

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

In the Matter of the Dismissal of:

ALDO GARBELLINI, A Permanent
Certificated Employee,

Respondent.

OAH Case No. 2013050545

DECISION

The Commission on Professional Competence (Commission) heard the above-captioned matter in Los Angeles on June 23 through 27, June 30, and July 1, 2014. The Commission members were Miriam Chapa, Vanessa Chavez, and Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH). Complainant was represented by Jeffery A. Morris, Stutz, Artiano, Shinoff & Holtz, assisted by Lynn Ibara, Los Angeles Unified School District Counsel. Respondent Aldo Garbellini appeared with his attorney, William J. Trejo, Leal Trejo, LLP, assisted by Liara A. Silva and Sandra J. Garcia.

The matter was submitted for decision on July 1, 2014. The Commission hereby makes its factual findings, legal conclusions, and order.

INTRODUCTION AND STATEMENT OF THE CASE

In this proceeding the Los Angeles Unified School District (District) seeks the termination of one of its tenured teachers, Respondent Aldo Garbellini. Five statutory grounds were asserted as justifying termination, although one, unprofessional conduct, was dismissed near the outset of the case. In essence, Complainant asserts that on several occasions between 2009 and early 2012, Respondent acted aggressively toward elementary school children that he was teaching. The two most recent events arose in late 2011 and February 2012, while Respondent was assigned to 52nd Street School in Los Angeles.

Respondent denied the bulk of the allegations, acknowledging that he did, in September 2010, improperly leave his classroom unattended to use the restroom. He provided evidence to refute most of the charges against him, excepting one claim, and he otherwise adduced evidence in support of his retention by the District.

As detailed below, the District has failed to prove the bulk of its claims, and the Commission concludes, unanimously, that Respondent shall not be terminated.

FACTUAL FINDINGS

The Parties and Jurisdiction

1. The District commenced this proceeding on March 29, 2013, when Vivian K. Ekhchian, then the District's Chief Human Resources Officer, executed a Statement of Charges against Respondent. That Statement of Charges was filed with the District's governing board, which thereafter determined to terminate Respondent.

2. On April 17, 2013, the District gave Respondent written notice of its intent to terminate him, and served Respondent with a copy of the Statement of Charges. Respondent made a timely request for hearing, which led to the issuance of the Accusation. He then filed a Notice of Defense.

3. Complainant's counsel, Mr. Morris, executed and filed the First Amended Accusation and Statement of Charges (FAA) on September 19, 2013. This hearing ensued. All jurisdictional requirements have been met.

4. Respondent has been an elementary school teacher in the District for approximately 24 years. During the events in question, he was assigned first to Miles Avenue Elementary School and then to 52nd Street School.

Findings on the Allegations Against Respondent

Background to the Events At 52nd Street School

5. Respondent was assigned to 52nd Street School (52nd Street) prior to the 2011-2012 school year. Respondent had experience teaching fourth and fifth graders. When he was assigned to the school, he went to the site ahead of time so that he could familiarize himself with the school.

6. According to the school's principal at the time, Mr. Osbaldo Jimenez (Jimenez), 52nd Street had suffered from neglect for a period of years. At hearing he described that prior to his assignment there in 2011, a culture of disrespect had arisen, where all the main groups tended to disrespect others. That is, he perceived that the students disrespected the teachers, and teachers disrespect students. He attested that he wanted to change that culture. He had openings on his fifth grade team, which taught in four classrooms. To be sure, Respondent was not part of the alleged culture of disrespect at 52nd Street, because he had not taught there prior to Jimenez's assignment as principal.

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7. Respondent and another teacher new to the school were assigned to the fifth grade team, joining two teachers who had been at the site for some time. It was recognized by the other members of the fifth grade team and by Jimenez that one of the four classes had a substantial number of students with significant behavior problems, and those students, and others, were known to be under-performers.

8. Respondent told Jimenez that he was willing to teach the class of students with behavior challenges. He told Jimenez that he had child with autism, and that he had learned to cope patiently with his child's behaviors, and he believed he was up to the challenge. Jimenez assigned Respondent to teach that class.

