

BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
SAN DIEGO UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of

THAD JESPERSON,

A Permanent Certificated Employee,

Respondent.

OAH No. 2009010286

**DECISION OF THE
COMMISSION ON PROFESSIONAL COMPETENCE**

On January 25, 26, and 27, 2010, a Commission on Professional Competence heard this matter in San Diego, California. The Commission consisted of Donald P. Cole, Administrative Law Judge, Rand Johnston, and Ruth Fagerstrom.

Jose A. Gonzales, Attorney at Law, represented complainant Sam Wong, Chief Human Resources Officer, San Diego Unified School District.

Jon Y. Vanderpool, Attorney at Law, represented respondent Thad Jesperson, a permanent certificated employee of the San Diego Unified School District, who was present throughout the administrative hearing.

On January 27, 2010, the matter was submitted. On February 25, 2010, 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 Thad Jesperson demonstrate evident unfitness for service as a teacher in the San Diego Unified School District by virtue of inappropriate behavior involving third grade student E [REDACTED] A.?
2. Did respondent Thad Jesperson engage in immoral conduct by virtue of inappropriate behavior involving third grade student E [REDACTED] A.?

3. Did respondent Thad Jespersen refuse to obey reasonable regulations prescribed by the governing board of the school district employing him by virtue of inappropriate behavior involving third grade student E [REDACTED] A.?

FACTUAL FINDINGS

Jurisdictional Matters

1. On November 20, 2008, the district notified respondent in writing of its intention to terminate his employment. On the same date, Sam Wong, Chief Human Resources Officer, signed the dismissal charges against respondent. On December 19, 2008, respondent requested a hearing. On January 8, 2009, Chief Human Resources Officer Wong 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 May 13, 14, and 15, 2009.

2. On February 17, 2009, a jurisdictional hearing commencement stipulation was filed with the Office of Administrative Hearings by which the parties deemed the matter to have commenced before a Commission on Professional Competence. No appearances by the parties were made on that date. The stipulation further provided for a continuance of the hearing to May 13, 14, and 15, 2009, on the joint motion of the parties. Pursuant to subsequent motions, the hearing was continued to January 25, 26, and 27, 2010. Respondent was served with a notice of continuance of hearing on October 6, 2009.

3. The district nominated Rand Johnston to serve on the Commission. Respondent nominated Ruth Fagerstrom to serve on the Commission. Neither nominee was related to respondent, neither was employed by the district, and each held a valid credential. Ms. Fagerstrom had served at least five of the past ten years as an elementary school teacher under a multiple subject credential. Mr. Johnston's professional experience during the preceding ten years was somewhat complicated, and it was difficult to determine whether he had served at least five of the past ten years as an elementary school teacher. However, the parties stipulated at the hearing to Mr. Johnston's qualification to serve on the Commission and waived any lack of qualification on Mr. Johnston's part. Accordingly, each nominee was qualified to serve on the Commission under Education Code section 44944, subdivision (b).

4. On January 25, 2010, the record in the administrative proceeding was opened and opening statements were given. On January 25, 26, and 27, 2010, sworn testimony and documentary evidence were received. On January 27, 2010, closing arguments were presented, the record was closed, and the matter was submitted. On January 27, 2010, the Commission met in closed session to determine the matter, and a unanimous decision was reached.

5. 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, it was agreed that Administrative Law Judge Donald P. Cole would sign the decision on behalf of the Commission.

Background

6. Respondent received his bachelor's degree in (honors) history from UC San Diego in 1996, at the age of 34.¹ He received his teaching credential in 1998. He was awarded a Master of Education degree in Cross-Cultural Teaching at National University on January 16, 2000.

7. In August 1998, respondent was given a one-year contract to teach at the district's Toler Elementary School as a "prep time" teacher. Respondent was rehired for the 1999-2000 school year as a second grade teacher. His employment in that assignment was renewed for 2000-2001 school year. By this time, respondent's employment had become permanent. For the 2002-2003 school year, respondent was assigned to a third-grade class. Respondent also taught summer school in 2000 and 2002, and was also involved in Toler's "6 to 6 program," in which he was responsible to provide care to a number of students whose parents dropped them off as early as 7:00 a.m. or picked them up as late as 6:00 p.m.

