

BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

JOSHUA CUNNINGHAM,

Respondent.

OAH Case No. 2009050212

DECISION

This matter came on regularly for a jurisdictional hearing in Los Angeles on June 5, 2009, and thereafter a hearing before the Commission on Professional Competence (Commission) at Santa Ynez, California, on October 5, 2009, December 1, 2 and 3, 2009, and January 5, 6 and 7, 2010. The Commission consists of the following members: Pam Winter, administrator, Clovis Unified School District; Charles Ritz, teacher, Fullerton Joint Union High School District; and David B. Rosenman, Administrative Law Judge, Office of Administrative Hearings.

The Santa Ynez Valley Union High School District (District) was represented by Liebert Cassidy Whitmore, by Mary L. Dowell and Danielle G. Eanet, attorneys at law. Respondent Joshua Cunningham was present and was represented by Hathaway, Perrett, Webster, Powers, Chrisman & Gutierrez, by Robert A. Bartosh and Adam A. Acevedo, attorneys at law.

Oral and documentary evidence was received and the parties submitted argument. The First Amended Accusation was amended further by motion during the hearing (see Exhibit 58 for the amended allegations). The Commission considered the matter in executive session. The matter was then submitted for decision. After due consideration of the entire record herein the Commission makes the following factual findings, conclusions of law, and order:

FACTUAL FINDINGS

1. The Accusation, First Amended Accusation and Statement of Charges were brought by Paul Turnbull in his official capacity as Superintendent for the District.

2. Respondent Joshua Cunningham (Respondent) has been employed by the District since the 2000-2001 school year. He is a permanent certificated employee. The events at issue in this proceeding relate to Respondent's activities as the head football coach for the high school during the summers of 2005, 2006, 2007 and 2008, and as a geometry teacher during the 2008-2009 school year.

3. The Statement of Charges was filed March 20, 2009, and recommends the dismissal of Respondent from the District for the following legal causes under Education Code¹ sections 44932 and 44939: (1) immoral conduct; (2) dishonesty; (3) evident unfitness for service; and (4) persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the District. Respondent submitted a Request for Hearing on April 9, 2009.

4. The Statement of Charges was amended on May 12, 2009, to add a cause for Respondent's dismissal for unprofessional conduct. An Accusation was signed May 4, 2009, and the First Amended Accusation was signed May 13, 2009. On May 19, 2009, Respondent submitted a Notice of Defense.

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

6. Several allegations are alleged to have taken place during Respondent's period 3 geometry class on August 27 and 28, 2008. However, the evidence relating to block scheduling of classes at the high school makes it unlikely, without further information, that Respondent taught period 3 Geometry for those two consecutive days.

7. On August 27 or 28, 2008, during Respondent's period 3 geometry class, he told a story to his class about his first day of teaching, including that he had neglected to button his boxers and accidentally left his zipper down on that first day. He said his penis fell out of his pants and was exposed in front of all of his students.² Respondent demonstrated this by putting one of his legs up on a desk in the front of the classroom.

8. After other incidents occurred and comments were made by Respondent, a meeting took place on August 29, 2008, with Respondent, Principal Suzanne Nicastro (Principal Nicastro) and SYVUHS Faculty Association representative Tory Babcock (representative Babcock). At this meeting, Respondent admitted that he engaged in the conduct set forth in Finding 7.

9. On August 27 or 28, 2008, during his class Respondent waved a stick with a hook on the end which was for opening high windows, and called it his ovary remover, saying that he would use the stick to remove the ovaries of bad girls in his class. He also stated that the hook on the end was rusty and the rust was caused by having removed the ovaries of past bad

¹ All statutory references are to the Education Code, unless otherwise noted.

² This Finding is made by the Commission by a unanimous vote, except the sentence "His penis fell out of his pants and was exposed in front of all of his students," which is found on a Commission vote of two-to-one. Where necessary in subsequent Findings, Commission votes will be in parenthetical notes.

girls. Respondent further stated something to the effect that, if students gave him problems, he would use the stick to “make sure I don’t have problems with your kids.” On August 29, 2008, in the presence of representative Babcock, Respondent admitted to Principal Nicastro that he engaged in this conduct.

