

BEFORE THE  
COMMISSION ON PROFESSIONAL COMPETENCE  
BONSALL UNION SCHOOL DISTRICT  
STATE OF CALIFORNIA

In the Matter of the Dismissal of:

JAMES MACWHORTER,  
a Permanent Certificated Employee,

Respondent.

OAH No. 2011010013

**DECISION OF THE  
COMMISSION ON PROFESSIONAL COMPETENCE**

On June 8, 9, 10, and 13, 2011, a Commission on Professional Competence heard this matter in San Diego, California. The Commission consisted of Donald P. Cole, Administrative Law Judge, Ginger Riggs, and Henry Montelongo.

Arthur M. Palkowitz, Attorney at Law, represented complainant Justin Cunningham, Superintendent, Bonsall Union School District.

Georgiana D'Alessandro, Attorney at Law, represented respondent James MacWhorter, a permanent certificated employee of the Bonsall Union School District, who was present throughout the administrative hearing.

On June 13, 2011, the matter was submitted. On **July 11, 2011**, Administrative Law Judge Donald P. Cole signed the decision on behalf of the Commission, whose vote in the matter was unanimous.

**ISSUES**

1. Did respondent James MacWhorter demonstrate evident unfitness for service as a teacher in the Bonsall Union School District by virtue of inappropriate comments he made in the classroom?

2. Did respondent James MacWhorter engage in immoral conduct by virtue of inappropriate comments he made in the classroom?

3. Did respondent James MacWhorter engage in a persistent violation of or refusal to obey reasonable regulations prescribed by the governing board of the school district employing him by virtue of inappropriate comments he made in the classroom?

## SUMMARY OF DECISION

Respondent taught at Sullivan Middle School from 1998 until October 11, 2010, when he was placed on administrative leave. On a number of occasions during the early part of the 2010-2011 academic year, respondent used profanity or made comments containing sexual innuendo in the classroom. Some students were upset by respondent's comments. Some parents complained.

While it was not established that respondent refused to obey reasonable regulations prescribed by the governing board of the school district employing him, a preponderance of the evidence established that respondent's classroom conduct involved immoral conduct and demonstrated his evident unfitness for service as a teacher in the Bonsall Union School District. For these reasons, the Commission unanimously concluded that legal cause was established to support respondent's termination of employment with the district.

## FACTUAL FINDINGS

### *Jurisdictional Matters*

1. On November 10, 2010, Justin Cunningham, Superintendent, Bonsall Union School District, signed the dismissal charges against respondent. On the same date, the district served respondent with the dismissal charges. On or about November 22, 2010, the district served respondent with a notice of intention to dismiss him as a certificated employee. On December 3, 2010, respondent requested a hearing. On December 23, 2010, the superintendent signed the dismissal accusation. The dismissal accusation and other required jurisdictional documents were served on respondent, who timely filed a notice of defense. The matter was set for hearing on June 8, 9, 10, and 13, 2011.

2. The district nominated Ginger Riggs to serve on the Commission. Respondent nominated Henry Montelongo to serve on the Commission. Neither nominee was related to respondent, neither was employed by the district, each held a valid credential, and each had served five of the past ten years as a middle school United States history teacher under a single subject social studies credential. Accordingly, each nominee was qualified to serve on the Commission under Education Code section 44944, subdivision (b).

3. On June 8, 2011, the record in the administrative proceeding was opened and opening statements were given. On June 8, 9, and 10, 2011, sworn testimony and documentary evidence were received. On June 13, 2011, documentary evidence was received, closing arguments were presented, the record was closed, and the matter was submitted.<sup>1</sup> On June 13, 2011, the Commission met in closed session to determine the matter, and a unanimous decision was reached.

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<sup>1</sup> After the conclusion of the hearing, the administrative law judge received Exhibit 7 *sua sponte* for jurisdictional, non-evidentiary purposes.

4. The draft of the decision was circulated between Commission members. Due to the difficulties anticipated in attempting to secure the signatures of all three Commission members on the final decision to permit service of the decision in accordance with the Education Code, it was agreed that Administrative Law Judge Donald P. Cole would sign the decision on behalf of the Commission.

### *Background*

5. Respondent received a bachelor's degree in Comprehensive Social Studies from Shippensburg University in 1989. He received a Master's degree in History, American and European Studies from the same institution in 1990. He holds teaching certificates in Pennsylvania (single subject: social studies) and California (single subject: social studies, multiple subject, CLAD).

Respondent taught at the district's Sullivan Middle School from 1998 until he was placed on administrative leave on October 11, 2010, in connection with the events at issue in this proceeding. Respondent primarily taught seventh and eighth grade history, social studies, and language arts. From 1992 to 1998, respondent taught at the secondary level at Fairbanks Country Day School, Rancho Santa Fe, California.

Respondent was at one time the social studies chair at Sullivan, i.e., a liaison between the school principal and language arts/social studies teachers. Respondent has also served on the school site counsel, and on the district technology committee. He has engaged in negotiations with the district school board.

6. The eighth grade history textbook used at Sullivan is *History Alive!* Respondent attended a Teacher's Curriculum Institute training program for the textbook. One of the themes emphasized at the institute was the use of visual primary sources and how to incorporate them into lessons.

7. Janet Whiddon has been the Principal of Sullivan Middle School since the 2008-2009 school year. Respondent's eighth grade history students during the 2010-2011 school year included N.R. (period 1), S.S. (period 2), H.S. (period 3), I.R. (period 3), B.R. (period 4), and M.D. (period 7).

