

BEFORE A COMMISSION ON PROFESSIONAL COMPETENCE  
SOUTH SAN FRANCISCO UNIFIED SCHOOL DISTRICT  
COUNTY OF SAN MATEO  
STATE OF CALIFORNIA

In the Matter of the Amended Accusation  
Against:

JAMES EBERLE, a permanent certificated  
employee of the South San Francisco Unified  
School District,

Respondent.

OAH No. 2009110115

**DECISION**

This matter was heard by a Commission on Professional Competence in South San Francisco, California, on February 1, 2, 3, and 4, and March 10 and 11, 2010. The commission members were Ricardo Cooke, Haywood Finder, and Steven C. Owyang. Owyang, an Administrative Law Judge, State of California, Office of Administrative Hearings, served as the Chairman of the commission.

Damara L. Moore, Dannis Wolliver Kelley, represented the South San Francisco Unified School District.

Sarah Sanford-Smith, Beeson, Tayer & Bodine, represented respondent James Eberle, who was present.

The record was held open for post-hearing briefing. The District's and respondent's briefs were timely served on March 24, 2010, and marked for identification as Exhibits 47 and JJ respectively. The matter was thereafter submitted for deliberation by the commission.

**FACTUAL FINDINGS**

1. John Thompson, Assistant Superintendent, South San Francisco Unified School District, issued the amended accusation in his official capacity.

2. Respondent James Eberle is a permanent certificated employee of the District. He began the 2009 – 2010 school year at Baden High School but was assigned to work as a substitute teacher after the initiation of these proceedings in October 2009.

3. On May 15, 2009 Assistant Superintendent Thompson issued a Notice of Unprofessional Conduct and Unsatisfactory Performance to respondent. More than 90 calendar days later, on October 8, 2009, Thompson filed with the Governing Board of the District written charges alleging that cause exists to dismiss respondent from his employment with the District. On that date, the board authorized and directed the service of a notice on respondent that he would be dismissed from his employment with the District at the expiration of 30 days unless he requested a hearing as provided by Education Code section 44934.

4. On October 12, 2009, the District notified respondent of its intention to dismiss him at the expiration of 30 days from the date of service of notice upon him of the charges presented by the board, unless he demanded a hearing to determine if there is cause to dismiss him from employment with the District. Respondent timely demanded a hearing to determine if there is cause to dismiss him from the District.

5. Respondent grew up in South San Francisco and attended the District's schools. He graduated from El Camino High School in 1984. He received his teaching credential from San Francisco State University.

6. Respondent has worked for the District for some 18 years. He taught at Parkway Heights Middle School (Parkway) from 1992 to 2006. At Parkway, respondent served as a class advisor and the teacher-in-charge when the principal and vice principal were away from the campus. Respondent taught English and social studies to six classes at Parkway. He had a 50-minute preparation period. His workday was from 8:30 a.m. to 3:05 p.m. Respondent received positive evaluations at Parkway.

7. Parkway was and continues to be in program improvement status. Toward the end of the 2006 – 2007 school year, and as part of Parkway's program improvement efforts, the District decided to transfer respondent to a high school beginning in the 2007 – 2008 school year. Respondent had the choice of two high schools, and chose to transfer to Baden High School (Baden), the District's continuation high school.

8. Respondent was unhappy about being transferred away from Parkway. He wrote on the back wall in his Parkway classroom with a permanent marker in letters approximately eight inches high:

J. Eberle

1992 – 2007

Respondent's graffiti was discovered by Parkway Principal Jay Rowley in August 2007. At a September 19, 2007 meeting, respondent admitted writing the graffiti. Thereafter, on September 26, 2007, Assistant Superintendent Thompson issued a letter of reprimand to respondent. Thompson wrote:

This conduct violates District rules and policies, which prohibit vandalism and the destruction or defacement of school property. In addition, your conduct is not consistent with the District's expectations of teacher behavior; we do not expect our teachers to deface school property. To the contrary, we expect teachers to model the behavior we expect of our students. If a student were to deface school property in the same manner that you did, the student would be disciplined, be charged a fee to remove the graffiti and would face possible criminal prosecution. Your conduct obviously did not model the behavior we expect of our students.

