

BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

OAH No. 2014100676

EDGAR CORDOBA,

Permanent Certificated Employee,

Respondent.

DECISION

This matter was heard by the Commission on Professional Competence (Commission) at Los Angeles, California, on January 20, 21, 23, 2015 and March 23, 2015. The Commission consists of the following members: Deanna Clark, Teacher; Elizabeth Hayne, Teacher; and Glynda B. Gomez, Administrative Law Judge, Office of Administrative Hearings.

The Los Angeles Unified School District (District) was represented by Assistant General Counsel Susan Hyman. Respondent Edgar Cordoba (Respondent) was present and was represented by Richard J. Schwab, Esq., of Trygstadt, Schwab & Trygstadt, Attorneys at Law.

Rulings on motions were made on the record during the proceedings. Oral and documentary evidence was received. The Commission considered the matter in executive session. After due consideration of the record, the Commission makes the following factual findings, conclusions of law, and order:

FACTUAL FINDINGS

1. The Accusation and Statement of Charges were brought by Justo H. Avila in his official capacity as Chief Human Resources Officer for the District.
2. On September 16, 2014, Respondent was given written notice of the District's intention to dismiss Respondent unless he demanded a hearing. Respondent submitted a timely demand for a hearing.

3. The Statement of Charges dated June 13, 2014, and the Accusation dated October 29, 2014, recommend the dismissal of Respondent from the District for the following legal causes under Education Code sections 44932 and 44939: (1) unprofessional conduct; (2) immoral conduct; (3) evident unfitness for service; and (4) 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 Respondent.

4. All pre-hearing jurisdictional requirements have been met by the parties and jurisdiction exists for these proceedings.

5. District contends that Respondent is subject to dismissal based upon allegations that he struck then 5-year-old kindergarten student EM, pushed him, threw his eraser, markers, and crayons, threatened to tear up a picture of EM and his sibling and then tore up the picture. District also contends that in January of 2012, Respondent touched the chest of 10-year-old, fifth grade student, JS, as she walked by his classroom.

6. Respondent contends that he did not commit the acts alleged in the Accusation and that contact, if any, with student JS was accidental, if she bumped into him.

Background Information

7. Respondent received a Bachelor of Science degree in Urban Planning from the Metropolitan University in Mexico City, Mexico in 1983 and a Master of Arts in Teaching and Research from the National University of Mexico in Mexico City, Mexico. Respondent obtained a Master's Degree in Education, a clear multiple subject teaching credential, and a Bilingual Cross Cultural certification (BCLAD) from National University in Los Angeles, California. Respondent has been a teacher for 15 years.

8. Respondent is fluent in English, Spanish and German. He was a bilingual first and second grade teacher in Compton Unified School District for five years where he taught both bilingual and immersion classes. Respondent has been an elementary school teacher with the District since 2006. Respondent taught a fifth grade class at Sylvan Park Elementary School from July to October of 2006 until he was displaced due to low enrollment. Respondent taught third grade and fifth grade at Plummer Elementary School from October of 2006 to June of 2011 until his position was eliminated due to a reduction in force. Respondent was immediately rehired by the District to teach a kindergarten class at Lassen Elementary School from September of 2011 until he was removed from the classroom in February of 2013 as a result of the allegations in the Accusation. Respondent also taught English as a Second Language courses at the Van Nuys Community Adult School within the District from 2006-2009. Respondent's evaluations have been positive noting that he met standards. He is

well liked and respected by his colleagues. There had not been any complaints about Respondent from any parent, student or staff member other than those set forth in the Accusation. Letters of recommendation from Respondent's former colleagues and supervisors were also admitted into evidence.

9. In January of 2012, then 10-year-old fifth grade female student, JS, told her teacher Ms. Catherine Barkle, that Respondent was "creepy." Ms. Barkle asked some clarifying questions and attempted to get JS to provide an explanation about why she considered Respondent to be "creepy." JS did not provide Ms. Barkle with any explanation or additional information. At that time, Ms. Barkle did not believe that she had any information that triggered her duties as a mandatory reporter of suspected child abuse and she had no suspicions of any possible abuse. At hearing, Ms. Barkle credibly testified that she had found JS to use the term "creepy" to refer to anyone she did not like. Accordingly, Ms. Barkle considered the comments to be reflective of JS's general attitude about Respondent and staff members in general and not indicative of any specific incidents.