9. The teachers in the fifth grade team told Jimenez that they would need administrative support. It appears that he gave them some discretion in handling problems among themselves. One tactic that was arrived at was for the teachers to take, temporarily, problem students from other classes, and especially Respondents.¹

10. The class to which Respondent was assigned to was a relatively small one because of the issues presented by the children; there were approximately 25 students in the class. It was well-known by the staff that there were students in the class who had been poor performers in prior years. It was also well known that five or six of the students posed significant behavior problems. Two of them, J [REDACTED] and H [REDACTED], had a history and reputation for posing problems, including eloping from class and running around the school building. When they ran around, they would often knock on classroom doors and engage in other disruptive acts. Jimenez acknowledged that they might do that two or three times per week, and one of the two boys admitted that amount of elopement during the hearing. Both J [REDACTED] and H [REDACTED] were receiving psychological counseling on the campus by counselors employed to come to the school and work with the two, on a weekly basis. The counselors were not District employees, instead employed by a firm under contract with the District. J [REDACTED]'s counselor was Gissele Lopez.

11. J [REDACTED] tended to be a leader of the problem group, and he often convinced H [REDACTED] to leave the room, or engage in other stunts. During the hearing, Jimenez described J [REDACTED] as a boy who had a tough time with the parameters of school, and Jimenez described him as a boy who would one-up a teacher, and if cornered would come out swinging; Jimenez did not appear to mean this in a physical sense. Jimenez acknowledged that other teachers had problems with J [REDACTED]. Jimenez was aware that Respondent was trying to build rapport with J [REDACTED] by not writing him up for his antics. Jimenez was also aware that J [REDACTED] continued in the behavior of leaving the classroom and wandering the hallways after Respondent started, as Jimenez had caught the boy in the hallways on more than one occasion.

¹ There was some limit to the support, as Mr. Tellez, another fifth-grade teacher, testified that the teachers were told that they could not put incidents involving black students into the computer system because the District had received complaints that too many African American students were being suspended.

The Alleged November 2011 Incident

12. (A) It was not established, as alleged, that on November 17, 2011, Respondent "grabbed and pulled student J [REDACTED] H. from under the desk, causing J [REDACTED] to hit his head on the desk." (FAA p. 2, lines 10-11.)

(B) On the day in question, Respondent had his students lined up, so that they were ready to leave for the day. J [REDACTED] was acting up, refusing to get into line, and at some point had gone under a desk. Respondent was speaking to the boy, trying to get him to come out, and Respondent reached under the desk, not to grab and pull J [REDACTED], but to bring him along. J [REDACTED] began to come to Respondent, and while making his way out from under the desk, he bumped his head. Respondent did not engage in some sort of rough or violent or otherwise untoward treatment of J [REDACTED] in this incident. Respondent was not acting in a disciplinary way, but instead was trying to obtain J [REDACTED]'s cooperation; Respondent was offering a helping hand, something that H [REDACTED], who had been in the classroom at the time, stated during his deposition.

(C) It should be noted that J [REDACTED] at some point told Jimenez that he bumped his head accidentally. His other statements as to how the accident occurred, were often inconsistent.

13. It was not established, as alleged in paragraphs 3a and 3b of the FAA, that Respondent failed to follow directives previously issued to him. Respondent in fact was speaking with J [REDACTED], trying to persuade him to stop his disruptive behavior, and to get into line with the other children. He did not need to call an administrator for help at the time, because he was able to persuade J [REDACTED] to come out from under the desk; therefore, Respondent did not fail to follow prior advice or directives to the effect that he should call for an administrator in some situations where a student was acting up.

The Alleged February 2012 Incident

14. On February 16, 2012, J [REDACTED] and H [REDACTED] left Respondent's classroom without permission and began roaming the hallways of the school. At some point they wanted to come back in, and Respondent would not let them in. J [REDACTED] fell down, and accused Respondent of pushing him; H [REDACTED] claimed that Respondent pushed him as well. The latter claims by the boys were not proven in this case.

15. It was alleged that on February 16, 2012, Respondent locked his classroom door after J [REDACTED] and H [REDACTED] left the room without his permission. That claim, standing alone was proven; the door was locked behind the boys. However, Respondent was obligated by a directive given by the principal, Jimenez, that all the classroom doors were to be locked during class. Jimenez required that the classroom doors remain shut and locked while class was in session as a security measure against possible intrusion onto the campus by outsiders who might do harm to the children or staff. Therefore, Respondent did not act improperly when he left the door locked after the boys left the classroom without permission.