Respondent did not again write graffiti or otherwise deface District property. He paid the cost of removing the graffiti.

9. When respondent removed his belongings from his Parkway classroom, he took home a school projector for his son to use while playing video games. Respondent asserts that he intended to return the projector when he finished cleaning out his classroom. When his principal questioned him about the projector, respondent acknowledged that he had it. Respondent returned the projector to the school during the summer.

10. Respondent taught at Baden in the 2007 – 2008 and 2008 – 2009 school years. He had not previously taught in a high school. He was assigned to teach an English Language Arts (ELA) class and two Read 180 classes at Baden. Respondent taught from 8:15 a.m. to 12:30 p.m. four days per week at Baden. One day per week he also tutored students on the California High School Exit Examination (CAHSEE) for about 50 minutes. Respondent had a two and one-half hour preparation period four days per week. His preparation period was shorter when he did CAHSEE tutoring. Respondent had fewer classes and students at Baden than he had previously at Parkway. He had a longer preparation period at Baden than he had previously at Parkway.

11. Read 180 is a highly structured and scripted English course for underachieving students. Read 180 is designed to be taught in 90-minute blocks of time. The class starts with the students meeting as a whole group. The students then break into three groups. One group does Read 180 work on computers, the second group does silent reading, and the third group works with the teacher. The groups rotate after 20 minutes and rotate again after another 20 minutes. The class ends by meeting as a whole for about 10 minutes. Class periods at Baden are 83 minutes long, so Read 180 is taught in 83 minutes rather than 90 minutes. Respondent did not consistently teach his Read 180 classes as scripted and directed. He did not, for example, ensure that his students used the time allocated for Read 180 computer work as mandated by the Read 180 curriculum.

12. School rules prohibited students from wearing hats and hoods in class. Respondent consistently failed to enforce these rules in his classroom and allowed students to wear hats and hoods in his class, despite multiple admonitions from District administrators

to enforce the rules. At hearing, respondent acknowledged that he often did not stop students from wearing hats and hoods in class.

13. Students in respondent's ELA and Read 180 classes engaged in frequent off task behavior, including surfing the internet, sleeping, playing solitaire, sending and receiving text messages, using cell phones, and listening to music on personal electronic devices. Some students were idle for long periods of time. Respondent often did not prohibit or stop this conduct, including while his class was being observed by District administrators.

At hearing, respondent acknowledged that he allowed students to use cell phones and iPods in class during the 2007 – 2008 school year. He maintained that this did not disrupt the class. He further acknowledged that he allowed electronic devices to be used in class at the beginning of the 2008 – 2009 school year. Respondent began to enforce the rule against electronic devices more rigorously later that year, after many admonitions from the school administration.

14. Throughout his tenure at Baden, respondent was unhappy about having been transferred out of Parkway, had a lack of motivation about his work, and was unable to make significant improvement in his performance despite many recommendations and opportunities for improvement. Events in his personal life (such as his wife losing her job and having to put down his dog) may have contributed to his lack of motivation. Through numerous classroom observations, meetings with school administrators, and evaluations, respondent on multiple occasions was asked to improve his performance in various ways, including to enforce school rules, submit lesson plans, and follow the Read 180 methodology. Despite being given multiple opportunities and directives to improve his performance, respondent had unsatisfactory evaluations in the 2007 – 2008 and 2008 – 2009 school years.

15. Under the collective bargaining agreement applicable to respondent, and in accordance with Education Code sections 44660 and 44662, District certificated employees are evaluated across five domains: Planning and Designing Instruction; Instruction; Classroom Management; Assessment; and, Professional Responsibilities. The five domains include 18 elements. The domains and their respective elements are:

Domain I: Planning and Designing Instruction

- Designs Long-Range Plans to Accomplish Yearly Learning Goals
- Selects Appropriate Lesson Objectives
- Designs Lessons that include Elements Essential for Learning

Domain II: Instruction

- Delivers Effective Instruction
- Utilizes Appropriate Learning Materials

- Utilizes a Variety of Instructional Strategies to Meet the Needs of the Students
- Demonstrates Subject Matter Competence

#### Domain III: Classroom Management

- Maintains a Positive Learning Environment
- Promotes Appropriate Student Behavior
- Effectively Manages Instructional Time
- Organizes Physical Space

