Assistant Principal Flores was dissatisfied with respondent's performance in all of her classroom observations. When she met with respondent after each observation, she tried to help him improve his performance, by providing him with support and guidance, which, respondent did not heed. Assistant Principal Flores provided respondent with detailed instruction, guidance, and reference materials, as well as directives, which were easy to follow and could have remedied aspects of respondent's unsatisfactory performance. Respondent failed to use her suggestions, guidance or materials, and his performance did not improve. (Factual Findings 23-24, 30-31.)

5. A. A certificated employee may be subject to dismissal for evident unfitness for service pursuant to section 44932, subdivision (a)(6).

B. "Evident unfitness for service" means clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444.) "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." (*Id.*)

C. It was established by a preponderance of the evidence that respondent is evidently unfit for service as a teacher pursuant to section 44932, subdivision (a)(6). Respondent failed to follow through after nine formal conferences with administrators that outlined directives for him to be more effective in the classroom and more professional as a member of his teaching community. He refused to follow clear and simple directives to stop

using hazardous games in his classroom and sending mass e-mails to colleagues that had no instructional purpose. [REDACTED]

[REDACTED] Respondent could not reflect on his behaviors and understand that what he was doing was wrong. He was also unable to identify methods he used that were not good for students. Respondent was repeatedly notified by his administrators that his actions in question were not acceptable, yet respondent was not able to remedy the problems upon receipt of that notice. (Factual Findings 20-21, 23-45.)

6. A. A certificated employee may be subject to dismissal for willfully refusing to perform regular assignments without reasonable cause, as prescribed by the rules and regulations of an employing school district, pursuant to section 44939.

B. The willful refusal of a teacher to obey the reasonable rules and regulations of the employing school district is tantamount to insubordination. (*Board of Educ. of City of Los Angeles v. Swan, supra*, 41 Cal.2d at p. 552, overruled, on another ground, by *Bekiaris v. Board of Education* (1972) 6 Cal.3d 575.)

C. It was established by a preponderance of the evidence that respondent willfully refused to perform regular assignments without reasonable cause, as prescribed by the rules and regulations of the District, pursuant to section 44939, subdivision (b). Respondent was given four formal classroom observations in a one-year period, after which Assistant Principal Flores gave him directives and advised him how to teach properly. He completely ignored almost all of those directives and continued doing as he pleased in the classroom. Principal Nunez and Assistant Principal Flores gave him repeated directives to not use the dartboard and basketball games in his classrooms or send mass e-mails to school colleagues. Respondent refused to comply with those directives. It was only after the incident involving Dr. Noble, when the dartboard was physically removed from his classroom, that respondent stopped using the dartboard. He quickly replaced the dartboard with the basketball and hoop, which respondent knew was not permissible. (Factual Findings 20-21, 23-24, 27-29, 31-39.)

7. A certificated employee may be subject to dismissal, pursuant to sections 44932, subdivision (a)(7), and 44942, for having a physical or mental condition unfitting him or her to instruct or associate with children. In this case, it was established by a preponderance of the evidence that respondent has a mental condition making him unfit to instruct children in the classroom. In 2015, Dr. Lane found respondent unfit to teach due to a mental condition. Dr. Lane's decision was confirmed in 2015 and 2016 by a panel of three psychiatrists, who similarly found respondent unfit for duty as a teacher due to a mental condition. The panel's conclusion reached in 2015 was subsequently confirmed by the Superior Court in a final judgment. Respondent has presented no medical or expert evidence suggesting he is fit for duty as a teacher. (Factual Findings 40-47.)

///

8. A. A certificated employee may be subject to dismissal 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, pursuant to section 44932, subdivision (a)(8).

B. Cause for dismissal here may be based on the violation of school rules or district policies. (*San Dieguito Union High School Dist. v. Commission on Professional Competence* (1985) 174 Cal.App.3d 1176, 1180-1181.) However, there must be a “showing of intentional and continual refusal to cooperate.” (*Id.* at p. 1196.) The violation must be persistent or “motivated by an attitude of continuous insubordination.” (*Governing Board of the Governing Board 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 Professional Competence* (1985) 174 Cal.App.3d 317.)

C. It was established by a preponderance of the evidence that respondent persistently violated, and refused to obey, the school laws of the state and reasonable District regulations, pursuant to section 44932, subdivision (a)(8). Respondent persistently violated District Bulletin 1353.1 and CTSP Standard 5 by using the dartboard and basketball games to determine student grades, even after he was given explicit directives to discontinue that practice. Respondent persistently violated the District’s Responsible Use Policy by sending mass e-mails with no instructional purpose to colleagues, even after he was given explicit directives by an administrator to not do so. (Factual Findings 20-21, 25, 27-29, 32-39.)