8. Respondent's classroom for the 2002-2003 school year was B-4, which was located in one of the school's raised (about three feet above ground level) bungalows. The door to the room was on the northwest side. Classroom windows were along the east and west walls. The windows were louvered, and extended from about three feet above the floor to the ceiling. The windows were equipped with blinds, which were almost always in the open (up) position. Book shelves along most of the east wall extended about six feet up from the floor. Because bungalow classrooms were raised above ground level, an individual standing outside respondent's classroom could not see the classroom floor unless he or she were standing right at the front door.

Upon entering the room, respondent's desk was straight ahead, on the north side. The student desk area was in the center of the room. On the right (south) side of the room against the wall was a white board, next to which was a large rectangular carpeted area where students could sit and certain types of instruction took place. Near the far right (southeast) corner of the classroom was a smallish "kidney" table, where respondent sat during certain class activities.

9. Respondent had one full-inclusion special education student in his class, D[REDACTED]. D[REDACTED] had a one-on-one aide assigned to him, Connie Murphy. D[REDACTED] was in respondent's classroom for most of the school day, and when D[REDACTED] was present, Murphy was usually in the classroom with him. Murphy's desk was near the far left (northeast) corner of the classroom. The view from Murphy's desk to the kidney table was unobstructed.

¹ After high school, respondent worked in the construction industry, married, and established his own carpet cleaning business. He eventually lost interest in his business and decided to return to school.

10. One of respondent's teaching assignments for the 2002-2003 school year was "math block," a tutorial session in which students were grouped according to their ability. Some of respondent's math block students were part of his regular third-grade class; others came from other classrooms. Math block, which lasted about 60 to 80 minutes, took place daily between recess and lunch. During the first (15-20 minute) portion of math block, students were seated on the carpet in the instructional area on the right (south) side of respondent's classroom. During the second portion, students broke off into work groups. During the third portion, students worked independently. If they finished early, they lined up at the kidney table in the back of the classroom where respondent was seated, and respondent reviewed and corrected their work while they stood waiting. E█████ A. was one of respondent's students for math block. E█████'s regular third-grade teacher was Ms. Eusebio.

11. Respondent was generally very well liked and respected by Toler students, fellow teachers, and administrators.

Criminal Trials and Appeals

12. On April 24, 2003, respondent was arrested in connection with a San Diego Police Department investigation of alleged misconduct involving a number of Toler third-grade students. After a preliminary hearing held in August 2003, respondent was charged with 13 counts of lewd acts with a child (Pen. Code § 288, subd. (a)) involving eight of his female students.

13. In March 2004, the first of three criminal trials against respondent commenced. Each of the students testified. Respondent did not testify. The jury returned a guilty verdict on count 11, involving student E█████ A., and deadlocked on the remaining 12 counts involving the other seven students.

14. In May 2004, the second criminal trial against respondent commenced on the remaining 12 lewd conduct counts. Each of the seven students testified. Respondent also testified. The jury returned a guilty verdict on one of the two counts involving student Jaicee S., but the trial court granted respondent's motion for a new trial as to that count. The jury returned not guilty verdicts as to three of the other students, and deadlocked as to a second count involving J█████ S. and as to the counts involving the remaining two students.

15. In December 2004, the third criminal trial against respondent commenced on the remaining seven lewd conduct counts. Each of the three students testified, as did respondent. The jury returned guilty verdicts as to all seven counts. The court sentenced respondent to seven concurrent prison terms of seven years to life, and one concurrent term of six years.

16. Respondent appealed the convictions, asserting juror misconduct during deliberations in the first and third trials, and ineffective assistance of counsel in the third trial. On September 12, 2007, the court of appeal reversed all of the convictions. In December 2007, respondent was released from prison. In January 2008, the trial court

granted the people's motion to dismiss the charges against respondent, after the San Diego County District Attorney decided not to retry him.

Chronology of School Events

17. In November 2002, A [REDACTED] A., the mother of E [REDACTED], went to Toler and told Nellie Goodwin, a school guidance aide,² that E [REDACTED] had said that respondent had touched her.³ Goodwin responded, "That teacher, he is a joker. I don't even know why he is here as a teacher." Goodwin also said she would "take care of it."