#### Domain IV: Assessment

- Establishes Clear Performance Standards
- Monitors Student Learning
- Adjusts Teaching and Learning Based on Assessment
- Uses Assessment Results to Give Students and/or Parents Timely, Accurate and Constructive Feedback

#### Domain V: Professional Responsibilities

- Grows and Develops Professionally
- Shares in the Responsibility of the Smooth Operation of the School
- Complies with Established Rules, Regulations, Policies and Laws

Pursuant to the collective bargaining agreement an overall unsatisfactory evaluation results if two or more elements in one domain are marked unsatisfactory or if four or more elements in domains one through five are marked unsatisfactory. Further, a permanent teacher who receives an overall evaluation of unsatisfactory is referred to the Peer Assistance and Review program (PAR).

16. Robert Beauchamp was the principal at Baden and respondent's supervisor in the 2007 – 2008 school year. In a September 11, 2007, initial evaluation conference, Beauchamp provided and respondent signed an evaluation document that informed respondent he would be rated as "Satisfactory," "Needs Improvement," or "Unsatisfactory" in the 18 elements of the five domains.

17. Respondent frequently failed to submit lesson plans despite repeated requests from Principal Beauchamp. Beauchamp's requests for respondent's lesson plans were reflected, for example, in memoranda dated January 19, 25, and 26, and February 12, 2008. Beauchamp also spoke with respondent about the need to submit lesson plans on numerous occasions. Respondent assured Beauchamp he would submit lesson plans but consistently failed to do so.

Beauchamp offered respondent assistance with lesson planning. In a January 26, 2008, memorandum to respondent, Beauchamp wrote:

You mentioned in our conversation on Thursday, January 24<sup>th</sup>, that you haven't designed long terms plans for the remainder of this school year. Please let me know if I can assist you in accomplishing your long term planning by connecting you with other English teachers in our school district who might provide planning information or in providing other curricular resources.

At hearing, respondent acknowledged that Beauchamp instructed him to turn in lesson plans. Respondent acknowledged that he often did not submit lesson plans because he had difficulty doing so, had trouble figuring what to do each day, and got "stuck." Respondent maintained, however, that he did not "wing it" despite not turning in lesson plans.

18. Principal Beauchamp conducted numerous observations of respondent's teaching, including on September 27, October 3, October 22, October 25, November 30, and December 4, 2007, and January 18, January 24, February 19, February 25, and April 2, 2008.

19. Principal Beauchamp provided respondent a January 28, 2008 interim evaluation. Beauchamp rated respondent "Unsatisfactory" in eight elements of the five domains (Domain I: Designs Long-Range Plans to Accomplish Yearly Learning Goals, Selects Appropriate Lesson Objectives, Designs Lessons that include Elements Essential for Learning; Domain II: Delivers Effective Instruction, Utilizes a Variety of Instructional Strategies to Meet the Needs of the Students; Domain III: Effectively Manages Instructional Time; Domain IV: Establishes Clear Performance Standards, Adjusts Teaching and Learning Based on Assessment), "Needs Improvement" in eight elements, and "Satisfactory" in three elements.

Beauchamp noted:

Lessons do not utilize the full instructional period and students are not managed so that they remain on task during the entire class time. Expectations of high learning and achievement [*sic*] are not present. Clear academic standards have not been set and there was no evidence that student learning has been monitored [*sic*] or that the instructional practices have been modified based on student assessment. The Read 180 program has not been implemented to the level discussed and agreed upon with the principal at the beginning of the school year. Jim has not incorporated the suggestions for improvement that have been discussed in earlier post-observation meetings and poor communication with administration has resulted in delay of the Read 180 implementation.

Beauchamp gave respondent specific recommendations regarding Read 180:

The second and third period blocks (classes) during the Spring 2008, should be focusing primarily on Read 180. These students should be participating in the Read 180 program between three and five days each week in order to cover the curriculum. The Read 180 assessments should also be used regularly to provide feedback on student progress. Some of these reports should also be shared with the students and parents.