10. On August 27 or 28, 2008, Respondent told his freshman geometry class that he would “rape their minds” to help them learn math.

11. On August 27 or 28, 2008, during Respondent’s period 3 geometry class Respondent used vulgar language in his class including the following words: “shit,” “ass,” and “damn.” On August 29, 2008, in the presence of representative Babcock, Respondent admitted to Principal Nicastro that he engaged in this conduct.

12. Although it is alleged that Respondent also used the word “fuck,” this was not established by the evidence. During the meeting with representative Babcock and Principal Nicastro, Respondent denied that he used this word.

13. There was evidence that Respondent may have used the word “fuck” at some later point in the classroom as an excited utterance when a computer was accidentally falling from a desk. One student may have heard Respondent. However, this is not the utterance that was alleged in the First Amended Accusation, nor is it found, under the circumstances, to be the kind of utterance that would support any of the alleged legal causes for Respondent’s dismissal.

14. On August 27 or 28, 2008, during Respondent’s period 3 geometry class Respondent told students in his class that, on days when the football team was going to play and there was a pep rally during school, he gets pumped up, and that the feeling was much like how the little blue pill makes him feel. On August 29, 2008, in the presence of representative Babcock, Respondent admitted to Principal Nicastro that he engaged in this conduct.

15. According to Respondent, his reference to the little blue pill was from a television commercial for Viagra. He was trying to convey excitement for student support of the team during weekly pep rallies.

16. On August 27 or 28, 2008, during Respondent’s period 3 geometry class Respondent explained to his class that, to potty train a young child, one should tell the child to “aim his penis at fruit loops, and sink the fruit loop by peeing on it.” On August 29, 2008, in the presence of representative Babcock, Respondent admitted to Principal Nicastro that he engaged in this conduct.

17. On August 27 or 28, 2008, during Respondent’s period 3 geometry class Respondent told students that their math compasses could be used as a weapon, and that when he was in high school, he jabbed the sharp point of his compass into a friend’s thigh just to see if it actually would go into his leg. On August 29, 2008, in the presence of

representative Babcock, Respondent admitted to Principal Nicastro that he engaged in this conduct.

18. On August 27 or 28, 2008, during Respondent's period 3 geometry class Respondent made fun of numerous students in his class by: 1) saying it was "funny" that a Hispanic boy was named Jesus; 2) laughing at a girl because she did not have a middle name; 3) making fun of a male student for being small in physical size; and 4) laughing at the size of a girl's purse. On August 29, 2008, in the presence of representative Babcock, Respondent admitted to Principal Nicastro that he engaged in this conduct.

19. After these comments were made during the first few days of the school year, some students complained to their parent, who complained to school administrators. Administrators investigated and collected written statements from students. A meeting was scheduled with Respondent, representative Babcock and Principal Nicastro. Respondent was given a summary of the statements and actions attributed to him and was asked for his response. Among other things, Respondent admitted that some of the statements and actions occurred, as set forth in more detail above.

20. After Respondent admitted many of the comments and actions, Principal Nicastro arranged for District Superintendent Paul Turnbull to join the meeting. After the meeting, the decision was made to place Respondent on a paid leave of absence for his actions. Respondent was on leave from his teaching and coaching duties from September 3 through September 14, 2008. During this leave, Respondent was required to undergo a fitness for duty examination for anxiety-related issues, from which he was cleared for duty with no restrictions.

21. Respondent explained at the hearing that he had told some of these stories to classes in the past, but they were interspersed throughout the semester or the year. For this school year, he was trying to loosen his image as the head football coach of being intimidating and intense. He thought that by making these comments at the outset of the school year he could be seen as having a sense of humor and as being more approachable, in an attempt to forge a connection with his students. The metal pole story was a joke, in contrast to Respondent's comments to the class that, if he has a problem with a student, he will talk to them about it. The open pants story was to make students more comfortable with embarrassing moments that inevitably occur. The potty training story related to students overcoming their fears.