16. (A) It was established that on February 16, 2012, Respondent used his body to block the doorway to his classroom, as part of his refusal to allow J [REDACTED] and H [REDACTED] to return to class. However, it was not established, as alleged in paragraph 6 of the FAA, that Respondent pushed J [REDACTED] as the student tried to reenter the classroom, causing the boy to fall on his buttocks. And, it was not established, as alleged in paragraph 8 of the FAA, that Respondent failed to contact the main office or a site administrator when the students left the classroom without permission.

(B) J [REDACTED] and H [REDACTED] eloped from Respondent's classroom, without permission, while class was in session. As previously noted, the two students had a long history of such behavior, going back to prior school years. On the day in question—February 16, 2012—they ran out, and then began running up and down the hallway. As found above, Respondent was obligated to keep his door locked by direction of the school principal.

(C) Respondent called the main office to advise them that the two boys were on the loose. Jimenez, the school's principal, was not available. The two boys knocked on the door. Respondent went to the door, and the boys ran away. They knocked again, and started to push in. Respondent spoke to them, asking them if they were ready to behave and return to class, but they did not assent to that; they just wanted back in on their own terms, and on their own time. Respondent did not deem this to be acceptable.

(D) J [REDACTED] tried to push in, and instead stumbled and fell. Just after he fell, his counselor, Ms. Lopez, arrived on the second floor, where Respondent's classroom was located. She saw J [REDACTED] sitting on the floor, and Respondent in the doorway of the classroom. She did not at first see H [REDACTED] nearby, but when she got closer to the classroom, she saw him further down the hallway, at the end of the hall opposite of the one from which she was coming. When she got closer to the scene, J [REDACTED] said to her that Respondent pushed him, or words to that effect, and J [REDACTED] appeared to want her to verify that. However, she did not see how he came to be on the floor. She described Respondent as calm and collected, and he said to her, in an even voice, that he did not push the boy. J [REDACTED] then ran off with H [REDACTED]. Ms. Lopez went downstairs to find J [REDACTED]—she had come up for a counseling session—and he eventually found her in the main office.

(E) J [REDACTED] later made written statements about the incident, which were obtained by the efforts of Jimenez. J [REDACTED] stated, in one of his written statements, that he had just made up the story that he was pushed, while also stating that he stepped on Respondent's foot, and then fell back. At the hearing, H [REDACTED] testified, and this part of his testimony was accepted, that J [REDACTED] told H [REDACTED], at some time after February 16, and while the two were walking home from school, that he had made up the story that Respondent had pushed him. Thus, J [REDACTED]'s statements and testimony to the effect that Respondent pushed him down are not credited. At the same time, H [REDACTED]'s statements, at various times, about what happened in the doorway, are inconsistent, and do not establish that Respondent pushed J [REDACTED], causing him to fall.

17. After this event, Respondent was removed from the classroom by Jimenez. On or about February 17, 2012, another fifth grade teacher, Ms. Spottville, whose classroom was next door to Respondent's saw that Respondent was not there, and she asked the students where he was. At least two of the children she associated as the group of problem students yelled out, "we got him fired!" She told the students that was not so, but some students repeated it in the hallways thereafter. This gives credence to the inference that J ■■■ had a motive to falsely accuse Respondent of pushing him, a claim he made to the counselor, and that he at times maintained to the principal.

The Allegations of Misconduct in 2009 and 2010 at Miles Avenue Elementary School

18. Prior to his assignment to 52nd Street, Respondent was a teacher at Miles Avenue Elementary School (Miles). During the relevant time period, 2009 and 2010, Respondent taught fourth grade students.

19. (A) It was established, as alleged, that on September 10, 2010, Respondent left his classroom for a few minutes to use the restroom, and that action was against District policy. However, it was not established, as was alleged, that some of the children engaged in inappropriate games of a sexual nature while he was out of his room.

(B) When his supervisor met with Respondent to discuss the matter, Respondent acknowledged that he had acted improperly. He was counseled not to leave his class unattended again, and he promised that he would not. He has not done so since the September 2010 incident.

20. (A) On July 10, 2010, Respondent was subbing for Mr. Dowty. It is undisputed that Dowty had left a hammer in his classroom. What is disputed is whether Respondent struck a student's desk with it, while making a statement with threatening overtones.