Beauchamp made numerous other observations and recommendations to improve respondent's performance with: instructional planning and design; use of time; weekly lesson plans; objectives; instruction; opportunity to engage students; goals, activities, and expectations; classroom management; limiting computer use to instructional purposes; assessment; enforcement of school rules regarding conduct and behavior; and, communication with students, parents, faculty members and the principal. Beauchamp offered to assist respondent with these observations and recommendations. Respondent had the right and opportunity to respond in writing to the evaluation. He signed it, but did not add any comments or contradict the evaluation.

20. Although respondent was supposed to be on campus until 3:00 p.m. each day, there were occasions when Principal Beauchamp could not locate respondent. On April 4, 2008, Beauchamp tried to find respondent at 1:50 p.m. and again at 3:00 p.m. but was unable to do so. Beauchamp wrote a note to respondent telling him that he needed to be on campus until 3:00 p.m. unless prior arrangements were made.

21. Principal Beauchamp provided respondent an April 14, 2008 final evaluation. Beauchamp noted that respondent had good rapport with his students and that his students responded positively to his instructions and directives. Beauchamp also noted, "Some improvement has occurred in utilizing the entire eighty-three minute instructional period. Beauchamp, however, rated respondent unsatisfactory in nine elements of the five domains (Domain I: Designs Long-Range Plans to Accomplish Yearly Learning Goals, Selects Appropriate Lesson Objectives, Designs Lessons that include Elements Essential for Learning; Domain II: Delivers Effective Instruction, Utilizes a Variety of Instructional Strategies to Meet the Needs of the Students; Domain III: Effectively Manages Instructional Time; Domain IV: Establishes Clear Performance Standards, Adjusts Teaching and Learning Based on Assessment; and, Domain V: Complies with Established Rules, Regulations, Policies and Laws). Beauchamp gave respondent an overall evaluation of "Unsatisfactory."

Beauchamp wrote:

In the Fall semester, a request for long term lesson plans resulted in one lesson plan being turned in and a one page

general weekly schedule of English activities. As a result, it was agreed that weekly lesson plans would be turned in to the principal every Monday. In the nine weeks since this agreement only two weekly lesson plans have been received.

As had been the case with the January 28, 2008 interim evaluation, Beauchamp gave respondent specific recommendations regarding Read 180:

These students should be participating in the Read 180 program between three and five days each week in order to cover curriculum. The Read 180 assessments should also be used regularly to provide feedback on student progress. Some of these reports should also be shared with the students and parents.

Beauchamp provided respondent a full page of specific recommendations to improve his performance in the five domains. Among the specific recommendations were:

[D]evelop long range plans that address California standards and build upon the student's previous knowledge and experiences. . . . Weekly lesson plans should continue to be submitted to the principal every Monday morning for the remainder of the Spring 2008 semester.

Respondent had the right and opportunity to respond in writing to the evaluation. He signed it, but did not add any comments or contradict the evaluation.

22. As provided in the collective bargaining agreement, respondent was assigned to the PAR program for the 2008 – 2009 school year. Teacher Kim Bambao was assigned as respondent's PAR consulting teacher. She is an experienced BTSA coach (a program of peer training for teachers). Bambao had not taught at the high school level and had not been a classroom teacher for some five years. Respondent was not given a voice in the selection of his PAR coach as required by the collective bargaining agreement, but it does not appear that respondent disputed Bambao's appointment at the time. At hearing, respondent contended that Bambao was not a good match for him but acknowledged that Bambao's coaching was helpful.

23. Kim Bambao worked closely and extensively with respondent over the 2008 – 2009 school year. She had numerous observations and meetings with respondent and worked with him on many facets of teaching, including lesson planning, methods of instruction, lesson delivery, and student engagement. She and Instructional Technologist Erica Chan worked with respondent on the Read 180 program. While noting some improvement in respondent's teaching performance, including in the Read 180 program, Bambao felt by the end of the 2008 – 2009 school year that respondent had not made sufficient progress. Bambao told the PAR joint committee (composed of three teachers and two administrators)



that she did not want to work with respondent in the 2009 – 2010 school year because she had exhausted her efforts without getting respondent where he needed to be.