### *The Alleged Misconduct*

#### *"Pocket Pool" comment*

8. Page 59 of the textbook has a bizarre picture of several men playing "trock," a game similar to pocket billiards. One of the men is depicted standing at one corner of the table with his hands in his pocket and a strange expression on his face. The net or sack which holds the billiard balls when they fall into the hole in the corner of the table seems to be hanging down right where the man's groin area is located. The caption states, "Below, colonists enjoy a form of billiards called 'trock.'"

9. Student H.S. testified that during a class discussion and in reference to the picture on page 59, respondent laughed and said that the man was playing pocket pool. Respondent also mentioned that one of his own teachers played “pocket pool,” i.e., put his hands in his pockets during class discussions. At some point during the discussion, respondent put his own hands in his pockets, but he did “nothing really, he just put his hands in his pockets to demonstrate.” H.S. understood the term “pocket pool” to mean messing around and putting one’s hands in one’s pocket.

H.S. was clearly uncomfortable during her testimony about this incident.

10. Student M.D. testified that in reference to the picture on page 59, respondent noted that the man had his hands in his pocket, stating “and we all know what that means.” M.D. understood respondent to mean that the man was playing with himself. At some point, respondent himself put his hands in his pocket, and then lifted his hands away from his body. This discussion made M.D. feel uncomfortable.

Principal Whiddon testified that she interviewed M.D. and that M.D. told her that respondent stated that the man standing at the corner of the table in the picture on page 59 was playing “pocket pool,” and that M.D. felt “violated” and “freaked out” by this remark. M.D. told Whiddon that M.D.’s parents told M.D. what “pocket pool” meant.

11. M.D.’s father testified that his wife overheard M.D. and a friend talking about respondent’s in-class comments when she was driving them home from school.

12. Student S.S. stated in a declaration submitted pursuant to Government Code section 11514<sup>2</sup> that respondent’s description of the men playing pocket pool made her feel uncomfortable. A few students were laughing. S.S. did not at the time know what the term “pocket pool” meant. Respondent placed his hands in his pockets when the picture in the text was discussed, “moved his hands around, smiled and laughed.” Respondent told the students about one of his former teachers who played pocket pool in his classroom. This made S.S. “very uncomfortable and shocked.” S.S. tried not to look at respondent and did not wish to return to his classroom.

13. Student I.R. stated in a declaration submitted pursuant to Government Code section 11514<sup>3</sup> that respondent referenced the picture and “put both his hands in his front pockets and leaned his body back and forth.” Respondent also said that one of his own teachers had “put his hands in his pockets and played pocket pool, like the man in the picture, he played with his private parts.” This made I.R. feel awkward.

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<sup>2</sup> Despite respondent’s request to cross-examine her, S.S. did not testify at the hearing. Her declaration was thus admissible as administrative hearsay.

<sup>3</sup> Despite respondent’s request to cross-examine her, I.R. did not testify at the hearing. Her declaration was thus admissible as administrative hearsay.

14. In an October 7, 2010, formal written complaint submitted to Whiddon by C.C., H.S.'s grandfather and guardian, C.C. wrote that on September 30, during dinner, H.S. "became visibly upset and began to relate several comments made in class that day" by respondent. H.S. told C.C. that respondent pointed out a male in the picture on page 59 "who appeared to be playing 'pocket pool.'" Several students began to giggle "with apparent knowledge that the term 'pocket pool' refers to male masturbation."

15. Student N.R. testified that he did not recall respondent making any inappropriate comments in connection with the picture, although he did recall respondent saying something about the men in the picture looking funny, and he recalled respondent asking what the man in the picture was doing.

16. Student B.R. testified that he did not recall respondent making any sexual comments in connection with the picture.

17. Whiddon testified that on about October 5, 2010, she spoke to respondent about the pocket pool comment while the two of them were walking to the school parking lot at the end of the school day. Respondent admitted that he had used the term "pocket pool" in reference to the picture on page 59. Respondent told Whiddon that in prior years male students made jokes about the picture, and respondent thus wanted to "beat them to the punch" and avoid the boys' snickering. Whiddon told respondent that it would be better to let the boys snicker than for respondent to appear to be the instigator. Whiddon directed respondent to stop this behavior, and respondent said he would.

18. Respondent testified that in previous years, students made inappropriate comments about the picture, and also made derogatory comments about other students adjusting themselves. By raising the issue himself during the current school year, respondent hoped to get it out of the way so his classes could move on. Respondent told his students that the man might be adjusting himself. One student responded by saying that the man was playing pocket pool. Another student asked what that meant. A third yelled out, "He's playing with himself." Respondent replied, "No, playing pocket pool is someone who is adjusting himself too much." Respondent also made reference to one of his own teachers, who was gay and who adjusted himself frequently. Respondent made this comment in order to deflect student comments about other students. Respondent acknowledged that his hands *were* in his pockets during the pocket pool discussion, but he denied that he *put* them in his pocket at that time, i.e., they were already there before the pocket pool discussion. Respondent admitted that students reacted audibly to his reference to his former teacher and that he grimaced following their reaction.

Respondent testified that in retrospect, he believes it was not a good idea to have called his students' attention to the picture – his efforts were not effective, and he would not do it again.

19. It is found that on September 30, 2010, respondent stated in class that the man depicted on page 59 of the textbook was adjusting himself. One or more students reacted by saying that the man was playing "pocket pool." Respondent did not immediately put a stop

to such comments, but instead went on to talk about pocket pool further, including making reference to a former teacher who had played pocket pool. Respondent put his hands in his pockets while talking about pocket pool. At one point while respondent's hands were in his pockets, respondent grimaced when students reacted audibly to his comment about his former teacher.