(B) The student, K ■■■, testified at the hearing that Respondent had picked up the hammer, and that Respondent came up the row the student was sitting in, and then struck the hammer on the desk two or three inches from his hand. The student testified that he thinks Respondent did this because K ■■■ was talking to another student and should not have been.

(C) Respondent denied doing anything of the sort, both when he was interviewed by his supervisor at Miles, and at the hearing. He stated he had found the hammer and put it away. He attested that K ■■■ was asleep, leading to the inference that something else startled the boy.

(D) At the hearing, K ■■■ was visibly upset while testifying. He testified that since the incident he has been afraid of noises like a hammer hitting something, and that walking by a construction site would scare him. His mother, however, testified that she has not seen such fear in the nearly four years since the incident.

(E) K [REDACTED] did not testify to Respondent making any statement to him when the latter hit the desk, and that allegation was not established. (See FAA, p 3, line 18.)

(F) Based very much on K [REDACTED]'s demeanor, the Commission finds that Respondent struck the boys desk in some way with the hammer. However, it is not found that he did so to threaten or intimidate the student.

21. (A) It was not established that on April 29, 2009, Respondent hit student L [REDACTED] S. with paper, and called him a jerk, as asserted in the FAA at page 3, lines 26-27.

(B) The testimony of Dowty, and Respondent, established that when one or the other had a student who was acting up in some way, the student would be sent to the other teacher's classroom.² On the day in question, L [REDACTED] S., one of Dowty's students, was sent by Dowty to Respondent's classroom because of some behavior issue. Respondent tried working with the boy, asking him about his interests for a career. When the student said he was interested in becoming a fireman, Respondent was able to print out some information about firemen, and he handed it to the student. Respondent may have inadvertently brushed the student's body with the papers. However, it was not established that Respondent struck the boy, despite L [REDACTED]'s claims.

(C) In this case the Commission reviewed the deposition testimony of the student, and heard Respondent's testimony about the matter. Even on paper, the student's testimony was not convincing, and it appeared as if designed to get back at Respondent for some vaguely remembered slight. (L [REDACTED] apparently thought he had been subpoenaed to testify regarding some claim about graffiti, it was only with some questioning that he realized the matter had to do with one interaction with Respondent several years before.) It appears from the entire record that when Respondent handed the boy the papers that Respondent had generated, he may have brushed them against the boy's body, but even the alleged victim's testimony does not establish he was hit by Respondent in some way. Any contact was inadvertent and not intended to harm or intimidate.

(D) As to the claim that Respondent called L [REDACTED] a jerk, it is noted that there was no testimony about that, despite reasonably open-ended questions by the attorneys during direct and cross-examination, until the former student's redirect examination.

(E) It was alleged that Respondent refused to apologize over the alleged incident, despite a recommendation to Respondent by his supervisor that Respondent do so; his supervisor was intent on managing perceptions. However, the claimed failure to apologize was contradicted by L [REDACTED]'s mother in her deposition testimony.

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² Dowty testified that the two did this instead of sending the students to the "opportunity room" because the students had learned that if they misbehaved, they would be sent there and not have to do any work.

22. It was not established, as alleged at page 3, lines 27-28, that Respondent ridiculed a boy named B [REDACTED] in front of the class. The only testimony offered to establish such was some less-than-clear testimony by L [REDACTED] during his deposition. Since L [REDACTED] was in Dowty's class, and B [REDACTED] was in Respondent's class, L [REDACTED]'s opportunity to observe such behavior by Respondent would be limited.

Credibility

23. (A) Respondent was credible in his testimony, both in terms of his demeanor, and in the overall content of the testimony. His credibility was bolstered by the testimony of fellow teachers. They painted the picture of a calm, gentle, and caring teacher, who has been willing to work in schools that need experienced teachers, schools that are located in economically challenged areas within the District. He volunteered to take on the toughest of the fifth grade classes at 52nd Street School, believing he could handle the children with the problem behaviors. In this he may have overestimated his skills, or underestimated the extent of the challenge, or the support he could or would receive from the administration, but he was well into the second semester with the class when he was removed from the classroom primarily due to charges that have not been established here.³ He made a point of visiting the parents of his students, often more than once; this included J [REDACTED]'s mother.⁴ His colleague, Tellez, made clear in his testimony that he was impressed with Respondent's efforts to reach out to the parents of his students, in part Tellez described the neighborhood as one a stranger should avoid walking around after dark. Tellez also noted that while Respondent did not find well-decorated bulletin boards to be especially important, he did find getting up in front of students and instructing them to be very important, and Respondent tried to concentrate on that.