24. Benjamin Stephen Redmond was the principal at Baden and respondent's supervisor in the 2008 – 2009 school year. On October 6, 2008, Redmond gave respondent a five-page improvement plan that set forth in detail concerns about respondent's performance and detailed directives for improving his performance across the five domains. Respondent signed the improvement plan. Respondent's April 14, 2008 evaluation was an attachment to the improvement plan.

The improvement plan directed respondent to participate in the PAR program for the 2008 – 2009 school year and encouraged respondent to work cooperatively with his PAR consulting teacher, Kim Bambao. The memorandum also informed respondent that he would be observed at least once each month, that observations would be followed by observation reports and conferences that would include recommendations for improvements. The memorandum specifically directed respondent to submit weekly lesson plans.

25. Respondent continued not to enforce school rules in the first months of the 2008 – 2009 school year. Respondent continued to allow students to wear hats and to surf the internet in class. On November 19, 2008, respondent received a warning letter from Principal Redmond regarding his failure to enforce the hat rule.

26. Respondent continued not to provide weekly lesson plans in the 2008 – 2009 school year. Principal Redmond gave respondent warning letters dated November 19 and December 11, 2008, and January 12, 2009, regarding his failure to submit weekly lesson plans as directed. Redmond reiterated that respondent was to submit lesson plans by 8:00 a.m. each Monday. Respondent was also informed that his failure to comply with the directive would result in a formal letter of reprimand.

Although respondent submitted some lesson plans, he did not submit lesson plans each week as directed.

27. Principal Redmond gave respondent a January 21, 2009 interim evaluation. Redmond rated respondent as "Unsatisfactory" in eight elements of the five domains (Domain I: Designs Long-Range Plans to Accomplish Yearly Learning Goals, Designs Lessons that include Elements Essential for Learning; Domain III: Promotes Appropriate Student Behavior, Effectively Manages Instructional Time; Domain IV: Establishes Clear Performance Standards, Adjusts Teaching and Learning Based on Assessment, Uses Assessment Results to Give Students and/or Parents Timely, Accurate, and Constructive Feedback; and, Domain V: Complies with Established Rules, Regulations, Policies and Laws). Redmond gave respondent an overall evaluation of "Unsatisfactory."

Respondent had the right and opportunity to respond in writing to the evaluation. He signed it, but did not add any comments or contradict the evaluation.

28. Assistant Superintendent Thompson observed respondent's Read 180 class on February 19, 2009. Respondent had submitted a lesson plan to Thompson that included as one of the learning objectives, "Use viewing strategies to identify important strategies." Thompson considered this objective "unclear and nonsensical" and believed that respondent was not following the general instructional plan for the Read 180 curriculum. Thompson also observed:

Throughout the observed lesson, students would frequently enter or leave the classroom without any observable permission from the teacher. Some students appeared to pick up a pass prior to leaving the classroom. Mr. Eberle did not visibly monitor this at all. For example, [V., K., B. – student names redacted] and one other student left the classroom and returned. They were gone between six and nine minutes each. A different student entered the class at 10:30 without a pass, sat down at a computer, and began working without any acknowledgement from Mr. Eberle. I don't believe that this complies with Baden school policy. Upon entry into Mr. Eberle's classroom at the end of 1<sup>st</sup> block, students were wearing hats and one was using an electronic device. No students were wearing hats in [*sic*] during 2<sup>nd</sup> block but one student was using a phone to "text" someone.

Respondent signed Thompson's observation report, but did not add any comments or contradict Thompson's observations.

29. Assistant Superintendent Thompson observed respondent's class on February 23, 2009. Respondent was not present at the beginning of the class at 8:15 a.m. During the observation, students used cell phones, sent text messages, and listened to music. Other students left the classroom; one of these students walked past respondent as she left the classroom. Thompson observed:

There was no instruction that took place in this lesson other than some feedback provided by Mr. Eberle to individual students. This due, at least in part, to Mr. Eberle having no real instructional plan for this lesson. Mr. Eberle needs to plan for his lessons.

Thompson further observed:

Students in this class frequently came and left the classroom without Mr. Eberle's approval or, at times, his awareness. In addition, Mr. Eberle openly allowed students to use electronic devices in the classroom. Mr. Eberle was two minutes late to

class and was not prepared to begin instruction once he arrived at the classroom.

Respondent signed Thompson's observation report, but did not add any comments or contradict Thompson's observations.

