

**BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

OAH No. 2011120112

MICHAEL SHAFER,

Respondent.

DECISION

This matter was heard on May 29 through 31, 2012, before the Commission on Professional Competence (Commission), which consisted of Lauren M. Hernandez, Barbara Christensen, and Administrative Law Judge (ALJ) Mark Harman, Office of Administrative Hearings, State of California, who presided. Eric Bathen and Jordan Meyer, Attorneys at Law, represented the Bellflower Unified School District (District). Kent Morizawa, Attorney at Law, represented Michael Shafer (Respondent).

The District filed a Statement of Charges on November 15, 2011, alleging that Respondent engaged in unauthorized sales of food and drink to students in his classroom, made false statements to students regarding these sales, and kept the profits from these sales. The District alleged that Respondent's acts were cause for his dismissal on grounds of immoral and unprofessional conduct, unsatisfactory performance of duties, evident unfitness for service, and persistent violation or refusal to obey rules and regulations of the District. Respondent requested a hearing and this matter ensued.

On April 24, 2012, the District served on Respondent a First Amended Statement of Charges that alleged new facts, including making false statements to school site administration about the sales of food and drink items in his classroom and misconduct related to "Tardy Sweeps," and a new grounds for dismissal: dishonesty. Respondent filed a Motion to Strike the new matter set forth in the First Amended Statement of Charges, which was marked for identification as exhibit J. The District's Opposition to this motion was marked as exhibit 49. Respondent's motion was denied, primarily because he was unable to demonstrate any prejudice to his ability to defend against the new allegations. The parties and the ALJ had a lengthy discussion on the record, and at the conclusion of this, the District moved to amend the First Amended Statement of Charges, which was granted as follows. On page 2 of Exhibit 3, the provision under Education Code section 44939, which states, "Willful refusal to perform regular assignments without reasonable cause, as prescribed by the rules and regulations of the employing school district," was struck. The provision under Education Code section 44932, subdivision (a)(1), "Unprofessional Conduct," was struck. The provisions under Education Code section 44932, subdivision (a)(3) and (4),

“Dishonesty,” and “Unsatisfactory Performance”, were struck. The entire paragraph 7 on page 3 was struck. The entire paragraph 9 on page 3 was struck. On page 6, the word “authorized” was changed to “unauthorized” sales of the food and drink.

Evidence was received in the form of documents, testimony, and by stipulations of the parties. At the ALJ’s request, the District redacted personal information contained in its exhibits and submitted the redacted exhibits to the ALJ, which were received on June 8, 2012. The record was closed and the matter was submitted for decision.

FACTUAL FINDINGS

1. The Accusation and First Amended Statement of Charges were filed by Brian Jacobs, Ed.D., the District’s Superintendent, acting in his official capacity.

2. Respondent is a certificated permanent employee of the District.

3. Respondent began teaching in the District in 2003. He taught at Ramona Elementary (Ramona) for seven years. At the end of the 2009-2010 school year, the District determined to reduce the number of teaching positions in the elementary school. Respondent was one of the teachers whose positions were eliminated. Because he possessed a multiple subject credential with an English authorization, he was qualified for reassignment to teach English to seventh graders at Bellflower Middle School. At Ramona, he had taught in a self-contained classroom, beginning in the fourth grade, and later, in the fifth grade. He found the transition to middle school students and departmentalized classes difficult. He had to learn new curriculum and classroom strategies, find new ways to manage students’ behaviors, and adapt to the magnitude of the campus and staff, without knowing any of his colleagues there. He previously obtained ratings in performance evaluations that were a mixture of exemplary and effective, but he struggled in his new position; however, he was happy to have the job and he felt he was up for the challenge.

4. In October 2010, Joseph Perry, the principal of Bellflower High School,¹ issued an “Improvement Plan” notifying Respondent that he needed improvement in standards areas, particularly the way he engaged and supported all students in learning. Concerns included how Respondent began lessons by having students open the textbook and read silently before answering the questions in the book. Respondent needed to plan instruction to connect learning to students’ prior knowledge, backgrounds, life experiences, and interests. Respondent needed to utilize a variety of instructional methods and strategies, and to increase the amount of class time spent on explicit instruction, paced throughout the class time, rather than relying on student-directed, silent reading activities and independent

¹ Bellflower High/Middle School is unusual because both high school and middle school students share a campus, although they are segregated. There is one principal for both schools; however, assistant principals separately oversee issues related to the master schedules of the middle and high schools.

practice from the textbook. Respondent needed to spend more time designing his lesson plans to connect them to the larger goals of the curriculum. In May 2011, Perry noted that Respondent had worked with Perry and the District's language arts specialist, had engaged in self-reflection, and had achieved professional growth. Respondent implemented the teaching standards into his practices. He prepared plans and materials in advance of instruction, and carefully planned each lesson with regard to pacing and outcomes. Classroom activities emphasized critical thinking skills and acknowledged the centrality of standards.