22. When Respondent returned from the leave of absence on September 15, 2008, he received a letter of reprimand. (Although the letter, Exhibit 6, is dated September 3, 2008, the evidence established this is when it was begun, not when it was finished or delivered.) The letter provided notice that his conduct on August 27 and 28, 2008, as described above, constituted unsatisfactory performance and unprofessional conduct, and included directions, including that Respondent maintain a professional demeanor and not make disrespectful comments "that are of a sexual nature, a demeaning nature, or a personal nature."

23. On September 17, 2008, from 7:00 pm to 8:45 pm, Respondent participated in Back to School Night activities that required him to present course requirements and curriculum content to visiting parents. Although it was alleged that his presentation did not address math standards and course requirements, the evidence established that Respondent did address these subjects. Among other things, Respondent discussed child psychology, the importance of a child's self-esteem, and made a reference to pre-marital sex. He also discussed personal stories and referenced sex multiple times. Respondent's conduct violated the guidelines of the written reprimand he received on September 15, 2008.

24. Respondent testified that, as he had just returned from a two-week suspension, he thought it was important to stress that he was aware of student self-esteem issues, needed parents' support, and that he had an open-door policy. The reference to pre-marital sex was in the context of Respondent's open-door policy whereby parents could ask him about anything such as whether their child was engaged in pre-marital sex, and if he was aware, he would inform them.

25. The day following Back to School Night, Principal Nicastro informed Respondent that she received complaints from some parents about his comments the prior night.

26. On December 5, 2008, in at least one class period, Respondent told the class that "if you want to find out if I am a man or a woman, you have to take my clothes off and see if I have a penis or a vagina." On December 15, 2008, he admitted to the Superintendent and Principal Nicastro that he made this statement. (The quoted language, with Respondent using himself as the example, is found by a vote of two Commission members. The third Commission member found that Respondent referred to others, not himself, in the example.)

27. During the meeting and at the hearing, Respondent explained that he was teaching the subject of direct and indirect logic and used an example that had been used by his college professor. Afterwards, he realized that the example may be problematic, and in a later class that day he changed the example to male and female dogs.

28. Between the last week in November 2008 and December 11, 2008, during Respondent's period 1 geometry class he told the female students something to the effect that they think they look so pretty kissing their boyfriends but they make themselves look like "ho's." (This is a reference to whores.) On December 15, 2008, he admitted to the Superintendent and Principal Nicastro that he made this statement.

29. Respondent explained that he had seen students making out and groping in the hallway, and thought there should be a policy against it. He told the class that they were wrong if they thought it made them look chic; rather, "it makes you look like a ho."

30. Between the last week in November 2008 and December 11, 2008, during Respondent's period 1 geometry class, Respondent stated, "there are 16 girls in here and that means that there are 32 breasts in the class," and that he would not want to be a woman

because he would not want to have breast cancer. On December 15, 2008, he admitted to the Superintendent and Principal Nicaastro that he made this statement.

31. Respondent explained that he had overheard a derogatory comment about breast cancer, which was a sensitive subject because he had family members with breast cancer. He made the comments to the students to convey that it was a serious subject, not to be joked about; that statistically there was a chance someone would suffer from it; and that he would not want to endure it himself. Respondent described it as a moment of passion.

32. During the Fall 2008 semester, Respondent told at least one of his math classes that Girl Scouts are “ho’s.” The context was that, in selling cookies, they were “cookie ho’s.”

33. After the meeting with Respondent on December 15, 2008, Superintendent Turnbull decided that more formal action against Respondent was required. On January 5, 2009, the Monday of the first week of school after the winter school recess, Respondent was given a Notice of Unprofessional Conduct and Unsatisfactory Performance (Exhibit 7). In the Notice, Respondent was informed that further instances of misconduct could lead to termination of his employment.

34. After the Notice was given to Respondent, Superintendent Turnbull and Principal Nicaastro learned of activities that had occurred in prior years, set forth in more detail below, which resulted in the District’s decision to terminate Respondent’s employment.

35. While he was the varsity head football coach at Santa Ynez Valley Union High School, Respondent took senior football players on senior camping trips during July 2005, 2006, 2007 and 2008.

36. The camping trips occurred on a private ranch located within the District’s boundaries.

37. Respondent organized the camping trips as a team building exercise and as a reward for players who had participated in other organized or individual activities. For the camping trip in 2008, Respondent was convinced to open the trip to include players who had not participated in the other summer activities.