10. On February 24, 2012, JS again stated to Ms. Barkle that she found Respondent "creepy." On this occasion, when Ms. Barkle made further inquiry, JS described an incident wherein she alleged that Respondent touched her chest as she walked by his classroom with her friend C[REDACTED]. Ms. Barkle was skeptical of JS's claims because she had found JS to not be trustworthy in the past. As examples, Ms. Barkle noted that JS was often not where she was supposed to be during lunch and recess and was sometimes untruthful in her explanations.¹ JS's friend C[REDACTED] also asserted that Respondent had touched JS's chest. Ms. Barkle remained skeptical because she was aware that JS and C[REDACTED] were best friends and often vouched for each other and sometimes lied for each other. Nevertheless, the information that the two students provided triggered Ms. Barkle's duty to report suspected child abuse. As a result, she immediately reported the information to Principal Dana Carter, prepared a suspected child abuse report, and contacted the Los Angeles Police Department, as required.

11. Principal Dana Carter interviewed C[REDACTED], JS and Ms. Barkle. Principal Carter also had each of them prepare a written statement. JS and Ms. Barkle prepared their statements on February 24, 2012. C[REDACTED] prepared her written statement on April 23, 2012. The students and Ms. Barkle were also interviewed by a detective from the

¹ Teacher Mehrdad Mazkooi also testified that JS had a reputation as being untruthful. Mr. Mazkooi had no personal experience with JS and ascertained this information from teacher meetings that are held each year to discuss which students should be paired with which teachers for the upcoming school year.

Los Angeles Police Department.² JS's claim has remained consistent with minor inconsistencies attributable to a lapse in time.

12. At hearing, JS was dressed in a modest sweat shirt and jeans appropriate for the proceeding. She was animated, confident, and clear in her testimony. JS testified that on a day in January of 2012, she and her friend C [REDACTED], also a fifth grader, had walked from one side of the campus to the other after school after having accompanied a friend to a side gate of the campus. JS testified that as she and C [REDACTED] passed Respondent's classroom, he stuck his head out, looked from right to left, stepped out, raised his hand, and brushed across her chest with his hand as they walked past. She felt uncomfortable, placed her hands across her chest and quickly walked away. JS was familiar with Respondent because she had been a volunteer helping kindergarten students in Respondent's class as part of a class project on one occasion. JS's friend C [REDACTED] did not testify at the hearing. However, the written statement she prepared on April 23, 2012, is mostly consistent with JS's account of the events with variations in some details. Most notably, the recollections of JS and C [REDACTED] differed with regard to the name of the friend that they walked to the side gate. JS testified that the girls walked J [REDACTED] to the gate. C [REDACTED]'s statement prepared three months after the alleged incident, indicates that the girls walked E [REDACTED] to the gate. JS's version of the events was otherwise uncorroborated.

13. Respondent credibly denied that he ever intentionally touched JS. Respondent had no recollection of ever meeting JS or seeing her prior to the hearing. He surmised that the only possible time that he may have had accidental contact with her was on a Friday in January of 2012 when he was asked by a colleague, Mehrdad Mazkoori, to translate for a parent. Mr. Mazkoori also testified that he remembered a Friday in January of 2012 when Respondent translated for a parent, at his request. Generally, the parent came each Friday to speak with Mr. Mazkoori about her student and brought a sibling to translate. On this day, the parent came alone. Respondent translated for the parent and Mr. Mazkoori whose classroom was adjacent to that of Respondent. The meeting and translation occurred in the outdoor corridor outside of Mr. Mazkoori's classroom sometime between 2:30 and 3:00 p.m., immediately after school. The corridors were somewhat crowded during that period with students, parents, and teachers in the corridors. Respondent completed the translation and returned to his classroom. Mr. Mazkoori testified at the hearing and corroborated the chain of events. Respondent remembers that someone bumped into him from the side and back as he was returning to his classroom and it jostled him, but he did not see who bumped into him. He did not think it was anything out of the ordinary at the time. Respondent did not see JS at that time. Respondent did not recognize JS when she testified at the hearing and did not remember seeing her on campus. Respondent first learned of the allegations when interviewed by a police officer from the Los Angeles Police department.