(B) Both J [REDACTED] and H [REDACTED] admitted to liking Respondent as a teacher, and to some benefits from being in his class. According to H [REDACTED], Respondent encouraged him to better behavior, and to not let others goad him. J [REDACTED] testified that Respondent helped him to stay calm, and that as a math teacher Respondent helped the boy to learn.

(C) Ms. Spottville, whose classroom was next to Respondent's, is a special education teacher with about 24 years of teaching experience, 12 with the District. She also had a small class, and had aides, because she was teaching special education students. She

³ Mr. Tellez, another fifth grade teacher at 52nd Street, explained to the Commission that after Respondent's removal, it took time to get a permanent teacher to replace him. When one became available, she could not handle the class, which was then reduced in size to 18 students, so that she could handle it. J [REDACTED] and H [REDACTED] were separated and moved into other fifth grade classrooms. This supports the inference that Respondent's teaching and classroom management skills were better than Jimenez would have the Commission believe.

⁴ Respondent and J [REDACTED]'s mother agreed that Respondent would call her at the end of every week with a progress report, and that he did so up until the week he was removed from the classroom.

credibly testified that Respondent routinely stayed after school, and would consult with her about teaching strategies, and ways to handle the problem behaviors. She gave insight into the nature of his class, and she indicated that she had less challenging behaviors from her students than Respondent did with his.

24. As set forth above, J■■■■'s claims of being pushed by Respondent were not credited. Not only did he tell Jimenez, in writing, that he had lied about being pushed, his friend H■■■■ impeached him during the latter's direct testimony. That impeachment—explaining that J■■■■ said he lied about being pushed—was volunteered spontaneously by H■■■■ during his direct examination, and reiterated by him on cross examination.

25. (A) Jimenez's credibility suffered as the case went on, although his demeanor was not the issue. His story of not reading J■■■■'s written statement (where the student said he lied) lacked credence, as did his claim that he gave that statement to Mr. Franco. The document did not get scanned into the District's data base, as it should have been, and it is more likely that it did not get scanned into the system because Jimenez did not give it to F■■■■, rather than that F■■■■ failed to have it scanned into the system. Jimenez denied asking Respondent to give him a written statement regarding the events involving the alleged pushing of J■■■■, asserting that Respondent volunteered a statement; it appears Jimenez was concerned that he had violated the Collective Bargaining Agreement by asking for the written statement to begin with. However, Respondent's statement, e-mailed to Jimenez, states that it was response to Jimenez's request for a written statement.

(B) Jimenez made efforts, during his testimony, to denigrate Respondent's teaching skills, even though Respondent is not charged with substandard teaching. Indeed, the FAA alleges that Respondent's 2011 evaluation provided that he met standards.⁵ (FAA, p. 4, line 14.) None of the teachers who worked with Respondent had a negative perception of Respondent's teaching; Dowty had observed him while both were at Miles and thought Respondent was a good teacher. All attested to his dedication, his efforts to reach out to the students and their parents, and to improving his skills. Near the beginning of his direct testimony, Jimenez stated that one of the key things he took away in some early training was that a principal had to protect himself; he had learned self-preservation. It appears that he came to conclusions about Respondent, and then handled the claim about the boy being pushed with an eye on that goal.

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⁵ Jimenez testified that if young students were engaged by their instruction, then they would not become behavioral problems; he indicated Respondent was not engaging the problem students, subtly trying to blame Respondent for the problems the students, especially J■■■■ and H■■■■, presented. However, it was clear that the students had been behavioral challenges long before they were placed with Respondent. It appears more likely that they were not readily engaged by any teacher. (See fn. 3.)

The Morrison Factors

26. Where there is conduct that might justify termination of a teacher, an examination must be made of whether or not that conduct indicates that the teacher in question is unfit to teach. This requirement was first set forth in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229. There the Supreme Court held that several factors that tend to indicate fitness to teach should be examined. This includes the likelihood that the conduct may have adversely affected students or fellow teachers; the degree of such adversity anticipated; and, the proximity or remoteness in time of the teacher's conduct. Other factors may include the type of certificate held by the teacher; extenuating or aggravating circumstances; the praiseworthiness or blameworthiness of the motives resulting in the conduct; the likelihood that the conduct in question will recur; and the extent that discipline will cause an adverse or chilling impact on the constitutional rights of the teacher involved, or of other teachers.