*Population sex comment*

20. Page 64 of the textbook discusses the growth of colonial population, as follows:

By 1750, the American colonies were bursting with growth. In just a century, the population of the colonies had grown from 50,000 to more than a million people. What brought about this rapid growth? Cheap land? Religious tolerance? Economic opportunity? All of these were important in attracting people to the colonies. But there was another reason.

The textbook went on to discuss the colonial power of self-government.

21. H.S. testified that during a discussion about the population growth, respondent asked the class how population growth occurred, that someone responded, "Sex!" and that respondent replied, "Yeah! Sex! Sex! Sex!" This interchange made H.S. feel uncomfortable.

22. In his formal complaint, C.C. wrote that, according to H.S., on September 30, 2010, respondent discussed a surge in colonial population. Respondent asked the class "what the reason for the surge could be and one student stated: 'sex'." In response, respondent said, "Yes, that's absolutely correct, sex, sex, sex. They must have been having a great time".

23. I.R. stated in her declaration that respondent "spoke frequently about sex in class." Regarding Britain's population growth, respondent said, "We all know how this happened: It happened when they had sex. They had a lot of sex." These comments made I.R. uncomfortable.

24. B.R. testified that respondent did not use the word "sex" in connection of his discussion of the population growth of the colonies.

25. Respondent testified that during the discussion on population growth, he asked the class what could have brought it about. One of the answers he received was, "Sex." This was *not* the answer he was looking for. He ignored that answer and redirected his question to other factors that caused the population growth.

26. It is found that during a discussion about colonial population growth that took place on or about September 30, 2010, respondent asked the class what the cause of that growth was. When he asked the question, he did not expect anyone to respond by referring

to sex. However, when he did receive that response, he did not immediately put an end to such comments; instead, he replied in some jocular or other fashion that emphasized or reinforced the concept of sex.

*Mistress comment*

27. Page 60 of the textbook depicts a colonial family preparing food. The caption reads, “Food preparation occupied a great deal of time in the colonies. Here, we see one woman rolling corn meal while another cooks on the stove. The woman in the doorway is using a butter churn.”

28. D.M. testified that during a class discussion of this picture, a student observed that one of the women in the picture looked sad. Respondent said that she looked sad because the man in the picture was probably her husband, and the other woman in the picture was probably the man’s mistress.

29. It is found that respondent on or about September 30, 2010,<sup>4</sup> made the statement attributed to him by D.M.

*King George comment*

30. Page 66 of the textbook states that George III, who became the King of England in 1760, was “not a bright man. One historian wrote that ‘he was very stupid, really stupid.’ He was also proud and stubborn.” The text suggested that George III was a “tyrant,” which the text defined as a “ruler who uses power” unjustly. The text went on to discuss the Proclamation of 1763.<sup>5</sup>

31. H.S. testified that during a classroom discussion, respondent called George III a “dick head” and “Richard head,” and that respondent used those words in “quite a few” class periods. Further, respondent gave a test, in which one of the fill-in-the-blank questions stated, “King George was a \_\_\_\_.” Respondent’s use of the word “dick head” made H.S. feel uncomfortable.

H.S. testified that on one occasion during class after Ms. Heck, a substitute teacher, took over respondent’s class, Ms. Heck asked what George III was, and someone responded, “A Richard head.” Ms. Heck drew back in surprise and said, “No, he’s a tyrant.”

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<sup>4</sup> The approximate date of the discussion is inferred from the page number in the textbook, relative to the dates of respondent’s other comments described in this Decision and the pages in the textbook that correspond to those comments.

<sup>5</sup> The Proclamation of 1763 was enacted by Parliament after the French and Indian War, which resulted in England’s acquisition of the vast French New World territories west of the Appalachian mountains. The Proclamation forbade the colonists to settle west of the Appalachian Mountains to minimize conflicts with Indians. Colonists generally ignored the Proclamation.

32. In his formal complaint, C.C. wrote that, according to H.S., on October 5, 2010, respondent asked who King George was. One student responded, “A Dick,” to which respondent replied, “Yes, a Dick, absolutely.” The class then had a review quiz, in which one of the questions was, “King George the Third was a \_\_\_\_\_. ” The next day, according to the formal complaint, respondent was “visibly indignant and perturbed in class, repeating the phrase: ‘King George the Third was a MMMMPH’.”

33. In her declaration, S.S. stated that respondent referred to George III as a “Richard-head,” an “ass,” and a “bastard.” This shocked S.S. Other students in class appeared to be shocked as well.

34. In her declaration, I.R. stated that she was in respondent’s third period history class during the 2010-2011 school year, until his suspension on October 11, 2010. She stated that respondent called George III “kind of like a dick” and a “Richard.” I.R. felt that respondent was trying to be funny, “but it is not funny to me.” Some students laughed, but most were surprised at respondent’s comments. I.R. felt “uncomfortable and awkward” as a result of these comments, and other students also appeared to be uncomfortable.

35. Lori Heck was a substitute teacher who taught respondent’s classes after respondent was placed on administrative leave and until Thanksgiving 2010. Heck testified that during her first week, when she mentioned George III, a few students burst out, “Richard!” At first Heck tried to ignore these comments, she then tried to silence them, and students replied that respondent had called him “Richard” and “Richard Head.”

36. N.R. testified the words “tyrant” and “idiot” were used in connection with the Proclamation of 1763. He did not recall the use of any other terms.