38. At the end of the 2005 camping trip, Respondent saw one of his coaches and the coach’s son engaged in target shooting, and he formed the idea to include shooting activities in later trips. There were no other shooting activities in 2005. In 2006, there was limited knowledge in the community before the trip took place of shooting activities planned for students. By the 2007 and 2008 trips, it was established that knowledge about shooting activities during the trips was somewhat known in the community.

39. During the 2006, 2007, and/or 2008 camping trips students were given bows and arrows, hatchets, .22 caliber rifles for target shooting, a .22 caliber pistol, and/or shot guns used for trap shooting. (Bows and arrows were found by a Commission vote of two-to-one.)

40. Under Respondent's supervision, students were divided into groups of 4 – 6 students to engage in target practice where students utilized the above-mentioned firearms. Although the pistol was used in a safety discussion on one trip, there was insufficient evidence to establish that it was used for target practice.

41. For the 2005, 2007 and 2008 camping trips, Respondent provided students with an invitation and a participant release of liability waiver form which explicitly stated that the students were not to bring guns. (Exhibits 30, 33 and 36.) Although it was alleged that Respondent misled parents, students, administrators and board members with the reference to "no guns," there was insufficient evidence to support this allegation. The invitation and release forms do not state that adults would bring guns and that students would be permitted to shoot guns. Nor was there written permission by any parent for their sons to shoot guns on the camping trips. The 2007 and 2008 invitations state that, if the student has a hatchet or an axe, he may bring it.

42. Respondent failed to inform school administrators that students would be provided with bows and arrows, hatchets, shot guns or .22 caliber rifles used for target practice before those activities took place in 2006, 2007 and/or 2008. (Bows and arrows were found by a Commission vote of two-to-one.)

43. Respondent failed to directly inform parents who were not participating in the camping trip that students would be provided with bows and arrows, hatchets, shot guns or .22 caliber rifles used for target practice. (Bows and arrows were found by a Commission vote of two-to-one.)

44. Respondent failed to inform students they would be provided with bows and arrows, hatchets, shot guns or .22 caliber rifles used for target practice. (Bows and arrows were found by a Commission vote of two-to-one.)

45. Pictures from the 2008 camping trip illustrate the inherently dangerous activities Respondent allowed students to engage in which posed unacceptable and unmitigated risks to their safety, including students aiming to fire weapons and firing weapons; Respondent holding a weapon in front of a group of students; and students loading bullets into a rifle. Although alleged, the evidence was insufficient to establish that there was a student holding a firearm unsupervised or an adult loading a handgun. (That the activities established by the evidence were inherently dangerous was found by a Commission vote of two-to-one.)

46. There was insufficient evidence to support the allegation that Respondent claimed he told Ken Fredrickson, the Athletic Director, about his plan to allow students to utilize firearms during the camping trips. It is found that Respondent did not inform Mr. Fredrickson of his intentions. On February 27, 2009, during a meeting with Superintendent

Turnbull and a faculty association representative, Respondent stated words to the effect that Ken Fredrickson told him not to take the school vans “so it wouldn’t be a school-related function” and that Mr. Fredrickson also said, “It wasn’t a district thing, so you don’t need approval.”

47. At least two of the camping trips (2007 and 2008) were approved by the Board of Education (see Board agendas and minutes in Exhibits 31, 32, 34 and 35, and testimony of Mr. Fredrickson) and were therefore school events. The evidence did not include notice to the Board that students attending the camping trips would be permitted to possess and use firearms. There was also no evidence of whether the Board had such knowledge from any other source.

48. On at least one occasion, firearms were present in the school parking lot when the students and adult drivers convened to caravan to the camping site. The presence of firearms at school and students’ possession and use of firearms was inherently dangerous and a violation of Board policies, administrative regulations and state laws. (That the trips were school events, that firearms were present in the school parking lot, and that the firearm activities were inherently dangerous and a violation of policies, regulations and laws were found by a Commission vote of two-to-one.)