27. (A) (i) *Adverse consequences on students and teachers, and the degree thereof:* As to the fact that Respondent left his classroom for a short period of time, no adverse consequences were established for any other teachers. Nor was any established for any students. While it was claimed in 2010 that some of the children engaged in games that had sexual overtones, there was no direct evidence on that point; a former supervisor had memorialized those claims, but that does not establish that such misbehavior occurred, only that it was reported. (No investigation was conducted.)

(ii) Regarding the incident with K [REDACTED], there was no evidence of adverse consequences for other teachers, but some evidence of adverse consequences for the student. During his testimony, he was visibly upset about the incident. He asserted that he is scared of noises similar to a hammer blow, although his mother testified she had not seen the adverse effects described by the student.

(B) *Proximity in time:* The act of leaving the classroom unattended occurred in September 2010, and the incident with K [REDACTED] also occurred in 2010. Thus, the incidents are not especially proximate in time.

(C) *Type of certificate held by Respondent:* He holds a multi subject credential.

(D) *Likelihood of recurrence:* The chance of recurrence is low. Respondent has not left his classroom unattended since the single incident in 2010. There has not been any other untoward behavior since that year.

(E) *Implication of constitutional rights:* No constitutional rights, of either Respondent or other teachers, are implicated if Respondent is terminated.

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(F) *Extenuating or aggravating circumstances*: It is inferred that Respondent's need to use the restroom was compelling, an extenuating fact.

28. Under all the circumstances, it is determined that Respondent has not been shown as unfit to teach.

LEGAL CONCLUSIONS

Legal Conclusions Generally Applicable To All Claims:

1. The Commission has jurisdiction to proceed in this matter, pursuant to Education Code section 44944,⁶ and Factual Findings 1 through 3.

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

(B) The allegations of unprofessional conduct were dismissed at the outset of the case, because Respondent was not given an opportunity to cure any defects in teaching after he was removed from the classroom; he was "housed" for a period of months. This created a jurisdictional defect. (*Tarquin v. Commission on Professional Competence* (1978) 84 Cal.App.3d 251, 259; *Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1446.)

3. "Evident unfitness for service" as used in section 44932, subdivision (a)(5), means "clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies." Unlike "unprofessional conduct," "evident unfitness for service" connotes a fixed character trait, presumably not remediable merely on receipt of notice that one's conduct fails to meet the expectations of the employing school district. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444.)

4. "Immoral conduct," as used in section 44932, subdivision (a)(1), is not confined to sexual matters. It has been defined to mean that which is hostile to the welfare of the general public and contrary to good morals. It includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, and dissoluteness. It can be conduct that is willful, flagrant, or shameless, conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward

⁶ All further statutory references are to the Education Code.

good order and the public welfare. (*Board of Education of the San Francisco Unified School District v. Weiland* (1960) 179 Cal.App.2d 808, 811 (*Weiland*); *San Diego Unified School Dist. v. Commission on Professional Competence* (2011) 194 Cal.App.4th 1454, 1466.)

5. In order for a teacher to be terminated under section 44932, subdivision (a)(7), for persistent disobedience of applicable rules and regulations, it must be established that there has been continuous and constant refusal to obey, or behavior motivated by an attitude of continuing insubordination; a single instance of disobedience is insufficient. (*Governing Bd. of the Oakdale Union School Dist. v. Seaman* (1972) 28 Cal.App.3d 77, 81-82.)

6. Even where unprofessional conduct, immoral conduct, evident unfitness for service, or refusal to follow rules and regulations is or are established, it must also be established that such conduct renders the Respondent unfit to teach. (*Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229-230 (*Morrison*); *Fontana Unified School District v. Burman* (1988) 45 Cal.3d 208; *Woodland Joint Unified School District v. Commission on Professional Competence (Zuber)* (1992) 4 Cal.App.4th 1429, 1444-1445; see *Bourland v. Commission on Professional Competence* (1985) 174 Cal.App.3d 317, 321.)