18. On or about January 13, 2003, Goodwin approached school principal Jane Davis⁴ and told her that the mother of a Toler student (not E [REDACTED]) had told Goodwin that respondent had "touched her daughter" and that "we needed to do something about it." Davis reported this allegation to the school police and requested that an investigation be undertaken. Several days later, the mother of a different student told Davis that respondent had touched her daughter on the leg. On January 17, 2003, Davis was directed to remove respondent from the classroom, which she did.⁵

19. On January 24, 2003, Davis sent a letter to the parents of all Toler students. The letter stated, "[W]e have recently removed an employee from our school campus for allegations of inappropriate behavior." The letter went on to state that the police were investigating the matter.

20. On February 3, 2003, Davis sent a letter to the parents of respondent's regular⁶ students. The letter informed that a long-term substitute "would be needed for this classroom due to the absence of the teacher." The letter also stated, "[A]s a parent, you need to know that he has been temporarily reassigned to another job pending the outcome of an investigation of allegations of inappropriate behavior."

21. On April 24, 2003, Davis sent a letter to Toler parents, stating that respondent had been arrested that day "on several counts of inappropriate behavior with a minor." This was the only letter in which Davis identified respondent as the teacher under investigation.

22. On May 1, 2003, respondent was placed on compulsory leave pursuant to Education Code section 44940.

² Goodwin was a classified guidance aide, who worked under a certificated guidance counselor.

³ A [REDACTED]'s testimony as to what E [REDACTED] told her and what she in turn told Goodwin is described below.

⁴ Davis retired in July 2003; since then she has occasionally worked as a substitute Principal or Vice Principal.

⁵ This Finding does not constitute a finding that respondent inappropriately touched either of these two students. (Gov. Code, § 11513, subd. (d).)

⁶ Since E [REDACTED] was not one of respondent's regular students, this letter was not sent to E [REDACTED]'s mother.

23. On October 29, 2004, respondent was notified that his employment with the district was terminated effective immediately pursuant to Education Code section 44936 because he had been convicted of a sex offense described in Education Code section 44010.

24. On November 5, 2008, respondent requested reinstatement as a classroom teacher with the district once his teaching credential was reinstated.

The Alleged Misconduct

E█'s Testimony and Declaration

25. E█ testified at the administrative hearing that “a few times” during math block, when she went up to respondent to have her math checked, he touched her on the upper legs/buttocks area and on the lower back. He touched her inside her pants and over her underwear. He never touched her skin directly. He touched her in the back, but never in the front. When he touched her, he moved his hand around. He touched her more than once, on different days. While he was touching her with one hand, he was writing on her math work with his other hand. The touching occurred while students were in line waiting for respondent to check their work. On some of the occasions, D█'s teaching aide (i.e., Ms. Murphy) was present in the classroom.

E█ seemed to testify that respondent's touching did not bother or make her feel uncomfortable at the time. She did not believe respondent's touching was wrong until she went to court. She believed that it was the police detective who first explained to her the difference between “good” and “bad” touching.

E█ testified that one evening when her mother was tickling her back and leg, she told her mother that her teacher did the same thing.

E█ testified that she was interviewed by a police detective, an individual at Children's Hospital, and the Deputy District Attorney who prosecuted respondent, in connection with respondent's alleged misconduct. E█ testified that no one told her what to say. At one point, E█ stated, “I'm just saying what my mom said I said.”

E█ testified that “afterwards,” she slept with the night light on and sometimes became scared. She could not recall what she got scared about, but stated, “I just got mixed emotions and I got scared.” She added that on some occasions before respondent touched her (e.g., after she watched a scary movie) she likewise slept with the night light on and/or was scared.

26. In a declaration executed on September 3, 2009, E█ stated that when respondent was checking or correcting her math sheets at the back table in respondent's classroom, “on more than one time and almost every day, he touched me in my private areas.” More specifically, E█ stated that when she wore pants, respondent “placed his hand under my outside pants and over my panties.” When she wore a dress, respondent

“would place his hand under my dress, between my legs and over my panties over my back area.” She did not remember whether respondent ever touched her skin, or whether he touched her over her underwear that covered the front part of her body. He did not place his hand under her underwear. If she wore a shirt, respondent “would place his hand under my shirt and slide his hand up from the bottom of my back. He also did that from the top of my back sliding his hand down.”

E[REDACTED] also stated in her declaration that she did not tell her mother about the touching until two months later, “because I thought she would be mad.” She added that she wanted to tell respondent “to stop but I never did because I was too scared.”