37. Respondent testified that in reference to George III he told his students that the qualities of pride, stubbornness, and stupidity were not a good combination for a king. He had a study sheet that he had passed out to students, which included the question, “King George was a \_\_\_\_\_?” His intention was that students would answer the question with the word “tyrant.” When respondent went over the study sheet in class, one of his students called out “Richard?” Respondent repeated the word, and said, “Yeah, I get it – Richard, Dick.” Respondent testified that he now understands that his comment could have been interpreted as offensive. Respondent denied that he ever referred to George III as a “Dick” or a “Richard Head.” He acknowledged that using these terms is offensive and could be taken the wrong way, and his using those words in class constituted a lapse of judgment.

38. It is found that during a discussion about George III on October 5, 2010, several students shouted out terms such as “Dickhead” and “Richardhead.” Respondent did not solicit these comments, but when they were made, he failed immediately to put a stop to them, instead reacting in some jocular or apparently amused fashion.



### *Pink lady comments*

39. Page 64 of the textbook contains a picture of colonists talking in groups outdoors. The caption reads, “Before 1763, the colonies enjoyed life free from British control.” One of the persons in the picture is a woman standing in the foreground, seen from the back, having a very thin waist and wearing an expansive pink dress, with (apparently) a corset underneath.

40. H.S. testified that there was a discussion in class that the woman in the picture had a “very large butt” and an “hour glass figure,” and that she was trying to be very thin. Respondent told the class that his wife was bulimic; that comment made H.S. feel awkward.

Whiddon testified that during her investigation of respondent’s conduct, H.S. told her that respondent stated that in colonial days women’s dresses were pulled really tight in the back, that this gave the impression that a woman had a “big butt,” that girls should not mind having a “big butt” and that “guys like their (i.e., women’s) curves.”

41. D.M. testified that in connection with the depiction of the woman in pink, respondent said that his wife was bulimic and that if he (respondent) sees any of the girls in his class getting skinny and not eating, he would talk to them about it. D.M. felt this was inappropriate.

42. S.S. stated in her declaration that respondent referred to his wife as anorexic and bulimic and that he stated that real women have curves. Respondent told girls in the class not to starve themselves, “We like your curves.” These comments made S.S. uncomfortable.

43. I.R. stated in her declaration that respondent referenced the picture on page 64 of the text by saying that it “showed a picture of a lady with a big skirt.” Respondent said, “The lady wore this dress to make her butt look big.” This comment made I.R. feel “weird.”

44. N.R. testified that several students remarked that the woman’s hourglass figure looked weird, and respondent stated, “Well, that was the fashion then.” N.R. did not recall respondent using the word “sex” in this connection.

45. Respondent testified that some students commented on the way people in the picture were dressed, and that students asked him why the woman in pink was dressed the way she was. Respondent answered by talking about the impossible hour glass figure and the use of a corset. He made reference to two movies, *Pirates of the Caribbean* and *Real Women Have Curves*. He commented that his own wife struggled with bulimia when she was younger, and he pointed out that if students starve themselves, their bodies will store the fat, and burn the muscle. Respondent drew a connection between the male-dominated society of colonial days, where women were forced to look a certain way, and the male-dominated society of today. Respondent’s purpose in bringing up bulimia and the comment about *Real Women Have Curves* was to let students know that eating disorders are real, such disorders are a sickness, it is nothing to be ashamed of and it’s okay to get help.

46. It is found that during a class discussion on or about October 5, 2010,<sup>6</sup> and in response to questions or comments by students about the appearance of the woman in the picture on page 64 of the textbook, respondent made comments about the shape of women's bodies, the concept of an "hour glass" figure, women's curves, the attempts of women to make their bodies look a certain way, and his own wife's struggle with bulimia.

*Profanity: Use of the "F" word*

47. Whiddon testified that on February 25, 2010, respondent sent one of his students, J.B., to Whiddon's office for disciplinary reasons. During Whiddon's discussion with J.B., J.B. told her that respondent used the "F" word in class. Later that day, or the next day, Whiddon spoke to respondent about this, and respondent admitted that he had used that word in class. Whiddon told respondent it was inappropriate and told him not to do it again. Respondent said he would not use it again.

J.B. testified that he never heard respondent use the "F" word in class. He did not recall whether he ever told Whiddon otherwise. J.B. recalled respondent using the word "damn"; he did not recall whether respondent ever used the word "hell."

Respondent admitted during his testimony that he used the "F" word once in class. He was frustrated with the student at the time, and he agreed that his use was inappropriate. He promised Whiddon he would never use that word again.

48. It is found that respondent used the "F" word on one occasion in class, on February 25, 2010. He was admonished concerning the impropriety of such use, he accepted and agreed with that admonition, and he did not use the word in class at any time thereafter.<sup>7</sup>

*Profanity: Use of other words and gestures*

49. H.S. testified that respondent used the words "hell" and "damn" on a number of occasions in class. H.S. did not believe these words were related to the curriculum or were appropriate. On one occasion, respondent pretended to be a priest, marched around the classroom and stated, "Repent your sins or you're going to go to hell." This made H.S. "a little uncomfortable."

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<sup>6</sup> The approximate date of the discussion is inferred from the page number in the textbook, relative to the dates of respondent's other comments described in this Decision and the pages in the textbook that correspond to those comments.

<sup>7</sup> Though respondent recalled the incident when he used the "F" word as occurring in 2008, the evidence did not establish that he used it more than once. Whiddon's recollection that it occurred in February 2010 is credited. Though M.D. testified (see below) that respondent used the "F" word during the 2010-2011 school year as well, this testimony was contrary to her deposition testimony and no other students testified that respondent used that particular word in class during the 2010-2011 school year.

50. M.D. testified that respondent used the word “damn” in class on a daily basis, and also used the “F” word and possibly the word “asshole.” On one occasion, respondent used the “up yours” arm gesture on class. M.D. did not know what that gesture meant.