49. While there was a picture of what could have been a beer bottle on a table during the camping trip in 2007, there was insufficient evidence of how the bottle got there, and no evidence that Respondent was aware of it or permitted beer to be present or consumed, as alleged.

50. On February 27, 2009, during a meeting with Superintendent Turnbull and a Faculty Association representative, Respondent admitted that before one or more camping trips, parents and coaches met in the school parking with guns and rifles secured in their vehicles.

51. During the camping trips, Respondent allowed some adults who were not certified safety instructors to demonstrate firearm safety techniques and to supervise students.

52. On February 27, 2009, during a meeting with Superintendent Turnbull and a Faculty Association representative, Respondent admitted that students could have gotten hurt but argued that no one was ever injured. (There was evidence of an injury to a student who ran into a field at night during the 2008 trip, unrelated to any activities organized by Respondent.)

53. Despite the fact that school administrators and some parents did not know that Respondent permitted students to use bows and arrows, shot guns, and .22 caliber rifles for shooting during the trip, Respondent stated words to the effect that, “It wasn’t a secret that they were going to ‘shoot trap.’” (Bows and arrows were found by a Commission vote of two-to-one.)

54. Respondent justified his actions by stating that firearms were kept under the supervision of adults.

55. On February 27, 2009, during a meeting with Superintendent Turnbull and a Faculty Association representative, Respondent admitted he was responsible for the safety and welfare of the students who attended the camping trip. Respondent stated words to the effect, "I'm responsible for every single one of the students; if something happened it's my responsibility."

56. After learning of the camping trips, Superintendent Turnbull recommended that Respondent be suspended without pay and that termination proceedings begin. The District agreed.

57. Respondent's creation of the summer camping trips was a creative strategy for team building as well as an incentive for senior football players to remain involved in other activities during the summer. During the trips, the players were split into groups and engaged in various activities that included competitions and awarding of points. Other aspects of the camping trips were community service and fundraising. In return for use of the land, the landowner got trees trimmed and downed trees cleared. Some of the cut firewood went to the landowner, and the rest was split between the Boosters Club and the team for sale as fundraisers.

58. Shooting and hunting are common activities in the community. Respondent's addition of target practice to the other team building activities was generally supported by the community, although some community members expressed concern. Before any shooting at the camping trips, parents and coaches who were experienced hunters or shooters gave safety instructions to the students.

59. Respondent is originally from Idaho. He became a teacher in California in 1996. He was first employed by the District for the 2000-2001 school year. Before the 2008-2009 school year, Respondent had told some similar stories and made similar statements without complaints by students. His summary evaluation for 2005-2006 (Exhibit K) includes ratings of satisfactory in instructional technique and exemplary in student progress and learning environment, with particular note of his "very positive feeling tone with students," excellent job in role modeling and high expectations for student progress.

60. Respondent was experiencing increased conflicts and tension from parents and the Booster's Club relating to his coaching position as he began the 2008-2009 school year. Many parents and boosters were questioning his decisions and his authority. Respondent perceived he had a lack of support from the Athletic Director. He was very anxious and stressed about this situation. Respondent also was anxious at the time concerning difficulties he was experiencing with his wife.

61. Three days before school started in August 2008, Respondent had asked for referral to a counselor for assistance. No referral was made. During the period of his paid leave, Superintendent Turnbull gave Respondent information about mental health benefits and resources.

62. After the initial classroom incidents, there were several requests for students to be transferred out of Respondent's classes, and some transfers were made. In the students' complaints and testimony, several stated that they were upset or confused by Respondent's conduct and/or were unsure why Respondent acted as he did. There was little direct evidence of any other publicity concerning the statements and actions of Respondent as found above. However, it was also established that Santa Ynez is a small community and many residents were aware of some of Respondent's comments and actions.

63. The letter of reprimand given to Respondent on September 15, 2008 (Exhibit 6), includes an instruction for Respondent to participate in professional development training to be determined by the District. The District could find no such training programs for Respondent during the school year and could only find a program for the summer of 2009. The Notice given to Respondent in January 2009 (Exhibit 7) included the statement that, to ensure that Respondent was taking the steps necessary to remedy his performance, "you will be subject to frequent observation and supervision by your supervisor"

64. After being placed on leave and again after receiving the Notice in January 2009, Respondent asked to be observed in class and evaluated. He was hoping for both confirmation of his effectiveness as a teacher as well as suggestions for improvement. To his recollection, there was a short observation of a few minutes by Mr. Swanitz, with no feedback, and a 15-20 minute observation by Principal Nicastro followed by praise for what she saw, no criticisms, and no suggestions for change. There was no evidence of any other observations or evaluations.

65. According to Respondent's testimony at the hearing, if he were returned to teaching by the District, he would no longer repeat the types of comments or engage in the activities that were the subject of this matter.

66. All other allegations and contentions raised by both parties were either not established by the evidence or not supported by applicable legal authority.

CONCLUSIONS OF LAW AND DISCUSSION

1. The Commission has jurisdiction to proceed in this matter, pursuant to section 44944 and Factual Findings 1 through 5.

2. The District has the burden of proof in this matter because it is seeking to dismiss Respondent from employment as a certificated employee. The standard of proof is preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1038-1039.)

3. The First Amended Accusation does not set forth specifically which of the District's factual allegations relate to each of the five alleged bases for dismissal (that is, immoral conduct, unprofessional conduct, dishonesty, evident unfitness for service, or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district). Rather, the District alleges that all five bases for discipline exist "by reason of the following charges" (First Amended Accusation, page 2, line 8) and that the charges "separately and, in any combination," support the recommendation for dismissal (First Amended Accusation, page 7, lines 18-24). The Commission has examined each charge to determine whether it was proven, and for those proven has determined, as set forth below, whether such charges were a violation of one or more of the statutory bases for dismissal as alleged.

4. "Immoral conduct," pursuant to sections 44932, subdivision (a)(1), and 44939, has been defined to mean that which is hostile to the welfare of the general public and contrary to good morals. It includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, and dissoluteness. Or, it can be conduct that is willful, flagrant, or shameless, conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare. (*Board of Education of the San Francisco Unified School District v. Weiland* (1960) 179 Cal.App.2d 808, 811.)

5. "Evident unfitness for service," within the meaning of section 44932, subdivision (a)(5), means clearly not fit or suitable for teaching, ordinarily by reason of a temperamental defect or inadequacy. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444-1445 (*Woodland*).) Evident unfitness for service requires that unfitness be attributable to a defect in temperament which "connotes a fixed character trait, presumably not remedial upon receipt of notice that one's conduct fails to meet the expectations of the employing school district." (*Id.* at 1444.) There is no set formula or definite technical meaning. Rather, "due consideration must be given to the circumstances of the case at hand." (*Oakland Unified School District v. Olicker* (1972) 25 Cal.App.3d 1098, 1108.)

6. "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.)

7. "Dishonesty" needs no especial definition, as it is an ordinary term known to the members of the Commission. However, within the context of these proceedings, not every act of dishonesty will constitute grounds for discipline. (*Fontana Unified School District v. Burman* (1988) 45 Cal.3d 208 (*Fontana*).) As stated in *Fontana*, at p. 220: "Dishonest conduct may range from the smallest fib to the most flagrant lie. Not every impropriety will

constitute immoral or unprofessional conduct, and not every falsehood will constitute ‘dishonesty’ as a ground for discipline.”

8. Under section 44932, subdivision (a)(7), the violation of school rules must be persistent or “motivated by an attitude of continuous insubordination.” (*Governing Board of the Oakdale Union School Dist. v. Seaman* (1972) 28 Cal.App.3d 77, 81-82.) Isolated events or incidents involving an issue unresolved over a period of time are generally not considered persistent. (*Bourland v. Commission on Professional Competence* (1985) 174 Cal.App.3d 317.) Cause for discipline may be based on the violation of school rules. (*San Dieguito Union High School Dist. v. Commission on Professional Competence* (1985) 174 Cal.App.3d 1176, 1180-1181.)

9. Under Penal Code section 626.9, known as the Gun-Free School Zone Act of 1995, as relevant here, it is illegal to possess a firearm in a school zone without the permission of the superintendent or other equivalent authority. Under Penal Code section 12072, as relevant here, it is illegal to give possession of a firearm to a minor, with exceptions as under Penal Code section 12078 which, as relevant here, allow the loan of a firearm to a minor either with the written permission of the minor’s parents or in the presence of the minor’s parents.

10. In its review of the allegations and the evidence, the Commission determined that some allegations were not proven (see Factual Findings 12, 13, 23, 40, 41, 45, 46 and 49).

11. In its review of Respondent’s statements and actions, the Commission looked at the proven conduct in the aggregate. This applied also to its determination of whether Respondent’s conduct shows unfitness for service. This approach was approved in *Woodland*, where the court found that it was not necessary to determine if each and every act demonstrated unfitness for service. Rather, it was proper to examine the totality of the offensive conduct. “When the camel’s back is broken we need not weigh each straw in its load to see which one could have done the deed.” (*Woodland, supra*, 2 Cal.App.4th at 1457.)

12. Even where immoral conduct, unprofessional conduct, or evident unfitness for service are established, it must also be established that such immoral conduct, unprofessional conduct, or evident unfitness renders the Respondent unfit to teach. (*Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229-230 (*Morrison*); *Fontana*; *Woodland, supra*, 4 Cal.App.4th at 1444-1445.) This analysis is essential to the question of whether there is a sufficient nexus between the proven acts and the position and duties of a teacher such as will support dismissal of a teacher from employment. The *Morrison* court established the criteria set forth below in facing the difficult determination of whether a teacher’s involvement for a single week in a physical but non-criminal homosexual relationship with another teacher justified the revocation of his teaching certificate. Utilizing the criteria discussed below, the Supreme Court of California determined there was no evidence of the teacher’s unfitness to teach.

In the *Morrison* case, the Supreme Court held that the determination whether a person is fit to teach must be based on an objective and analytical approach. Under the facts of that case, the Court reviewed the teacher's conduct and determined that a school board may consider such specific criteria as: (1) the likelihood that the conduct adversely affected students or fellow teachers and the degree of such adversity; (2) the proximity or remoteness in time of the conduct; (3) the type of teaching certificate held by the teacher; (4) the existence of extenuating or aggravating circumstances and publicity, if any, surrounding the conduct; (5) the praiseworthiness or blameworthiness of the motives resulting in the conduct; (6) the likelihood of recurrence of the questioned conduct; and (7) the extent that discipline may adversely impact or have a chilling effect on the constitutional rights of the teacher.

Application of the *Morrison* standards indicates that the Commission has broad discretion in disciplinary matters. The role of the Commission is not merely to determine whether the charged conduct in fact occurred, but to decide whether the conduct, as measured against the *Morrison* criteria, demonstrates unfitness to teach. (*Fontana, supra*, 45 Cal.3d at 220.)

13. The nexus between Respondent's actions and the type of immoral conduct, dishonesty, unprofessional conduct, evident unfitness to teach, and disobeying of rules necessary to conclude that Respondent should be dismissed are found herein. The factors identified in *Morrison* (see Conclusion 12) have been considered. Some of the factors of significance to the Commission were that many of the actions were relatively recent, and that others stretched over a period of time. The number of student and parent complaints, and the nature of those complaints, establishes that there was an adverse affect on students that was more than minor, and in some instances was substantial.

Respondent's teaching certificate entitles Respondent to teach the very population of students who were subjected to his comments and actions. With regard to the likelihood of recurrence of the questioned conduct, on the one hand are Respondent's statements that he would not repeat the offending comments and actions. On the other hand, Respondent's actions belie those statements. He was warned, in writing, in the first few weeks of school and yet made sexual comments on Back to School Night. He was warned again, and yet made inappropriate comments in November and/or December. (See Factual Findings 26-31.) In some ways Respondent's actions speak louder than his words.

Respondent has no recognizable constitutional rights that would be affected by a decision of dismissal. There are no rights to free speech or to bear arms under the circumstances of this case. With respect to publicity, the evidence established that, Santa Ynez is a small community and that the events at issue were known by many people.