30. Principal Redmond observed respondent's Read 180 class on February 24, 2009. Respondent had not turned in lesson plans for the week. No agenda or objectives were on the board to tell students what was expected. Redmond observed that students were on task and focused, that respondent circled the room to assess students' conduct, and that the groups switched with no interruptions. A student was using earphones and Redmond was concerned that students in respondent's classroom did not follow school rules against using electronic devices in the classroom.

Respondent signed Thompson's observation report. Respondent did not add any comments of his own.

31. Assistant Superintendent Thompson observed respondent's ELA class on March 13, 2009. The observation was by pre-arrangement between Thompson and respondent. Respondent prepared and gave a lesson plan to Thompson before the observation. Thompson observed that respondent's students were "well-behaved and responded appropriately to directives given by Mr. Eberle." Respondent's lesson included a discussion of poems by Langston Hughes, the Harlem Renaissance, and their connections with the present. Thompson observed:

Mr. Eberle's intent to connect the content of Langston Hughes' poetry to modern day events was good. Mr. Eberle attempted to relate events that occurred during the Harlem renaissance to events occurring today such as the election of President Obama and the current economic crisis. Students were interested in this discussion. However, Mr. Eberle did not make the connection between Langston Hughes [*sic*] poetry and the discussion about the two time periods. Mr. Eberle vacillated between talking about the two different time periods and then Langston Hughes' poems – but never connected the two.

Thompson observed, "I did not see any students using electronic devices or wearing hats."

Respondent signed Thompson's observation report. Respondent did not add any comments of his own.

32. Assistant Superintendent Thompson observed respondent's ELA class on March 31, 2009. Respondent had not turned in lesson plans for the week. A student got up and left the classroom, later returned, and later left again. At 9:20 a.m., Thompson saw five

of 15 students working. At 9:30 a.m., two of 15 students appeared to Thompson to be on task. Thompson observed much off task behavior, lack of clear direction from respondent, and little or no attempt by respondent to ensure that students were engaged in learning. Four different students used electronic devices on six occasions. Four students wore hats or hoods. Students came and went as they pleased.

Respondent signed Thompson's observation report, but did not add any comments or contradict Thompson's observations.

33. Principal Redmond gave respondent an April 15, 2009 final evaluation. Redmond rated respondent as "Unsatisfactory" in 10 elements in the five domains (Domain I: Designs Long-Range Plans to Accomplish Yearly Learning Goals, Selects Appropriate Lesson Objectives, Designs Lessons that include Elements Essential for Learning; Domain II: Delivers Effective Instruction, Utilizes a Variety of Instructional Strategies to Meet the Needs of the Students; Domain III: Effectively Manages Instructional Time; Domain IV: Establishes Clear Performance Standards, Monitors Student Learning, Adjusts Teaching and Learning Based on Assessment; and, Domain V: Complies with Established Rules, Regulations, Policies and Laws). Redmond gave respondent an overall evaluation of "Unsatisfactory."

Respondent had the right and opportunity to respond in writing to the evaluation. He signed it, but did not add any comments or contradict the evaluation.

34. On May 15, 2009 Assistant Superintendent Thompson issued a fifteen-page Notice of Unprofessional Conduct and Unsatisfactory Performance to respondent. The notice stated:

This letter is not a dismissal notice; however, it may be necessary to recommend dismissal or suspension in the future based on the conduct set forth herein and if your conduct or performance does not improve. In the event that dismissal or suspension proceedings are filed against you, this notice is not intended to preclude causes or instances other than those set forth below.

The notice reiterated that the District evaluated certificated employees across the five domains. It recited the "Unsatisfactory" and numerous "Needs Improvement" ratings respondent had received since his September 11, 2007 initial evaluation conference. The notice referred to the numerous evaluations, requests for lesson plans, recommendations for performance improvement, warning letters, and classroom observations respondent had received over the past two school years.

The notice provided respondent 23 specific directives to improve his performance and informed him that the District would monitor his performance over the next 90 days. It advised respondent to meet with his supervisor and others as directed by his supervisor who

would provide him help in complying with the directives and in ways to improve his performance.

35. Assistant Superintendent Thompson observed respondent's ELA class on September 9, 2009. Respondent was not present and the classroom door was locked when the class period began at 8:15 a.m. One student was waiting at the door while 14 of the 15 students in the class were late. Respondent arrived at 8:17. During the class respondent did not address the issue of the 14 students being late. Respondent appeared not to have any specific plan for the class. He did not keep students on task. A discussion about a speech by President Obama that respondent read aloud for 14 minutes primarily involved only three students. Thompson observed that few students were engaged in learning activities. Students held conversations among themselves, passed notes, used cell phones, and called out and interrupted the class. One student used a cell phone to send text messages while speaking directly with respondent. Respondent did not enforce school rules against electronic devices, hats, or tardiness.

Thompson gave respondent a four-page report on the September 9, 2009 observation. Respondent had the opportunity to attach his own comments but did not do so and did not controvert Thompson's report. Respondent signed the report, acknowledging that it had been received and discussed.

36. Principal Redmond sent respondent a September 25, 2009 warning letter. Respondent had not turned in lesson plans for the weeks of September 7, September 14, and September 21 despite previous directives to do so. Redmond reminded respondent that his 2008 – 2009 improvement plan stated:

Weekly lesson plans are to be handed in no later than 8:00 a.m.  
on the Monday of that week to Stephen Redmond.

Redmond stated:

Your failure to comply with this directive after repeated warnings has shown your unwillingness to plan effective lessons for your students. Not turning in your lesson plans limits your ability to clearly communicate objectives for each lesson, which limits the amount of learning that is needed for your students to be successful.

In October 2009, at the urging of his wife, respondent went to see Desiree Arretz, M.D., an internist at St. Luke's Hospital who was also respondent's neighbor. After forming a doctor-patient relationship with respondent, Dr. Arretz diagnosed respondent with minor depression. Among respondent's symptoms were a lack of motivation and anhedonia, i.e., a lack of interest in doing the things one normally does or enjoys. Dr. Arretz opined that respondent had had years of undiagnosed depression. She prescribed the antidepressant medication Lexapro for respondent.

Although respondent's depression may have affected his motivation and job performance at Baden, he did not raise the issue with his supervisors, was not diagnosed until October 2009, and made no request for reasonable accommodation.<sup>1</sup>

37. Respondent for the most part did not deny or contradict the evaluations and observations provided by Principals Beauchamp and Redmond and by Assistant Superintendent Thompson. At hearing, respondent largely acknowledged the accuracy of those evaluations and observations. It was not apparent from respondent's testimony at hearing that he had or would significantly improve his performance.

38. The evidence did not show that Assistant Superintendent Thompson acted against respondent because of bias.

### LEGAL CONCLUSIONS

1. Respondent asserts that the charges against him must be dismissed, arguing that the District failed to comply with the 90-day notice requirement in Education Code section 44938. Section 44938 provides, in pertinent part:

(b) The governing board of any school district shall not act upon any charges of unsatisfactory performance unless it acts in accordance with the provisions of paragraph (1) or (2):

(1) At least 90 calendar days prior to the date of the filing, the board or its authorized representative has given the employee against whom the charge is filed, written notice of the unsatisfactory performance, specifying the nature thereof with such specific instances of behavior and with such particularity as to furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge. The written notice shall include the evaluation made pursuant to Article 11 (commencing with Section 44660) of Chapter 3, if applicable to the employee.

Respondent received a Notice of Unprofessional Conduct and Unsatisfactory Performance on May 15, 2009. The written charges and notice of dismissal were filed on October 8, 2009, more than 90 calendar days later. Respondent asserts that only days during the school year (and not days during the summer break) may be counted toward the 90 days.<sup>2</sup>

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<sup>1</sup> Official notice is taken of the Diagnostic and Statistical Manual of Mental Disorders IV (DSM-IV) criteria for major depression and the Diagnostic and Statistical Manual of Mental Disorders IV-TR (DSM-IV-TR) criteria for major depression.

<sup>2</sup> Discounting summer vacation days, respondent calculates that he received only 74 days notice.

That is not what the statute demands; section 44938 requires “90 calendar days.” The District complied with that requirement. Respondent’s request to dismiss the charges against him is denied.