M.D. admitted during her testimony that when she spoke to respondent’s counsel during her deposition, she denied hearing respondent use the “F” word.

51. S.S. stated in her declaration that she never heard respondent use the “F” word. She heard respondent use the word “damn” jokingly “and it was not referenced to what we were learning in history.” Respondent also used the word “hell,” and used gestures in class “that included the middle finger and ‘up yours.’” Respondent’s hand gestures were made in connection with the colonists being upset with the British. Respondent demonstrated with hand and arm gestures “what Americans do to flip off people.”

52. I.R. stated in her declaration that respondent used the hand gesture for the “F” word and said, “When you go to England, do not show the peace sign.” When respondent put down his index finger, “it was left with the middle finger still standing.” This made I.R. uncomfortable.

53. Substitute teacher Heck testified that students told her respondent had shown them how to make obscene gestures.

54. Respondent testified that during his lesson about the Salem witch trials, he described the trials in terms of “Damned if you do, damned if you don’t.” He used this phrase because the accused witch was put to the ordeal by water, i.e., if the individual drowned, then he or she was not a witch; if the individual did not drown, that he or she *was* a witch. He also used the word “hell” in historical context, e.g., “War is hell” or “a hellfire and brimstone preacher.” He estimated that he used the term “damn” about ten times in class during the last four years. He did not believe his use of the term was necessarily inappropriate – it depended on the situation.

Respondent testified that he never used the “middle finger” gesture during class. He admitted that he used the “up yours” arm gesture, and explained to his students that they should not use the reverse peace sign in England, because that also means “up yours.” He added that he now understands why parents would be upset by these remarks and why some female students would be upset; he stated that he would not repeat the misconduct in the future.

55. It is found that on a number of occasions during late September and early October 2010, respondent used the words “damn” and “hell” in class. It was not established that, in context, such use was inappropriate. It is also found that on a number of occasions during this same period, respondent made reference to and/or demonstrated certain obscene hand and arm gestures in class, and that these references and/or demonstrations were gratuitous and inappropriate.

*Monty Python video*

56. Page 53 of the textbook has a picture depicting “a woman being tried for witchcraft in Salem, Massachusetts, in 1692.” The text described the Salem witch trials, and noted that 20 “accused witches were put to death . . . before calm was restored and the townspeople realized that the girls’ accusations were not true.”

57. In late September or early October 2010, respondent showed in class a portion of the movie, *Monty Python and the Holy Grail*. Though a DVD of the movie was available at the hearing, neither party sought to introduce the DVD or to exhibit any portion of it to the Commission. The movie was rated PG.

58. M.D. testified that during the portions of the movie shown in class, men grabbed a woman, put her on a scale, and stated that if she weighed the same as or less than a duck, she was a witch. M.D. felt that this “kind of” related to what they were studying in class, but that she thought it was “weird.”

59. S.S. stated in her declaration that the *Monty Python* video “depicted witchcraft and how women were treated,” that two knights were fighting “and the gruesome scenes included blood and inappropriate language.”

60. Respondent testified that he showed a five-minute excerpt from the movie, which depicted a “witch village” scene. He stated that there was no cursing or inappropriate language in the scene he showed. The scene poked fun at mob mentality, false assumptions, and the fear, ignorance, and prejudice that characterized witch hunts. Respondent said that he showed a second scene, lasting at most two minutes, in which the knights of Camelot were satirized.

Respondent testified that he would not now show either of these scenes again, since he now knows that some took offense. He conceded that showing the movie constituted a lapse of judgment.

61. The evidence did not establish that respondent acted inappropriate by showing portions of the *Monty Python* movie in class. Absent admission into evidence of the portions of the movie that were shown, and given that the movie was rated PG, the testimony was insufficient to establish the impropriety of showing the portions in question.

*Blue-footed booby video*

62. Page 69 of the textbook discusses Lord North, referring to him as a “great, heavy, booby-looking man.”

63. On October 5, 2010, respondent showed in class a portion of a youtube.com video depicting two blue-footed booby birds. Though a copy of the video was available at the hearing, neither party sought to introduce the video or to exhibit any portion of it to the Commission.

64. During her testimony, H.S. referred to the video as depicting booby birds attracting their mate, with one bird trying to impress the other. Respondent stated, “He’s really impressing the other bird.” H.S. felt “kind of awkward.”

65. M.D. testified that respondent described the video as “like a mating call or something.” Respondent’s comment made M.D. feel uncomfortable, though the video itself did not.

66. S.S. stated in her declaration that respondent showed a video in class “about the Blue-footed Booby mating dance.” The video made her uncomfortable and was inappropriate and irrelevant.

67. I.R. stated in her declaration that respondent referenced the word “booby” in the text book, and showed a video of the blue-footed booby mating dance.

68. N.R. testified that respondent made no sexual comments in connection with the video.

69. B.R. testified that respondent did not make any sexual comments in connection with the video.

70. Respondent testified that on the date he gave his classes the assignment to read the portion of the book containing the reference to Lord North, respondent told his students as a “heads up” before their parents got upset that the term “booby-looking man” would appear in the text. Concerning the video, respondent testified that he did not say “He’s really impressing her,” but something more along the line of, “Check out his dance move.” He added that it was not necessary for him to show the video or to make the comments he made.

Respondent testified that after school on the day this incident occurred, Whiddon approached him as he was walking out the door on the way to the parking lot. Whiddon wished to talk to respondent about some of the comments she had heard that he had made in class. During this conversation, respondent apprised Whiddon, as a “heads up” that he had shown the booby video in class.

71. It was not established that respondent acted inappropriate by showing the blue-footed booby youtube video in class. Absent admission into evidence of the video itself, the testimony was insufficient to establish its impropriety. The evidence established, however, that respondent’s comments about the video were inappropriate, in that they contained sexual overtones.

#### *Class secrecy*

72. H.S. testified that respondent once told the class not to share “our personal jokes.” For example, if a student saw respondent in a store, the student should not yell out one of the class jokes.

73. D.M. testified that respondent told students in class not to discuss outside of class what went on in class, because people could get the wrong idea. This discussion occurred in the context of the video of the blue-footed booby. D.M.'s impression was that respondent wanted to keep that a secret.

74. In her declaration, S.S. stated that on one occasion respondent told students that "what happens in the classroom should remain confidential. When he said that he appeared angry and upset." Respondent added that "he did not want to get phone calls from parents that would get him [sic] trouble."

75. Whiddon testified that when she interviewed S.S. in connection with respondent's conduct, S.S. told her that respondent told the class to keep what went on in class amongst themselves.

76. Respondent testified that on the day he made the blue-footed booby reference and showed the video in class, he was on duty after school, apparently monitoring students as they waited for their rides home. At that time, some students called out to him, making references to the "Booby looking man." The next day, at the beginning of class in each of his periods, he told his classes that it was not appropriate for them to yell to him outside of class about the blue-footed booby bird. His intent was to reprimand those students who had done so the day before, but he made these comments to all of his classes, so as not to single out any particular individuals. Respondent denied instructing students not to tell their parents about what went on in class, or that what went on in class was confidential.

77. It is found that in early October 2010, respondent in some way and to some extent communicated to students his desire that they not disclose outside of class some of the matters that were discussed in class. The precise nature and extent of respondent's communication in this regard could not be discerned. Though some students may have gotten the impression from respondent's comments that he was asking them in broad, unqualified fashion not to tell parents or school administrators about what went on in class, the evidence did not establish that respondent intended to communicate such a broad request.

#### *Character evidence*

78. In an email to Whiddon dated November 1, 2010, C.A. wrote that respondent had "made quite an impact on" C.A.'s daughter, who was currently in respondent's class. C.A.'s daughter "has grown to love learning about History because of Mr. MacWhorter's passion and the way he teaches." C.A. wrote that when her son was in eighth grade, respondent had a similar positive effect on him. C.A. added that her son was bullied at school, and that the "only person [he] could talk to was Mr. MacWhorter. He really helped [my son] get through that year and for that I am very grateful." C.A. expressed her great fondness for respondent, who "really touched the life of my son."

C.A. also testified at the hearing, stating that her daughter was upset when she heard that respondent was not coming back to Sullivan. C.A. felt respondent was an asset to the school and to education.

79. C.G. was a ninth grader at the time of the hearing, but she had respondent as a teacher the preceding academic year (2009-2010). C.G. testified that she learned well in and enjoyed respondent's class. Respondent explained history very well, gave the class good examples, told interesting stories, and let the students have their own opinions about history. Respondent encouraged discussions, and she herself felt very comfortable asking respondent questions. She did not recall any sexual comments in class, or any other comments that made her feel uncomfortable. Respondent never told students not to tell their parents what went on in class. C.G. would definitely be willing to have respondent as a teacher again.

#### *District Policies*

80. Bonsall Union School District board policy 4119.21 (Personnel) provides in part:

The Board of Trustees expects district employees to maintain the highest ethical standards, follow district policies and regulations, and abide by state and federal laws. Employee conduct should enhance the integrity of the district and advance the goals of the educational programs. Each employee should make a commitment to acquire the knowledge and skills necessary to fulfill his/her responsibilities and should focus on his/her contribution to the learning and achievement of district students.

81. Bonsall Union School District board policy 5145.7 (Sexual Harassment) provides in part:

The Board of Trustees is committed to maintaining an educational environment that is free from harassment and discrimination. The Board prohibits sexual harassment of students by other students, employees, or other persons, at school or at school-sponsored or school-related activities. The Board also prohibits retaliatory behavior or action against persons who complain, testify, assist, or otherwise participate in district complaint processes.

82. Bonsall Union School District administrative regulation 5145.7 (Sexual Harassment) provides that "prohibited sexual harassment" includes "unwanted verbal, visual, or physical conduct of a sexual nature made against another person . . . in the educational setting, when made on the basis of sex and under" certain conditions. The conditions include, "The conduct has the purpose or effect of having a negative impact on the student's academic performance or of creating an intimidating, hostile, or offensive educational environment." Examples of "types of conduct which are prohibited in the district and which may constitute sexual harassment" include "sexual jokes" and "obscene gestures."

### *Other Evidence*

83. H.S. testified that respondent “rarely” gave homework and that his exams were “very easy.” She added that respondent was popular because “he was a cool teacher,” i.e., he was inappropriate, funny, everyone liked him, and he was really easy.

In her deposition, H.S. stated that respondent’s comments did not make her feel uncomfortable.

84. S.S. stated in her declaration that respondent “made inappropriate comments nearly every day in class. As the year progressed, I would try not to look or listen to him in class. I would put my head down and look at the text book.”

85. I.R. stated in her declaration that she “observed inappropriate comments and behavior by Mr. MacWhorter . . . usually . . . a couple times a week, since the beginning of the school year.”

86. H.S., M.D., and S.S. were friends, at least at the beginning of the 2010-2011 school year. The three of them at times discussed things that respondent said during class.

87. J.B. testified that he didn’t recall if respondent ever made sexual jokes in class. J.B. never felt uncomfortable in respondent’s class.