Analysis of the Morrison Factors

9. A. In deciding whether cause for dismissal exists under the amorphous concepts of unprofessional conduct and evident unfitness for service, it also must be established that a teacher’s misconduct relates to his fitness to teach, within the meaning of *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 227-230. The *Morrison* analysis does not apply to causes for dismissal for unsatisfactory performance, willful refusal to perform regular assignments, or persistent violation of school rules, laws or policies, because such theories, by definition, have a direct nexus with teaching. (*Id.*, at pp. 227-230). While it is unclear whether the *Morrison* analysis applies to the cause for dismissal of mental unfitness to instruct children, the Commission assumes it does for purposes of this case out of abundance of caution.

B. With regard to the three identified causes for dismissal that must be analyzed, all of the factors suggested by *Morrison* were considered and compared to the facts established above. Not all “*Morrison* factors” need be present for the *Morrison* test to be satisfied. (*Governing Board v. Haar* (1994) 28 Cal.App.4th 369.) Moreover, the *Morrison* analysis need not be conducted on each individual fact established, but rather can be applied to the accumulated facts established collectively. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1457.)

///

C. In this case, the Commission has analyzed the *Morrison* factors and concludes they establish by a preponderance of the evidence that respondent's misconduct makes him unfit to teach, as follows:

1. The likelihood the conduct may adversely affect students or fellow teachers. Respondent's students suffered most. They were not learning, were deprived of District curriculum and the opportunity to learn science, and were not allowed to develop as critical thinkers. There was a lack of engagement in respondent's classes, with no challenges for students. Respondent's frequent and off-topic mass e-mails invaded the time and privacy of his colleagues. In fact, teachers who were once respondent's allies lost respect for him and became increasingly nervous about the tone of his e-mails. Many teachers at SEHS tried to avoid him. Respondent's conduct increased anxiety on campus. Since respondent has been removed from school, the collaborative community at SEHS has improved.

2. The degree of such adversity. Students suffered the greater amount of adversity, especially given most of respondent's classes were composed of students being introduced to senior level science. Respondent failed to give his students a good foundation to problem-solve, or engage in creative learning, which impeded their matriculation to other sciences. The adversity to faculty was more moderate, although respondent's behavior was enough to cause many teachers to complain to administrators, and one teacher, Ms. Bakos, to obtain her own personal protection.

3. The proximity or remoteness in time of the conduct. Respondent's misconduct is fairly proximate, in that it occurred two to three years ago. The misconduct's proximity is practically greater, in that respondent still contends he does not have a mental illness impairing his ability to function in the classroom.

4. The type of teaching certificate held by the party involved. As touched on above, respondent's credential put him in contact with high school students just beginning their introduction to senior sciences. His poor teaching and behaviors undercut those students' ability to gain a solid foothold in that level of science.

5. The existence of extenuating or aggravating circumstances, if any, surrounding the conduct. The Commission finds neither exists.

6. The praiseworthiness or blameworthiness of the motives resulting in the conduct. The Commission finds neither exists. The Commission concludes respondent's mental illness best explains the motives behind his misconduct.

7. The likelihood of recurrence of the questioned conduct. If respondent is returned to the classroom, he will engage in misconduct exactly the same as before.

8. The extent discipline may cause adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. The Commission does not see how discipline will have such an effect upon properly exercised constitutional rights.

Disposition

10. A. “The Commission has broad discretion in determining what constitutes unfitness to teach . . . , and whether dismissal or suspension is the appropriate sanction.” (*California Teachers Ass’n v. State of California* (1999) 20 Cal.4th 327, 343-344.) Thus, even where cause for dismissal has been established, a Commission still has broad discretion to determine whether such discipline is actually warranted. (*Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208, 222.)

B. Respondent engaged in serious misconduct, even after being given numerous directives, guidance, and support. His misconduct includes unsatisfactory teaching, unprofessional interactions with colleagues, and willful refusal to follow clear directives of his supervisors. More concerning is respondent’s mental illness, which the overwhelming and uncontroverted evidence shows renders him unfit to teach. Despite an avalanche of evidence, respondent continues to deny he has a problem or that it impairs his fitness to teach. Until respondent accepts those facts and takes significant and long-term steps to address his illness, it is certain that, if returned to the classroom, he will continue to engage in the same misconduct that was proven in this case. All students should have the opportunity to learn. Respondent cannot give them that opportunity in his present condition. His colleagues at school also should not be subjected to the anxiety and fear provoked by his erratic behavior. Even respondent agrees he is still many months away from being ready to return to the classroom. Respondent’s termination from the District is therefore warranted. (Factual Findings 1-50; Legal Conclusions 1-9.)

///

///

///

///

///

///

///

///

///

///

///

ORDER

Hector Schmidt is dismissed from employment with the Los Angeles Unified School District.

DATED: November 5, 2017

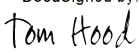
DocuSigned by:

E08381E7779D4F1

ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings

I concur.


DATED: November 3, 2017

DocuSigned by:

D04E96E22B4A4E1

Tom Hood, Commissioner

I concur.

DATED: November 3, 2017

DocuSigned by:

AB8154B4F60C4EE...

Jay San Agustin, Commissioner