2. The District seeks to dismiss respondent from employment on the basis of unsatisfactory performance and unprofessional conduct. (Ed. Code, § 44932, subds. (a)(1) and (a)(4)). The District has the burden of proving its case by a preponderance of the evidence.

3. The evidence established respondent’s unsatisfactory performance and unprofessional conduct over more than two school years, including that respondent: defaced school property; failed to enforce school rules; frequently and persistently allowed off task student behavior; failed to submit lesson plans; had numerous “Unsatisfactory” evaluations across the five domains and in his overall performance; could not be located on campus during work hours; did not teach Read 180 as scripted and directed; and, was unmotivated, “stuck,” and had trouble figuring out what to do each day. The evidence, moreover, established that the District gave respondent numerous opportunities, suggestions and directives to improve his performance but that respondent nevertheless did not make significant improvement in his job performance.

The collective bargaining agreement provides that an overall “Unsatisfactory” evaluation results if two or more elements in one domain are marked unsatisfactory or if four or more elements in domains one through five are marked unsatisfactory. Respondent had overall “Unsatisfactory” evaluations under either criterion, in both 2007 – 2008 and 2008 – 2009. Notably, respondent did not contest or refute the “Unsatisfactory” ratings he received at the time of his evaluations. Moreover, he essentially did not dispute his evaluations at the hearing in this matter.

The District established cause to dismiss respondent from employment for unsatisfactory performance and unprofessional conduct. (Ed. Code, § 44932, subds. (a)(1) and (a)(4).)

4. In *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, the Supreme Court articulated factors that are considered in determining a teacher’s fitness to serve: (1) the likelihood that the conduct adversely affected students or fellow teachers; (2) the proximity or remoteness in time of the conduct; (3) the type of teaching certificate; (4) the extenuating or aggravating circumstances; (5) the praiseworthiness or blameworthiness of the motives resulting in the conduct; (6) the likelihood of recurrence of the conduct; and, (7) the extent to which disciplinary action would have a chilling effect on the constitutional rights of teachers. *Id.* at 229. *Morrison* involved a teacher’s non-teaching conduct outside the school setting. By contrast, the District here seeks to dismiss respondent for his performance in the school and classroom.

Although the District does not seek to dismiss respondent based on “evident unfitness to serve” (Ed. Code, § 44932, subd. (a)(5)), respondent asserts that the *Morrison* factors must

be considered. Application of the *Morrison* factors does not change the result in this case. It is determined: (1) respondent's conduct in the classroom adversely affected his students; (2) his conduct had a direct and proximate effect on the classroom environment; (3) the teaching credential factor is inapplicable to this case; (4) it was not shown that respondent's depression was an extenuating circumstance; (5) respondent's motives were not an issue in this case; (6) respondent repeatedly failed to comply with suggestions and directives for improvement, over two school years, and the evidence did not show that respondent significantly changed his performance so that his past conduct will not recur; and, (7) there was no showing that disciplinary action against respondent will have any effect on teachers' constitutional rights. Thus, the *Morrison* factors support the District's disciplinary action.

5. To protect confidentiality, all documents in the record containing student names shall be placed under seal, and shall be opened for public inspection only pursuant to the order of a court of competent jurisdiction.

#### ORDER

1. Respondent James Eberle is dismissed from his position as a permanent certificated employee of the South San Francisco Unified School District.

2. All documents in the record containing student names shall be placed under seal, and shall be opened for public inspection only pursuant to the order of a court of competent jurisdiction.

Date: July 1, 2010

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STEVEN C. OWYANG  
Chairperson, and on behalf of Commissioners  
Cooke and Finder<sup>3</sup>

RICARDO COOKE  
Commissioner

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<sup>3</sup> The decision is signed by the Chairman on behalf of Commissioners Cooke and Finder, with their authorization.



### CONCURRING AND DISSENTING OPINION

I agree that the District established cause to dismiss respondent James Eberle from his position on the basis of unprofessional conduct.

In my view, however, the District did not establish cause to dismiss respondent on the basis of unsatisfactory performance. While respondent's classroom methods may have been unorthodox, there was no showing that they harmed his students. Indeed, there was evidence that his students performed as well or better than other Baden students.

HAYWOOD FINDER  
Commissioner