88. An undated “petition” was signed by 80 students. The petition stated, “We want Mr. Mac back!!! He is an awesome teacher & we all learn from him!”

89. Respondent’s most recent formal evaluation occurred in June 2010. Respondent earned “meets” or “exceeds” expectation ratings in all areas. He received “exceeds” expectation ratings in “engaging students in problem solving, critical thinking, and other activities that make subject matter meaningful,” “using materials, resources and technologies to make subject matter accessible to students,” “drawing on and valuing students’ backgrounds, interests, and developmental learning needs,” “establishing professional goals and pursuing opportunities to grow professionally,” and “working with colleagues to improve professional practice.” The “comments by evaluator” section stated:

Mr. MacWhorter works with the 8<sup>th</sup> grade team to develop plans for consistency among the subject areas. He designs his lessons using various technologies, stories, and video to get the important concepts across. Jim assisted the team by having students complete their math MAP testing in his class.

90. Whiddon testified that she considered respondent’s conduct to be unprofessional, to constitute a serious lapse of judgment, and that respondent was not a good role model for his students.



91. District Superintendent Justin Cunningham testified that the aspect of respondent's misconduct that concerned him the most was the allegation of secrecy, i.e., that respondent told students not to reveal what went on in class and/or became upset when respondent learned that students had done so. He elaborated that if possible child molestation had occurred, the idea of keeping that information from the administration was extremely egregious. Cunningham's reference to "molestation" was in the context of C.C.'s use of that term in his October 7, 2010, formal complaint. Beyond that, Cunningham was of the view that respondent's "almost perverse insistence" on including sexual references in a middle school U.S. history course amounted to immoral conduct.

Cunningham acknowledged during his testimony that some students would find respondent's sexual references to be "really cool," but others would be very uncomfortable and, accordingly, respondent's comments constituted sexual harassment. Again, the conduct was compounded by the secrecy issue.

Cunningham was of the view that respondent's conduct violated the personal and professional standards prescribed in Board policy 4119.21. He explained that students need to have role models of the highest ethical standards. Cunningham was also of the view that respondent's conduct violated the district's sexual harassment policy.

#### *The District's Investigation*

92. On Tuesday, October 5, 2010, and again a day or two later, Whiddon received phone calls from the parents of M.D., who expressed concern about comments respondent made in class relating to "pocket pool." M.D.'s parents stated that M.D. felt "creeped out" and "violated" by respondent's comments.

On October 5, 2010, Whiddon spoke to respondent about the pocket pool comment.

93. On October 6, 2010, Whiddon received a phone message from C.C., the guardian and grandparent of H.S.

On October 7, 2010, Whiddon spoke with C.C., H.S.'s grandfather. On the same day, C.C. followed up his discussion with Whiddon by submitting a formal written complaint to Whiddon. In the complaint, C.C. referenced certain allegedly inappropriate comments by respondent in class, which he deemed "completely unacceptable" and possibly in violation of Penal Code section 647.7 (annoying or molesting children under the age of 18). C.C. requested "an investigation into these incidents with the application of any or all discipline deemed appropriate by supervisory staff."

94. On Monday, October 11, 2010, respondent was placed on paid administrative leave "until further notice." Respondent was told that an investigation would take place in response to the "formal complaint made against you on October 7, 2010 . . . ."

95. On October 12, 2010, Whiddon wrote a letter to C.C., acknowledging receipt of his complaint and stating that it would be immediately investigated.

## *Evaluation*

96. The evidence considered as a whole established that respondent demonstrated evident unfitness for service as a teacher in the Bonsall Union School District by virtue of his inappropriate comments in class. On some occasions, when students made sexual references or other inappropriate comments, respondent reacted in such a manner as to fan the flame of the comments in question, rather than immediately extinguishing it. On other occasions, respondent himself injected a sexual element or other inappropriate matters into the classroom. Clearly, respondent lacked an internal filter – matters laced with sexual innuendo came repeatedly out of his mouth. Further, he taught his classes in such a way as to give a great deal of (and in fact too much) freedom to students to say even inappropriate things. His reactions to inappropriate comments in effect constituted a reward to students who tried, by their comments, to steer the class into irrelevant side issues.

The evidence also established that respondent's unfitness, and his misconduct that was the manifestation of that unfitness, was caused by a defect in temperament. He failed to perceive that, as a teacher of eighth grade students along a wide spectrum of emotional and physical development and maturity, a teacher must be extremely careful about what he or she says, and must be especially guarded when it comes to matters of a potentially sexual nature. Respondent testified that he realized his specific comments at issue in this proceeding were inappropriate and that he would no longer make such comments in the future. However, his testimony came across as though he were merely checking off items on a list. The evidence as a whole did not suggest that he truly understood, at a fundamental level, what the problem was. Other incidents will invariably come up in other contexts, other comments will be made by students in class, and other matters will be presented in the textbook, to all of which respondent is likely once again to react verbally in an inappropriate way.

97. The evidence considered as a whole established that respondent engaged in immoral conduct by virtue of inappropriate comments in class. The matters discussed immediately above with regard to evident unfitness apply to immoral conduct as well. Further, or to state the matter in slightly different terms, respondent taught with one part of the student body in mind, i.e., that part that would (and did) find his comments amusing and "cool." However, he completely ignored another part of the student body, i.e., that part that would (and did) find his comments offensive and troubling. He lacked empathy for the latter group; he lacked the ability to understand that his comments could cause discomfort, embarrassment, and confusion to children at a very awkward, difficult, pre-adolescent stage of their development.