Selling Food to Students in the Classroom

5. In or about October 2011, a few teachers told Robin Beato (Beato), the Associated Student Body (ASB) financial technician, that Respondent sold food and soda in his classroom. Beato notified Michael Lundgren (Lundgren), an Assistant Principal overseeing the student activities office, and Holly Hennessy (Hennessy), the activities director. Lundgren in turn notified Assistant Principal Aileen Kennison (Kennison), who oversaw the middle school, on October 13, 2011. At about this same time, Kennison was in her office counseling an eighth-grade student, D. F.,² regarding his grades. Kennison asked D.F., who was one of Respondent's students in the 2010-2011 school year, whether Respondent had sold food in the classroom. D.F. disclosed to Kennison that he had purchased food in Respondent's classroom, including granola bars, "hot Cheetos," and diet Pepsi, almost daily. D.F. said he had spent up to \$15 per week to purchase these food items. Kennison discussed the matter with Perry, who directed her to investigate. Kennison began to poll Respondent's current and former students, and obtained 65 written statements.

6. Respondent began selling "hot Cheetos," Gatorade, and granola bars to students at least as early as May 2011, and continued to sell these items, as well as diet Pepsi, through the first weeks of the 2011-2012 school year. He informed students that they could not eat or drink anything in his classroom except the food and drinks that he sold to them. He also sold food to students who were not in his classes during the passing period. He stored the cold drinks in a mini-fridge next to his desk and kept the other items on a shelf above his desk. Students left money on Respondent's desk when they purchased these items. Students also could receive credit to purchase items. Respondent did not tell students anything specific about what he did with the money he collected, although at one point, he used some of the money for a school-wide "penny drive" contest, which his students apparently won. The District estimated that gross proceeds from these sales amounted between \$100 and \$300 per week, but Respondent disputes that amount.

7a. The Bellflower High/Middle School staff handbook includes the school's disciplinary policies and provides that students are not allowed to have "food, drink, gum or hats" in the classroom. Respondent received a copy of this handbook, which is between 250 and 300 pages, at a middle school staff meeting he attended on August 30, 2010. He also received a poster entitled "No Food, Drink or Gum Permitted in the Classrooms" at this

² Initials are used to protect the student's privacy.

meeting, which, as expected, he hung on his classroom wall in 2010. Disciplinary matters such as students having food in the classroom were discussed during this meeting, as well.

7b. The District also provided its teachers with a sample of an activity fundraising request form, which a club or other organization filled out if it wanted to sell something to students. A sponsor/teacher used this form to verify the amount to be raised and whether a snack being offered for sale fit within the District's Wellness Policy and Nutrition Standards (Guidelines).³ The Guidelines specifically prohibited offer foods with high fat or sugar contents, or carbonated soft drinks, on school premises during the school day. Respondent was selling prohibited items. Respondent maintains he never saw these Guidelines.

8. Hennessy is the activities director for grades 7 through 12. She is involved with teachers who advise or run student clubs. When a teacher becomes an advisor, Hennessy provides them with an "Advisor's" handbook and goes over the rules with them. This handbook generally is given out only to persons who are advisors of a club, or an athletic organization, or anyone who wants to sell products to children. Respondent never requested a copy of the Advisor's handbook and he never received specific training from Hennessy. Hennessy, however, spoke at school staff meetings and provided all teachers with general information about the fundraising process. She told teachers that everything must be run through the ASB office, and that a teacher must have approval before selling any items to students. Hennessy testified that after she was informed that Respondent was selling items in early October 2011, she asked him directly about selling in his classroom, and Respondent denied it. Respondent told her, "I have rewards for my kids. But I don't sell anything."

Tardy Sweep

9. Candace Lawther (Lawther) is a supervision assistant who has been employed by the District for 15 years. She supervises all of the students that are tardy or suspended at the end of the day. She described "Tardy Sweep" as "where the children go when they are late to class. If you are not in the door when the bell rings, you go to Tardy Sweep." Lawther was a credible witness. Lawther also had heard that Respondent was selling food to students. Kennison was made aware of this and summoned Lawther into her office on October 14, 2011, to discuss it with her. During their meeting, Lawther disclosed to Kennison that Respondent allowed his students, in an up or down vote, to decide whether a particular tardy student would be sent to Tardy Sweep or be allowed to stay in class. Lawther had noticed that, since the beginning of the 2011-2012 school year, all of Respondent's students who arrived at Tardy Sweep were upset. Approximately 10 students had told Lawther that they were voted against staying in class. Lawther at first was skeptical of the students' stories, but then she had a conversation with Respondent and asked him about his application of the Tardy Sweep policy. Respondent told Lawther that he allowed the class to vote up or down whether to send a student to Tardy Sweep "because it was a

³ Persons conducting fundraisers also were required to check out a cash box, keep all student monies/receipts in the cash box, and hand the cash box back to the ASB bookkeeper to verify how much money they had raised.

form of entertainment for him. He did not say anything about democracy.” Respondent did not immediately cease this practice even after he discussed it with Lawther.

Respondent’s Meeting with Perry

10a. Kennison completed her investigation and summoned Respondent to meet with her, Perry, and Lundgren on October 17, 2011. Kennison began by relating the concerns about Respondent selling food items to students, and Respondent admitted that he was selling food to students in his classroom. Respondent explained that, in tough economic times, he did not want to burden the school with asking for supplies. Thus, he implied that he had taken profits from the food sales to purchase instructional supplies and materials. Respondent did not tell the administrators how specifically he had used the money.

10b. Respondent told the administrators that he had sold food items to his students as an “incentive.” He did not describe the nature of this reward system; for example, he did not say what kinds of things students were required to do in order to be allowed to eat in his classroom. Respondent seemed receptive during the meeting and he agreed to provide a list of supplies that he had purchased with the profit. When asked about his Tardy Sweep practice, he said it fostered democracy in his classroom. The students got to decide whether someone should be held accountable. Perry told Respondent immediately to cease selling food items and to cease giving his students an opportunity to vote on whether to enforce the Tardy Sweep policy. Respondent complied with Perry’s orders to cease these practices.

11. Perry did not receive anything from Respondent such as an accounting for these food sales. On October 19, 2011, Perry sent a memorandum to Respondent stating that the District was requesting a full accounting of the food sales that took place in Respondent’s classroom during the 2010-2011 school year, and the beginning of the 2011-2012 school year. “Your accounting report should include receipts of food items purchased for sale, as well as, receipts showing school supplies and materials purchased for your classroom during this period of time. [¶] Through your own admission, you acknowledged that you sold food items out of your classroom and would cooperate with this request.” (Exhibit 22.) Respondent did not respond to Perry’s memo, or provide any receipts or other accounting information regarding these sales. Perry sent a second, formal request for a full accounting. Respondent again did not respond. Respondent was placed on administrative leave on November 1, 2011.

Respondent’s Later Explanations

12. Respondent knew that he was violating school policy by allowing students to eat and drink while in attendance in his classroom. He offered some explanations for why he sold food products and allowed his students to violate school rules. He sensed that students went into a lull after taking the statewide achievement tests in April 2011. These tests had been a means of encouraging students to do their best. Respondent thought that “giving food” away would motivate students the way that preparing for the test had motivated them. He talked to them about their lackadaisical attitudes. He noticed a change in their

performance “as soon as they got their drinks or food.” Respondent said, “I also allowed them to purchase items. I took the extra money from the sale of the food items to buy more food items.” Respondent, however, never described the so-called “reward system” to the students as a whole, but purportedly spoke individually to students. He said, “The kids who did not need the extra help had to pay for their drinks.” The evidence did not establish that Respondent gave food away to his students, as Respondent has maintained.

13. Respondent maintained that he was not aware that he was violating school policy when he sold certain types of food. The District, however, established that the Wellness Policy and Nutrition Standards was an agenda topic that ostensibly got discussed at the September 2, 2011 staff meeting. Respondent maintained that the items he sold at the beginning were allowed to be sold on campus. Respondent cited instances in which the band teacher sold Cheetos across the hall from his classroom. He thought Gatorade was available in the school’s vending machines; however, Respondent knew that he was not allowed to sell Pepsi or other carbonated beverages when he began selling Pepsi at the end of the 2010-2011 school year. And he continued selling Pepsi and other food items in the 2011-2012 school year until Perry told him to stop.

14. Respondent did not deposit the monies he received from students for the food and drink items in any ASB account. He did not use the funds for any District approved use; instead, he put the money in his desk drawer. He did not maintain records of sales or of the value of food that he gave away. He did not maintain anything but some purchase receipts documenting his costs to purchase the food items. He later produced approximately \$273 in cash during his deposition on March 16, 2012. He described this money as his total profit from the food sales, which he had maintained in a jar above the washing machine at his house. Respondent did not purchase any instructional materials or supplies with the profit from the sale of the food items.

Mitigation/Rehabilitation Evidence

15a. Respondent had never been disciplined by the District before this proceeding. He graduated with a Bachelor of Arts degree in liberal studies from California State University at Long Beach in 2003 and obtained a multiple subject teaching credential with an English authorization. His goal while in college was to teach in the elementary grades. He also obtained his Master’s degree in Public Administration.

15b. Respondent presented character evidence demonstrating that he is well liked by friends and colleagues. Three witnesses testified on his behalf. Respondent was described positively as a good father and husband. He is very energetic and has the ability to engage students and the children of his friends, in part because he is funny, interactive, and considerate of their feelings and emotions. For two years, Respondent was a team leader with a group of students at his church, and participated in activities on the weekends and during functions throughout the week. He is the kind of person who calls his friends to check up on them and to see how they are doing.

15c. Respondent expressed remorse for his conduct. He believes his conduct had a negative impact on students, and he regrets it. He continues to maintain, however, that he violated the rules in order to motivate his students.

The “Morrison” Factors

16. Respondent’s conduct must be evaluated in terms of his fitness to teach pursuant to the pertinent criteria, first set forth by the Supreme Court in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229-230 (*Morrison*).⁴ Application of the *Morrison* factors indicates unfitness to teach. Respondent admitted that he engaged in conduct that adversely affected students. The students who did not get positive votes from their classmates and were sent to Tardy Sweep were very upset. Respondent’s acts confused his students. He allowed them to break a basic classroom rule while a sign hung on the classroom wall that said eating was not permitted. Respondent acted for the purpose of self-aggrandizement, and his other explanations to administrators were false and misleading. Also, he has failed to demonstrate an understanding of the effect of his behaviors on his students. His actions were anathema to good order: students were encouraged to openly violate school rules, which Respondent says was a way to motivate them. He applied a popularity contest instead of fairness in his enforcement of the Tardy Sweep policy in his classroom. He made a mockery of the District’s disciplinary system. All of these actions had deleterious effects on the learning environment that went beyond what Respondent seems to perceive: he ostensibly believes the worst of it for his students was the effect of being interviewed by administrators during the investigation process.

17. Respondent aggravated these circumstances by denying his misconduct when he was confronted by Hennessy, and making light of the issue when he spoke to Lawther. He fabricated implausible explanations when he met with Kennison, Perry, and Lundgren. Further aggravation occurred when he failed to respond to Perry’s requests for accounting records and receipts. It was suggested that a union representative advised Respondent not to

⁴ The Court set forth the following factors: 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 C.3d 691, 698, fn. 3; *Fontana Unified School District v. Burman* (1988) 45 Cal.3d. 208, 220-221; *Haar, supra*, 28 Cal.App.4th at p. 384.)

respond, but more likely, the reason for this failure is the fact that Respondent had no records that he could produce. He simply did not know how much money he had collected from students. Respondent's explanations were not credible. A reasonably prudent teacher would have known that there are rules that govern the sale of items to students on campus. Respondent's unwillingness to accept this point is further aggravation. Respondent's deficiencies also affected the quality of the educational services provided to students. The consequences of his behavior cannot be treated lightly. Respondent unsuccessfully argued that what he did was for the benefit of students. In the final analysis, Respondent's actions set a very bad example. He conveyed to his students the idea that one's personal values are more important than the established rules, and that equal and fair treatment under those rules is something that only other people must follow.

18. Respondent's failures were not mere negligence. First, he admitted that he knew students were not allowed to consume food in the classroom. He even admits that he knew he was not supposed to sell Pepsi. His actions were blatant, repetitive, and recklessly indifferent to school policy. Second, Respondent tried to conceal what he was doing to Hennessy. These facts demonstrate that he was aware of the policies about the sale of food items to students, never consulted anyone further about it, and continued to violate the policies after being confronted. Respondent's arguments to the contrary were not credible. Respondent did not require a direct confrontation with the administration to know that he must comply with the District's clear policies. He had resources, such as the employee handbook, from which to learn of his obligations regarding selling items to students. These matters were discussed at staff meetings. Based on these circumstances, it is unlikely that Respondent will behave differently in the future.

19. Respondent's violations of the District's rules and procedures are evident and are the result of an inadequacy or defect in character. Although he stopped the particular violations after the meeting with administrators, he still has failed to demonstrate that he understands the wrongfulness of his conduct.

20. Except for those previously found to have merit, all other allegations in the Statement of Charges and all other contentions of the parties at the hearing are found to lack merit or to be surplusage.

LEGAL CONCLUSIONS

1. The District has the burden of proof. The standard of proof is preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1038-1039.)

2. "Immoral conduct," of which Respondent has been accused, has been defined to mean that which is hostile to the welfare of the general public and contrary to good morals. It includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, and dissoluteness. Or, 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 (*Weiland*).)

3. “Evident unfitness for service,” within the meaning of section 44932, subdivision (a)(5), requires that the unfitness for service be attributable to a defect or inadequacy in temperament, presumably not remediable merely on receipt of notice that the teacher’s conduct fails to meet the expectations of the employing school district. (*Woodland Joint Unified School District v. Commission on Professional Competence (Zuber)* (1992) 2 Cal.App.4th 1429, 1444-1445.)

4. Cause for dismissal exists under Education Code⁵ section 44932, subdivision (a)(1), (5), and (7),⁶ for immoral conduct, evident unfitness for service, and persistent violations of school laws and regulations, as set forth in factual finding numbers 1 through 19 and legal conclusion numbers 2 and 3. The District has established that Respondent violated the reasonable regulations and standards adopted by the District. Moreover, he engaged in a pattern of immoral conduct, e.g., he repeatedly encouraged students to flagrantly violate school rules, whether it was allowing them to eat in the classroom, or allowing them to dictate whether a school policy would be enforced. Additionally, he acted immorally by collecting money from his students in violation of school policies and utterly failing to account for the monies that he collected. Respondent was not subjected to progressive discipline, but his actions were flagrant and repeated over a significant period of time (at least 10 weeks). Respondent appears to have been motivated, at least in part, by a need to have students approve of him and an attitude of indifference to school policies. This was further demonstrated by his limited acceptance of the wrongfulness of his conduct.

⁵ All further statutory references are to the Education Code, unless indicated otherwise.

⁶ Section 44932 provides, in pertinent part, as follows:

(a) No permanent employee shall be dismissed except for one or more of the following causes:

(1) Immoral or unprofessional conduct.

[¶] . . . [¶]

(5) Evident unfitness for service.

[¶] . . . [¶]

(7) 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.

Respondent's assertions of ignorance of school policies or naiveté regarding the impact of his misconduct on his students are deemed not credible. The District also has established that, based on Respondent's demonstrated lack of respect or consideration for administrators, students and parents, Respondent's misconduct meets the criteria demonstrating "unfitness to teach," as promulgated by the California Supreme Court in *Morrison*, discussed in detail, *ante*.⁷

5. Cause exists for dismissal under Education Code section 44939, for immoral conduct, as set forth in factual finding numbers 1 through 19 and legal conclusion numbers 2 and 4. Respondent violated the District's policies on numerous occasions, but he also encouraged students to violate the District's policies, as well, which undermined the entire disciplinary system of the District. Respondent's actions reflect more than poor judgment; rather, they constitute immoral conduct as this term is defined in the *Weiland* case. Respondent made his own rules to benefit himself, and to the detriment of his students. Further, Respondent kept the profits of his sales of food items to students. This action is deemed a moral failure akin to corruption.

6. Respondent's misconduct warrants his dismissal as a middle school English teacher with the District.

ORDER

The Accusation and Statement of Charges are sustained. Michael Shafer is dismissed from his position as a permanent certificated employee of the Bellflower Unified School District.

Dated: September ____, 2012

Lauren M. Hernandez, Commission Member

Dated: September ____, 2012

Barbara Christensen, Commission Member

Dated: September ____, 2012

Mark Harman, Commission Member

⁷ The Commission members would have found cause for dismissal under the grounds of dishonesty as provided in section 44932, subdivision (a)(3), but the District chose to delete this grounds from the statement of charges prior to the hearing. Therefore, to the extent that Respondent engaged in dishonesty in giving false explanations for his conduct to school administrators, this will only be considered in terms of the *Morrison* factors.