There are many extenuating and aggravating circumstances to consider. Among the extenuating circumstances are Respondent's anxiety and stress coming into the school year; his request for help before school started; his prior evaluation had been positive; Respondent had used many of the stories in prior years, and the example he gave of direct/indirect proof had been used by his college instructor; Respondent was sensitive to the

subject of breast cancer; the written instruction that Respondent receive professional development training was not acted upon immediately by the District; Respondent was returned to the classroom by the District, first after the events of the first days of school, then after the Back to School night incident, and again after the incidents in November and December; the District did not perform more observations and evaluations of Respondent; and the shooting activities were in keeping with the regular activities of the community, included safety instruction, and took place in designated shooting areas under adult supervision. (Factual Findings 21, 57, 58, 59, 61, 62, 65.)

Aggravating circumstances include that, despite repeated warnings, Respondent repeated sexual comments to his students; even when he realized that an example he was using was inappropriate, he changed it to another sexual example, just related to dogs instead of people; in this same incident, although Respondent used the example given by his college instructor, he was using it for much younger and less mature high school students; and Respondent made no attempt to determine whether the District was aware of or condoned the activities on the camping trips, including target shooting.

Praiseworthy motives include Respondent's desire to soften his intense image with students; his purpose was to explain himself, his classroom policies, and to give the students valuable information; he did not have a prurient interest in his sexual comments; and the camping trips were a new, innovative program that served as an incentive to players to participate in other summer activities and had a community service element. Blameworthy motives include that Respondent, despite the warnings, intentionally injected sexual comments into his presentations to students and parents. Respondent could have used equally effective examples and stories without the sexual elements, but he did not.

In total, Respondent's comments and actions depict a lack of judgment that is particularly troublesome considering the types of sensitive subjects involved, including a sexualized atmosphere and a disregard to the risks of having students handle firearms, particularly without the knowledge or permission of their parents. (See Factual Findings 7, 9-11, 14-48, and 50-65.)

14. Cause exists to dismiss Respondent for immoral conduct, pursuant to sections 44932, subdivision (a)(1), and 44939, for the reasons set forth in Factual Findings 7, 9-11, 14-48, and 50-65, and Conclusions 2, 4, 9, 11, 12 and 13.

15. Cause exists to dismiss Respondent for unprofessional conduct, pursuant to section 44932, subdivision (a)(1), for the reasons set forth in Factual Findings 7, 9-11, 14-48, and 50-65, and Conclusions 2, 6, 9, 11, 12 and 13.

16. Cause exists to dismiss Respondent for dishonesty, pursuant to section 44932, subdivision (a)(3), relating to the failure to disclose the shooting activities to school administrators, the Board of Education, or parents of students invited on the trips, for the reasons set forth in Factual Findings 35-44, and Conclusions 2, 7, 9, 11, 12 and 13.

17. Cause exists to dismiss Respondent for evident unfitness for service, pursuant to section 44932, subdivision (a)(5), for the reasons set forth in Factual Findings 7, 9-11, 14-48, and 50-65, and Conclusions 2, 5, 9, 11, 12 and 13.

18. Cause exists to dismiss Respondent for persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him, pursuant to section 44932, subdivision (a)(7), for the reasons set forth in Factual Findings 7, 9-11, 14-48, and 50-65, and Conclusions 2, 8, 9, 11, 12 and 13.

19. Cause does not exist to dismiss Respondent for the reasons set forth in Conclusion 10 and the Factual Findings noted therein. These Findings do not establish any basis for dismissal as contended by the District.

20. Respondent should be terminated from his position as a certificated employee of the District, based on Conclusions 1-9 and 11-21, and their factual predicates.

21. The Conclusions that there is cause to dismiss Respondent and that Respondent should be terminated from employment were made by votes of two Commissioners, constituting a majority, with one Commissioner voting against.

ORDER

WHEREFORE, IT IS HEREBY ORDERED that:

Respondent Joshua Cunningham is dismissed from his employment as a permanent certificated employee of the Santa Ynez Valley Union High School District.

DATED: July ___, 2010.

PAM WINTER, Member
Commission on Professional Competence

DATED: July ___, 2010.

CHARLES RITZ, Member
Commission on Professional Competence

DATED: July ___, 2010.

DAVID B. ROSENMAN
Administrative Law Judge
Member
Commission on Professional Competence