² The Los Angeles City Attorney notified Respondent that it has closed its case on this incident without charges as has the Commission on Teacher Credentialing.

14. On October 5, 2012, student F [REDACTED] told his teacher and school officials including Principal Dana Carter, that Respondent had slapped and pushed student EM while EM and F [REDACTED] were in Respondent's class. F [REDACTED] reported that it had been EM's first day in the class and that EM had cried for 20 minutes afterward. At the time, EM was a recent immigrant and did not speak English. EM confirmed that "Mr. Cordoba" had slapped him during a reading lesson. He also disclosed that "Mr. Cordoba" had thrown EM's markers, pencils and erasers and on another occasion "broke" a picture of him with his brother or his entire family. He kept the picture in his school box or back pack. The evidence did not establish why EM had the picture out at the time. EM also testified that he did not like F [REDACTED] and found him to be a "bad boy." EM thought that his cousin G [REDACTED] may have seen "Mr. Cordoba" slap him. Complainant did not introduce any evidence that G [REDACTED] saw Respondent slap EM.

15. EM gave clear and concise testimony about being slapped by "Mr. Cordoba" early in the school year. However, he had confusion about kindergarten and first grade and when the incident occurred. When asked if "Mr. Cordoba" was in the hearing room, EM was unable to identify the Respondent. Moreover, testimony from EM and first grade teacher Margarita Garcia, established that EM had a male teacher at the beginning of first grade. EM was transferred to Ms. Garcia's class as part of rebalancing of classes in his first grade year.

16. Neither F [REDACTED] nor G [REDACTED] testified at the administrative hearing.

17. Respondent credibly denied ever slapping, hitting, or pushing EM. Respondent also denied throwing Respondent's erasers, pencils and markers, threatening to or tearing a picture belonging to EM. Respondent testified that at the time markers were not used in his kindergarten class. Respondent does not remember EM having a photograph or that any photograph was damaged.

18. In Charge 1 of the Accusation, Complainant alleges that on or about February 6, 2012, Respondent "struck a 5 year old, limited English proficient, recent immigrant student [EM], on the cheek with an open hand during his first week in Cordoba's classroom causing [EM] to cry for several minutes." The Commission found that Complainant failed to establish by a preponderance of the evidence that Respondent struck EM. It was established that EM was a limited English proficient student in February of 2012. It was also established that EM had been a student in Respondent's kindergarten class and that at some point either in kindergarten or first grade, EM was struck by a male teacher. EM gave conflicting accounts of the details of the incident including what grade he was in at the time and was unable to identify Respondent as the teacher who struck him when he saw him in the hearing room. While the Commission believed that EM truthfully testified about what happened to him, there was sufficient confusion about time frames of kindergarten and first grade and identity of the teacher who slapped EM for the Commission to have serious doubts about whether Respondent

was the person who struck EM. Accordingly, Complainant did not meet his burden to establish the facts set forth in Charge 1 by a preponderance of the evidence.

19. In Charge 2 of the Accusation, Complainant alleges that on February 6, 2012, Respondent "threw [EM's] eraser, markers and crayons." The Commission found that Complainant did not establish by a preponderance of the evidence that Respondent had thrown EM's eraser, markers or crayons. Respondent credibly denied that he engaged in such conduct at any time. However, the Commission did believe that a teacher threw EM's eraser, markers and crayons.

20. In Charge 3 of the Accusation, Complainant alleges that during the month of February 2012, Respondent "pushed [EM] on his back." The Commission found no evidence to support Charge 3 and Complainant conceded in closing argument that no evidence had been introduced to support Charge 3. Respondent credibly denied that he engaged in such conduct at any time.

21. In Charge 4 of the Accusation, Complainant alleges that during the month of February 2012, Respondent "threatened to tear up a picture of [EM] and his brother and did so." The Commission found no evidence to support the allegation that Respondent threatened to tear up a picture of EM and his brother. However, the preponderance of the evidence did establish that EM had a picture of either himself and his brother or himself with his family in his possession at school in February of 2012. The evidence also established that he kept the photograph either in his backpack or in his school box for comfort purposes. At some point, for a reason not established by the evidence, EM had the photograph out of either his backpack or school box and it was damaged, most likely by accident, in an interaction with Respondent.

22. In Charge 5 of the Accusation, Complainant alleges that in January of 2012, Respondent "put his hand up and touched a 10-year-old fifth grade female student [JS's] chest as she walked past his classroom." The Commission did not find JS's version of the events as probable as Respondent's version. To the extent that there may have been any physical contact between Respondent and JS, the Commission found that such contact was accidental. The Commission did not find JS's version of the events as credible as Respondent's denial and explanation that at most, he may have had accidental contact with JS, if she was the person who bumped into him in January of 2012. The Commission found that Complainant failed to establish the allegations set forth in Charge 5 by a preponderance of the evidence.

23. It was not established by a preponderance of the evidence that Respondent had any physical contact with JS. The conduct that was established consisted of the accidental damage to a treasured photograph. The conduct had an adverse effect on Student EM who believed that the photograph was intentionally damaged and was distraught about the photograph. The conduct was remote in time occurring more than three years ago. There were no aggravating or extenuating

circumstances. Respondent's conduct was neither praiseworthy nor blameworthy. There was no evidence that the conduct was either likely or unlikely to occur again. There were no constitutional implications with regard to Respondent's conduct.

LEGAL CONCLUSIONS

1. The Commission has jurisdiction to proceed in this matter pursuant section 44944. (Factual Findings 1 through 4.)

2. Pursuant to section 44944, subdivisions (c)(1)-(3), when a school board recommends dismissal for cause, the Commission may only vote for or against it. Likewise, when suspension is recommended, the Commission may only vote for or against suspension. The Commission may not dispose of a charge of dismissal by imposing probation or an alternative sanction.

3. The District has the burden of proof in this matter because it is seeking to dismiss Respondent from employment as a certificated employee. The standard of proof is preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1039.) The "preponderance of the evidence" standard requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence. (*In re Michael G.* (1998) 63 Cal.App.4th 700,709.)

4. The Amended Accusation and Statement of Charges does not set forth specifically which of the District's factual allegations relate to each of the four alleged grounds for dismissal: (1) unprofessional conduct, (2) immoral conduct, (3) evident unfitness for service, and (4) 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.

5. Section 44932 provides in pertinent part:

(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.

6. The term "immoral conduct" has been defined to include conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, dissoluteness; or as willful, 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. (*Board of Ed. of San Francisco Unified School Dist. v. Weiland* (1960) 179 Cal.App.2d 808, 811.)

7. "Unprofessional conduct," as used in section 44932, subdivision(a)(1), may be defined as conduct "Unprofessional conduct," as used in section 44932, subdivision(a)(1), may be defined as conduct which violates the rules or ethical code of a profession or is such conduct that is unbecoming of a member of a profession in good standing. (*Board of Education v. Swan* (1953) 41 Cal.2d 546, 553; *Perez v. Commission on Professional Competence* (1983) 149 Cal. App. 3d 1167, 1174.)

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

9. Under section 44932, subdivision (a)(7), the violation of school rules must be persistent or "motivated by an attitude of continuous insubordination." (*Governing Board of the Oakdale Union School Dist. v. Seaman* (1972) 28 Cal.App. 3d 77, 84.) Cause for discipline may be based on the violation of school rules. (*San Dieguito Union High School Dist. v. Commission on Professional Competence* (1985) 174 Cal.App.3d 1176, 1180-1181.)

10. With respect to determination of witness credibility: On the cold record a witness may be clear, concise, direct, unimpeached, uncontradicted -- but on a face to face evaluation, so exude insincerity as to render his credibility factor nil. Another witness may fumble, bumble, be unsure, uncertain, contradict himself, and on the basis of a written transcript be hardly worthy of belief. But one who sees, hears and observes him may be convinced of his honesty, his integrity, his reliability. (*Meiner v. Ford Motor Co.* (1971) 17 Cal.App.3d 127, 140.) The trier of fact may "accept part of the testimony of a witness and reject another part even though the

latter contradicts the part accepted.” (*Stevens v. Parke Davis & Co.* (1973) 9 Cal.3d 51, 67.) The trier of fact may also “reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material.” (*Id.*, at 67-68, quoting from *Neverov v. Caldwell* (1958) 161 Cal.App.2d 762, 767.) Further, the fact finder may reject the testimony of a witness, even an expert, although not contradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.)

11. The Commission found Respondent’s testimony more credible and his version of events more probable than the uncorroborated testimony offered by student JS. While the Commission found EM credible, his young age at the time of the incident, confusion about time and grade, and inability to identify Respondent, caused the Commission to doubt whether or not the person that EM referred to as “Mr. Cordoba” was in fact, Respondent. Moreover, EM’s testimony was uncorroborated. Under these circumstances, Respondent’s outright denial of ever slapping EM or throwing his pencils, erasers and markers was more persuasive.

12. The Commission found that Complainant did not establish by a preponderance of the evidence that Respondent’s conduct was immoral. It was not established that Respondent’s conduct was inconsistent with rectitude, indicative of corruption, indecency, depravity, dissoluteness; nor that he displayed willful, flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the community or an inconsiderate attitude toward good order and the public welfare. The Commission determined that cause does not exist to dismiss Respondent for immoral conduct, pursuant to section 44932, subdivision (a) (1), for the reasons set forth in Factual Findings 1-23 and Legal Conclusions 2-6, 10 and 11.

13. The Commission found that Complainant did not establish by a preponderance of the evidence that Respondent’s conduct was unprofessional. However, the handling of EM’s photograph, while not unprofessional, did not reflect best practices or good classroom management skills. However, the conduct did not violate the rules or ethical code of a profession nor was the conduct such that it would constitute conduct unbecoming of a member of a profession in good standing or unfitness to teach pursuant to section 44932, subdivision (a)(5), for the reasons set forth in Factual Findings 1-23 and Legal Conclusions 2-5, 7, 10 and 11.

14. The Commission found that Complainant did not establish by a preponderance of the evidence that Respondent is unfit to teach. It was not established that Respondent has a defect in his temperament or a fixed character trait that makes him unfit to teach. The Commission determined that cause does not exist to dismiss Respondent for evident unfitness for service, pursuant to section 44932, subdivision (a)(5), for the reasons set forth in Factual Findings 1-23 and Legal Conclusions 2-5, 9, 10 and 11.

15. The Commission found that Complainant did not establish that Respondent violated school rules, the District Code of Conduct, the Code of Ethics, the Corporal Punishment Policy, or any other directive, policy, law, or rule set by the District or the State board of Education on a persistent basis. The Commission determined that cause does not exist to dismiss Respondent for persistent violation of school laws of the state or the reasonable regulations prescribed by 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) (7), for the reasons set forth in Factual Findings 1-23 and Legal Conclusions 2-5, 8, 10 and 11.

16. Even where unprofessional conduct or evident unfitness for service are established, it must also be established that such unprofessional conduct, or evident unfitness renders the Respondent unfit to teach. (*Morrison v. State Board of Education* (1969) 1 Cal. 3d 214, 229-230 (*Morrison*); *Fontana Unified School District v. Burman* (1988) 45 Cal. 3d 208; *Woodland, supra*, 4 Cal.App. 4th at pp. 1444-1445.) Under the facts of the *Morrison* case, the Court reviewed the teacher's conduct and determined that a school board may consider such specific criteria as (1) the likelihood that the conduct adversely affected students or fellow teachers and the degree of such adversity; (2) the proximity or remoteness in time of the conduct; (3) the type of teaching certificate held by the teacher; (4) the existence of extenuating or aggravating circumstances and publicity, if any, surrounding the conduct; (5) the praiseworthiness or blameworthiness of the motives resulting in the conduct; (6) the likelihood of recurrence of the questioned conduct; and (7) the extent that the discipline may adversely impact or have a chilling effect on the constitutional rights of the teacher.

17. Analysis of the *Morrison* factors indicates that the Commission has broad discretion in disciplinary matters. The role of the Commission is not merely to determine whether the charged conduct in fact occurred, but to decide whether the conduct, as measured against the *Morrison* criteria, demonstrates unfitness to teach. (*Fontana, supra*, 45 Cal. 3d. at 220.) Although it is not necessary to analyze the *Morrison* criteria here, an application of the *Morrison* factors to the facts of this case also leads to the conclusion that Respondent is not unfit to teach.

(a) *Morrison* Factor: The likelihood that the conduct adversely affected students or fellow teachers and the degree of such adversity. Respondent's involvement in the damage to EM's photograph, had an adverse effect on EM. Although the damage was most likely accidental, EM believed that it was intentional.

(b) *Morrison* Factor: The proximity or remoteness in time of the conduct. Respondent's conduct was remote in time occurring more than three years ago.

(c) *Morrison* Factor: The type of teaching certificate held by the teacher. Respondent holds a Multiple Subject teaching credential, which entitles him to teach classes typically found at the elementary school level.

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(d) *Morrison* Factor: The existence of extenuating or aggravating circumstances and publicity, if any, surrounding the conduct. There were no extenuating or aggravating circumstances.

(e) *Morrison* Factor: The praiseworthiness or blameworthiness of the motives resulting in the conduct. Respondent's conduct was neither praiseworthy nor blameworthy.

(f) *Morrison* Factor: The likelihood of recurrence of the questioned conduct. There was no evidence that the conduct was likely or unlikely to occur again.

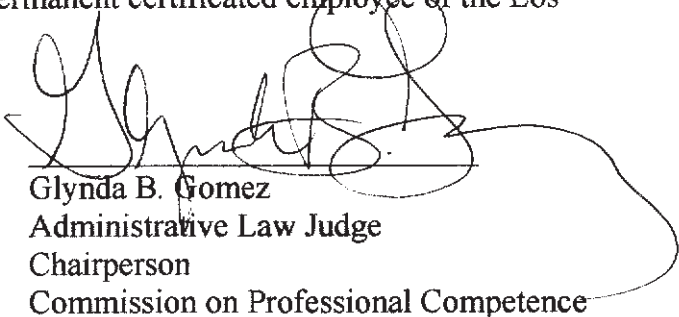
(g) *Morrison* Factor: The extent that discipline may adversely impact or have a chilling effect on the constitutional rights of the teacher. No adverse effect on constitutional rights was identified as being implicated in this action for termination of Respondent from employment with the District.

18. Respondent's conduct does not show such unfitness to teach as to warrant dismissal from District employment. (Factual Findings 1-23 and Legal Conclusions 1-17.)

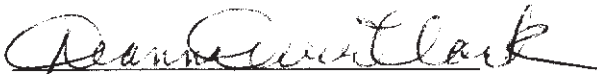
ORDER

The Accusation and Statement of Charges are dismissed. Edgar Cordoba shall not be dismissed from his position as a permanent certificated employee of the Los Angeles Unified School District.

April 6, 2015


Glynda B. Gomez
Administrative Law Judge
Chairperson
Commission on Professional Competence

April 2, 2015


Deanna Clark
Member
Commission on Professional Competence

April __, 2015

Glynda B. Gomez
Administrative Law Judge
Chairperson

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April __, 2015

Deanna

Clark
Member

Commission on Professional Competence

April __, 2015



Elizabeth Hayne

Member

Commission on Professional Competence