27. E[REDACTED] testified at the first trial in March 2004 that respondent touched her private parts more than once, at the back table in his classroom while he was reviewing or correcting her math sheets. She did not recall whether respondent touched her more than once on the same day or on different days.⁷ Respondent touched her “on my private part, my back, my legs, and I am not sure about my neck.” By “private part,” she meant that respondent “stuck his hand inside my pants,” “over my underwear or something like that.” Respondent did so in the back of her pants, not in the front.⁸ Similarly, E[REDACTED] stated that respondent touched her only on the back, not the front, of her leg, and that there was never any touching to the front part of her body. When she wore pants, respondent would stick his hand down her pants and over her underwear; when she wore a shirt, respondent would stick her hand under her shirt and slide up and down her back. Respondent never put his hands beneath her underwear. E[REDACTED] could not recall whether his hand stood still or instead moved when he was touching her. When asked whether the touching felt like a “good” or a “bad” touching, E[REDACTED] responded, “I didn’t really know.” She stated that it tickled. When San Diego Police Department Detective Newbold first interviewed her, she (E[REDACTED]) stated that she had not been touched in a bad way, because she did not at that time know the difference between a good touch and a bad touch. It was not until after Detective Newbold talked to her again that she knew about bad touching. Detective Newbold told her at that time that the way respondent had touched her was bad. E[REDACTED] stated she did not tell her mother about respondent’s actions for two months, because she thought her mother “would be mad.” She thought she told her mother after the school sent a letter to her mother “about the touching.” At that point, her mother asked her a lot of questions about the touching.

A[REDACTED]’s Testimony

28. E[REDACTED]’s mother A[REDACTED] A. testified at the administrative hearing that one afternoon after school in November 2002, she and E[REDACTED] were playing around in the bedroom. A[REDACTED] touched E[REDACTED] on the leg, E[REDACTED] started laughing, A[REDACTED] stated, “Oh,

⁷ On cross-examination, E[REDACTED] stated the touching occurred almost every day, when she went to respondent’s desk to have her math sheets checked.

⁸ At another point, E[REDACTED] stated that respondent touched her “on my front private part.” In response to what appeared to be a follow-up clarifying question, E[REDACTED] stated that she didn’t “really remember” whether respondent had touched her on her front private part.

that's where you're ticklish!" and E [REDACTED] said, "That's what my math teacher does to me." The next day, A [REDACTED] went to Toler and told Nellie Goodwin what E [REDACTED] had said.⁹ Goodwin told A [REDACTED] that respondent was a charlatan¹⁰ and that Goodwin did not know why respondent was working at that school. Goodwin told A [REDACTED] that she (Goodwin) would take care of it. A [REDACTED] told Goodwin she wanted to speak to the school principal, but Goodwin told her the principal was at a meeting at that time.

A [REDACTED] testified that E [REDACTED] also told her that respondent touched her back as well as her leg, that respondent moved his hand, palm out, up and down E [REDACTED]'s back, and by grabbing the side of E [REDACTED]'s upper thigh and squeezing it with his thumb in the front, and his other fingers in the back.

A [REDACTED] testified that near the beginning of December 2002, her family went to Mexico for a one-month vacation.

A [REDACTED] testified that she never contacted the police herself, though she spoke to the police when they phoned her in March or April 2003.

A [REDACTED] testified that she noticed changes in E [REDACTED] in November 2002. She was "sad," did not want to sleep in her bedroom alone, and wanted to sleep with the lights on.

A [REDACTED] testified that at some point E [REDACTED] underwent therapy for several months.

A [REDACTED] testified that the family sued respondent in connection with his alleged inappropriate conduct, but the suit was dismissed, apparently on statute of limitations or some other procedural grounds.

29. A [REDACTED] testified at the first criminal trial that in November 2002, while she and E [REDACTED] were playing in the bedroom, E [REDACTED] told her that respondent "would tell her that she was very pretty" and "would touch her legs, and he would touch her back." E [REDACTED] also told her mother that respondent would put his hand under her shirt and would tickle her, moving his hand up and down and his outstretched fingers somewhat back and forth. E [REDACTED] told her mother, "Don't worry, mom. He is a very playful person." The next day, A [REDACTED] went to school and told Goodwin what E [REDACTED] had said. Goodwin responded, "That teacher, he is a joker. I don't even know why he is here as a teacher." Goodwin also said she would "take care of it."

A [REDACTED] testified that in May 2003, she received phone calls from the police department and from E [REDACTED]'s school. A [REDACTED] was informed of an appointment for E [REDACTED]

⁹ A [REDACTED] met Goodwin during student registration. Goodwin spoke Spanish, and told A [REDACTED] at the time of registration that she was a counselor and that A [REDACTED] could come to her if any need arose.

¹⁰ A [REDACTED] and Goodwin conversed in Spanish. Though A [REDACTED] testified (through an interpreter) that "charlatan" meant "playful," the record was in fact unclear as to what Goodwin or A [REDACTED] meant by the word "charlatan" or what the actual Spanish word was or meant.

that had been arranged at Children's Hospital. It was after receiving these phone calls that A [REDACTED] and E [REDACTED] spoke further about respondent's conduct. A [REDACTED] added that it was "in the hospital is when I was told how he really touched her."

Testimony of Connie Murphy

30. Connie Murphy, D [REDACTED]'s special education aide, testified that she worked with respondent daily from the outset of the 2002-2003 school year until respondent's removal from the classroom on January 17, 2003. During math block, D [REDACTED] (and, therefore, Murphy) normally remained in respondent's classroom. Two to three times per week, however, D [REDACTED] left respondent's room during math block in order to attend such activities as physical and occupational therapy. On such occasions, Murphy left the room with D [REDACTED] and was gone from about five to seven minutes while she escorted him to the location where the other activity was to take place, before she returned to the classroom. During math block, Murphy went around the room to assist other students. While assisting other students, she kept her eye on the entire room, in order to monitor how D [REDACTED] was doing.

Murphy testified that she observed respondent pat students on the back and the arm and say, "Good job," and she observed respondent hug students, "a gentleman's hug to a child." She also observed students try to jump on and hug respondent, and grab his arm and hand. She never observed respondent touch a student's leg, or touch a student under her pants and over her underwear.

Murphy testified that during the first week after respondent was removed from the classroom, students asked where he was. She added that "the children missed Mr. Jesperson greatly."

Murphy testified that in October or November of 2002, Goodwin approached and asked her whether she (Murphy) had ever noticed respondent touching any students. Murphy responded in the affirmative, and noted an instance when respondent had helped E [REDACTED] tie her shoe lace. Later, after respondent was removed from the classroom, Goodwin had another discussion with Murphy about respondent, and told Murphy not to tell anyone about the touching.

Murphy testified that Goodwin was very hostile toward respondent, and that she expressed criticism of respondent "too many [times] to count." Goodwin told Murphy that she hated respondent and wanted him out of the school. Goodwin used the term "joker." Goodwin said that respondent was a lousy teacher and was no good.

Murphy testified that when Detective Newbold interviewed her, the latter was very intimidating. For example, when Murphy's answer to a question was one Detective Newbold apparently did not like (e.g., when Murphy stated she had never seen respondent touch a child inappropriately), the detective leaned her whole body toward Murphy so that it was about a foot away from her, and asked the next question in an angry tone of voice.

Murphy testified that she has stayed in touch with respondent, e.g., via occasional telephone calls, emails, and letters. She has seen him in one social setting, at a barbecue in 2003 or 2004 at which other teachers were also present. Though it did not appear that Murphy and respondent were friends, it was clear that Murphy felt strongly that respondent had not inappropriately touched E[REDACTED], and that Murphy felt sympathy for him.

Murphy came across as very credible. She seemed quite relaxed, with little tension in her voice, even on cross-examination. She readily admitted when she did not recall a particular detail, and she seemed to be attempting to answer every question in a direct and truthful manner to the best of her recollection.

Respondent's Testimony

31. Respondent testified at the administrative hearing that he never touched E[REDACTED]'s underwear or legs, that he never tickled her, that he never touched the skin of her back or under her shirt, and that he never deliberately stroked her back.¹¹

Respondent testified that at one point during the course of the San Diego Police Department investigation, Detective Newbold phoned him and suggested that he come to the police station and meet with her. When respondent stated that he wanted to talk to his attorney first, Detective Newbold stated, in a stern tone of voice, "If that's the way you want to play it, fine!"

Respondent testified that at some point during the 2002-2003 school year, Heather Menlock, district counselor, offered to come to respondent's classroom and teach students the difference between "good" and "bad" touching as part of the district's sexual harassment policy. Respondent declined her offer, since he did not wish to further burden Menlock's already busy schedule and because he had already given such a talk to his students.

Other Information

32. San Diego Unified School District Administrative Procedure No. 7046, paragraph C-20, states:

"All certificated employees are to maintain a professional relationship with students of the school district. Certificated employees are specifically prohibited from dating, making sexual advances to, engaging in sexually provocative or exploitive conduct with, or having sexual relations with district students."

¹¹ He elaborated that possibly as children left the area of the kidney table after he finished reviewing their math work, he often patted them on the back in connection with an encouraging remark such as "Good job," and that possibly, since the children were moving, and since he had large hands and the children were small, it might have appeared to them that he was rubbing or stroking, as opposed to patting, their backs.

Evaluation

33. The evidence considered as a whole was insufficient to establish that respondent touched E[REDACTED] in the manner to which she testified.

The Commission was confident that E[REDACTED] did not lie at the administrative hearing. However, her testimony¹² presented a number of concerns, none of which viewed in isolation would perhaps have been that significant, but which when considered collectively raised substantial concerns as to her credibility. First, she stated that the inappropriate touching occurred while other students were in class and standing nearby. She also stated that the touching occurred every day. Even if this meant only “frequently,” it implies that the touching occurred on numerous occasions when another adult — special education aide Connie Murphy — was in the classroom. Yet Murphy testified that she never observed any kind of inappropriate touching. In addition, E[REDACTED] described respondent as touching her with one hand while he was correcting her math assignment with the other, which seems an awkward way in which to engage in such conduct. Also of note, the touching did not appear to bother E[REDACTED] at the time it occurred. She first reported it to her mother in what can only be described as a light-hearted fashion, while she and her mother were happily engaged in affectionate play. E[REDACTED] did not consider the touching to be “bad” touching until much later, after Detective Newbold and perhaps others told her that this was the case. E[REDACTED]’s statement that she was initially afraid to tell her mother because she thought the latter would be mad seemed inconsistent with initial lack of awareness on E[REDACTED]’s part that the touching was bad. It appeared, too, that the timing of E[REDACTED]’s more serious statements coincided with letters Toler parents received from the school. Finally, E[REDACTED]’s demeanor while describing the touching at the administrative hearing was without significant emotion.

In light of the foregoing concerns about E[REDACTED]’s testimony, the lack of corroboration from any other alleged victim raised concerns as well.

A[REDACTED]’s testimony also raised concerns. Her demeanor suggested that she was perhaps overdramatizing the events she described. E[REDACTED]’s disclosure in November 2002 must have been very benign, since A[REDACTED] did not contact the police. In fact, even Nellie Goodwin, who clearly had a strong disliking for respondent, and to whom A[REDACTED] related those initial disclosures of E[REDACTED], took no action at that time. Even later, A[REDACTED] never went to the police. Finally, the civil lawsuit filed on E[REDACTED]’s behalf, though it had already been dismissed before the administrative hearing, suggested a possible initial bias on A[REDACTED]’s part, which could have influenced, consciously or otherwise, E[REDACTED]’s perception and description of respondent’s conduct.

The Commission was also concerned about the potential influence on E[REDACTED]’s recollection of Detective Newbold, who appeared to have conducted a decidedly aggressive and not necessarily impartial investigation of the allegations against respondent.

¹² Testimony in this context includes not only her testimony at the administrative hearing, but also her criminal trial testimony and her signed declaration.

Finally, respondent's testimony in denial of any wrongdoing, while self-serving, nonetheless raised no substantial specific concerns, concerning either the content of his testimony or his demeanor, that negatively reflected on his credibility.

While the evidence established that respondent was physically affectionate with his students, and that he touched E [REDACTED] (and other students), the evidence did not establish that he touched her in the manner to which she testified, or in any other manner that was immoral or a violation of district regulations, or that demonstrated an evident unfitness to serve.

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, subds. (a)(1), (5), and (7).)

4. *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, identified certain criteria to be applied when determining an individual's unfitness 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. The Commission concluded that the evidence did not establish respondent's unfitness for service, immoral conduct, or a persistent violation of district regulations. These conclusions necessarily follow from the Commission's findings, and in particular Finding 33.

7. By reason of Findings 1 through 33, and Conclusions 1 through 6, cause does not exist to dismiss respondent from his teaching position with the San Diego Unified School District.

DISPOSITION

The Accusation and Statement of Charges are dismissed.

DATED: _____

DONALD P. COLE
Administrative Law Judge
Office of Administrative Hearings

For the Commission on Professional
Competence