98. The evidence considered as a whole did not establish that respondent refused to obey reasonable regulations prescribed by the governing board of the school district employing him. The evidence did not establish either a clear violation of a clear board policy, or any clear communication to respondent via, for example, a written warning or a plan of correction, that gave him notice of the policy he was violating. As such, a persistent violation of or refusal to obey a board policy was not established.

## LEGAL CONCLUSIONS

1. A permanent employee may be dismissed for cause only after a dismissal hearing. (Ed. Code, §§ 44932, 44934, and 44944.)

Under Education Code section 44944, subdivision (b), the dismissal hearing must be conducted by a three-member Commission on Professional Competence. Two members of the Commission must be non-district teachers, one chosen by the respondent, and one by the district, and the third member of the Commission must be an administrative law judge from the Office of Administrative Hearings.

When a school board recommends dismissal for cause, the Commission may only vote for or against it. The Commission may not dispose of a charge seeking dismissal by imposing probation or an alternative sanction. (Ed. Code, § 44944, subd. (c)(1)-(3).)

2. The standard of proof in a teacher dismissal proceeding is a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1039-1040.) This standard requires a party to convince the trier of fact that the existence of a fact is more probable than its nonexistence. (*Redevelopment Agency v. Norm's Slauson* (1985) 173 Cal.App.3d 1121, 1128.)

3. A permanent employee may be dismissed based on evident unfitness for service, immoral conduct, or the persistent violation of or refusal to obey reasonable regulations prescribed by the government board of the school district. (Ed. Code, § 44932, subs. (a)(1), (5), and (7).)

4. *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, identified certain criteria that should be applied when determining an individual's fitness for service. These criteria include "such matters as 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. These factors are relevant to the extent that they assist the board in determining whether the teacher's fitness to teach, i.e., in determining whether the teacher's future classroom performance and overall impact on his students are likely to meet the board's standards." (*Id.*, at pp. 229-230.)

5. The Morrison criteria "must be analyzed to determine, as a threshold matter, whether the cited conduct indicates an unfitness for service. [citation omitted] If the Morrison factors are satisfied, the next step is to determine whether the 'unfitness' is 'evident'; i.e., whether the offensive conduct was caused by a defect in temperament." (*Woodland Joint Unified School District v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1445.)

6. “Immoral conduct” necessarily involves unfitness to teach. As such, it covers much the same ground as evident unfitness for service. A school board cannot abstractly characterize conduct as “immoral” unless that conduct indicates that the individual is unfit to teach. In determining whether a teacher's conduct thus indicates unfitness to teach, the board may consider such matters as 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. These factors are relevant to the extent that they assist the board in determining whether the teacher's fitness to teach, i.e., in determining whether the teacher's future classroom performance and overall impact on his students are likely to meet the board's standards. (*Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 220-221, 229-230.)

7. “Persistent violation” of board regulations within the meaning of the Education Code has been defined as “refusing to relent; continuing, especially in the face of opposition . . . stubborn; persevering . . . constantly repeated.” The phrase has been judicially defined to mean “continuing or constant.” A single violation is insufficient under the Education Code to constitute grounds for dismissal. (*Governing Board of the Oakdale Union School District v. Seaman* (1972) 28 Cal.App.3d 77.) “The Legislature undoubtedly intended that opportunity for correction be available and refrained from providing for dismissal for a single violation of regulations, or until repeated violations could be considered persistent.” (*Id.*, at p. 83.) The concept of “persistent violation” involves an element of willfulness. (*San Dieguito Union High School Dist. v. Commission on Professional Competence* (1982) 135 Cal.App.3d 278, 287.)

8. An issue arose at the hearing with regard to whether or not, in the event grounds for dismissal under Education Code section 44932 are established, the Commission nonetheless retains the discretion *not* to discharge the teacher. Respondent cited *Fontana Unified School District v. Burman* (1988) 45 Cal.3d 208, in support of his contention that the Commission has such discretion. In *Fontana*, the district sought to dismiss the teacher on the ground of dishonesty. The holding in *Fontana*, which is not explicitly limited to cases involving dishonesty, appears to support respondent's position. However, it is difficult to see how the Commission may be deemed to retain discretion not to discharge a teacher found to be evidently unfit. To conclude otherwise would mean that a teacher could be retained even though the teacher is unfit to teach, and even though that unfitness is caused by an irremediable defect in temperament. Accordingly, *Fontana* cannot reasonably be extended to dismissal based on evident unfitness.

9. Despite the conclusion set forth immediately above, the Commission affirmatively found that even if it has the discretion not to terminate respondent based on evident unfitness, it would still exercise its discretion in favor of termination. The

Commission also concluded that termination of respondent based on immoral conduct was required, notwithstanding the existence of any discretion to the contrary.

10. Based on Findings 1 through 98, and Conclusions 1 through 9:

a. Respondent demonstrated evident unfitness for service, so that cause to terminate respondent from his employment with the Bonsall Union School District existed pursuant to Education Code section 44932, subdivision (a)(5).

b. Respondent engaged in immoral conduct, so that cause to terminate respondent from his employment with the Bonsall Union School District existed pursuant to Education Code section 44932, subdivision (a)(1).

c. Respondent did not engage in a persistent violation of or refusal to obey reasonable regulations prescribed by the governing board of the district, so that cause to terminate respondent from his employment with the Bonsall Union School District did not exist pursuant to Education Code section 44932, subdivision (a)(7).

#### DISPOSITION

The Accusation and Statement of Charges are sustained. Respondent is terminated from his employment with the Bonsall Union School District.

DATED: \_\_\_\_\_

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DONALD P. COLE  
Administrative Law Judge  
Office of Administrative Hearings

For the Commission on Professional  
Competence