7. (A) It is settled that the trier of fact may "accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted." (*Stevens v. Parke Davis & Co.* (1973) 9 Cal.3d 51, 67.) The trier of fact may also "reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material." (*Id.*, at 67-68, quoting from *Neverov v. Caldwell* (1958) 161 Cal.App.2d 762, 767.) Further, the fact finder may reject the testimony of a witness, even an expert, although not contradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.) And, the testimony of "one credible witness may constitute substantial evidence," including a single expert witness. (*Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, at 1052.)

(B) The rejection of testimony does not create evidence contrary to that which is deemed untrustworthy. That is, disbelief does not create affirmative evidence to the contrary of that which is discarded. That the trier of fact may disbelieve the testimony of a witness who testifies to the negative of an issue does not of itself furnish any evidence in support of the affirmative of that issue, and does not warrant a finding in the affirmative thereof unless there is other evidence in the case to support such affirmative. (*Hutchinson v. Contractors' State License Bd.* (1956) 143 Cal.App.2d 628, 632-633, quoting *Marovich v. Central California Traction Co.* (1923) 191 Cal.295, 304.)

Legal Conclusions Pertaining to the Specific Allegations of the Accusation:

8. It was not established that Respondent engaged in immoral conduct, based on the foregoing. Essentially, it was established that Respondent once left his classroom unattended for a few minutes, and that he is some way frightened a student in 2010. The

former does not constitute immoral conduct within the meaning of the term (Legal Conclusion 4). The evidence of the other incident does not establish that Respondent acted in a way that was depraved or indecent.

9. It was not established that Respondent is evidently unfit to teach. In fact, the evidence is to the contrary, Factual Findings 19 and 20 notwithstanding. The testimony of other teachers established that Respondent is firmly committed to teaching and mentoring young students, and to assisting their growth and progress, in the classroom and outside of it. Even H [REDACTED] and J [REDACTED] thought that Respondent was a good teacher. (Factual Finding 19.)

10. It was not established that Respondent has engaged in persistent violations of school laws or regulations, nor has there been persistent refusal to obey them. To be sure, he admitted that he should not have left his classroom unattended in 2010; he admitted it at the time of the incident and during the hearing, and such has not happened again. As to the other incident, it stands in isolation as well.

11. It was not established that Respondent refused to perform regular assignments, as prescribed by the reasonable rules and regulations of the District. Again, the District established two incidents had occurred, several years before the hearing, and the conduct in question has not been repeated.

12. Notwithstanding the two claims that were established, Respondent is not unfit to teach within the meaning of *Morrison*, based on Factual Findings 26 to 28.

13. Any allegations or claims upon which findings are not made are deemed not proven, or surplusage. This includes claims asserted by Respondent that the applicable provisions of the Education Code were not followed, as well as claims that the District did not comply with applicable provisions of the Collective Bargaining Agreement between the District and its teachers.

14. Based on all the foregoing, Respondent shall not be terminated as a certificated employee of the District.

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ORDER

Respondent Aldo Garbellini shall not be terminated by the Los Angeles Unified School District.

DATED: September __, 2014

Miriam Chapa

DATED: September 29, 2014



Vanessa Chavez

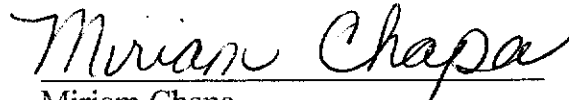
DATED: September __, 2014

Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings

ORDER

Respondent Aldo Garbellini shall not be terminated by the Los Angeles Unified School District.

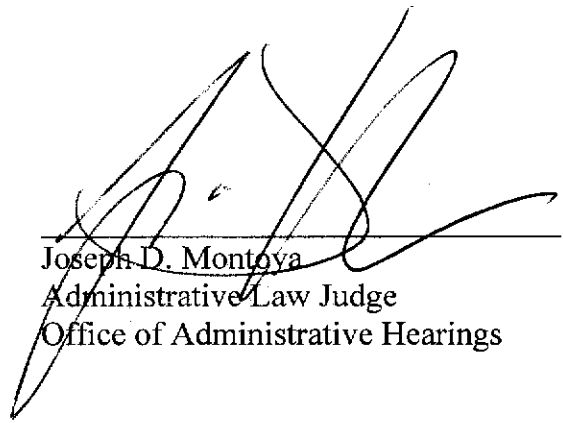
DATED: September 30, 2014


Miriam Chapa

DATED: September __, 2014

Vanessa Chavez

DATED: ~~September~~ ^{October 7} __, 2014



Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings