

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

In the Matter of the Accusation Against:

OAH No. 2012021111

RICARDO GONZALES,

Respondent.

DECISION

This matter was heard on September 10 through 13, 2012, before the Commission on Professional Competence (Commission), which consisted of Ruthie Fagerstrom, Regina Donahue, and Administrative Law Judge (ALJ) Mark Harman, Office of Administrative Hearings (OAH), State of California, who presided. Ernest L. Bell, Attorney at Law, represented the Los Angeles Unified School District (District). Richard J. Schwab, Attorney at Law, represented Ricardo Gonzales (Respondent).

The District alleges that Respondent engaged in unauthorized and inappropriate assistance of his fifth grade students during the administration of the California Standards Tests (CST) in May 2010. The District alleges that Respondent's acts are cause for his dismissal under Education Code sections 44932 and 44939 on grounds of immoral and unprofessional conduct, dishonesty, evident unfitness for service, persistent violation of or refusal to obey school laws, rules and regulations, and willful refusal to perform regular assignments without reasonable cause. Respondent denies the District's allegations.

Evidence was received in the form of documents, testimony, and by stipulations of the parties. The record was closed and the matter was submitted for decision on the last day of the hearing.

FACTUAL FINDINGS

1. On February 8, 2012, the District served Respondent with a Notice of Intention to Dismiss, along with an Accusation and Statement of Charges executed by Vivian K. Ekchian, Chief Human Resources Officer, acting in her official capacity. The District received Respondent's Demand for Hearing on or about February 15, 2012, and thereafter filed a Request to Set Hearing with the OAH. On or about March 9, 2012, the District again served Respondent with the Accusation and Statement of Charges. The District received

Respondent's Notice of Defense on March 12, 2012. The District served upon Respondent an Amended Accusation on August 31, 2012.

2. Respondent is a certificated permanent employee of the District who began teaching for the District at Hart Street Elementary (Hart Street) in 1997. He started his teaching career in a first grade classroom, and later, he taught fifth graders at Hart Street between 2005 and 2011.

Preparation for the CST at Hart Street

3. Almost all of Hart Street's students are English language learners who come from disadvantaged socio-economic backgrounds. Dr. Sue Klein (Dr. Klein), Hart Street's principal for approximately a decade until 2010, expected her teachers to spend a substantial amount of instructional time during the school year preparing students in grades 2 through 5 for the CST given annually in May. Dr. Klein's emphasis was not limited to teaching to the standards, i.e., ensuring that the curriculum included all grade level subject matter which each student was expected to learn. She believed teaching students in test-taking techniques or strategies would improve their performance on the CST.

4. Students' CST scores improved in all grades during the years that Dr. Klein led Hart Street. For example, 37.7 percent of all students were proficient or above in English language arts in 2006; this percentage rose to 55.4 in 2010. Students proficient or above in mathematics increased from 55.6 percent in 2006 to 75.1 percent in 2010. Hart Street's Academic Performance Index (API) rose as follows:

API Growth Report	2006	2007	2008	2009	2010
Targeted rate ¹	590	590	620	650	680
Achieved rate	738	730	762	790	814

As a result of improvements in students' academic achievements, Hart Street was taken off "Program Improvement" status in 2010, which meant, in part, that Hart Street no longer received categorical funding to pay for additional tutoring to meet its students' academic needs. Curtis Johnson (Johnson) replaced Dr. Klein as principal in 2010-2011. Among other things, Johnson discontinued Dr. Klein's emphasis on specific test preparation because, in his view, it did not comply with state and District policies. He instructed teachers to limit their test preparation activities to a two-week period preceding the administration of the CST.

5. Under Dr. Klein, Respondent generally had begun preparing his fifth grade students no later than October. He taught test preparation for an hour or more nearly every school day, using various materials and means, to improve his students' abilities to get good scores on the CST. During his test preparation instruction, he used District-sanctioned materials, including "Blast Off" and "Measure Up." He used the "test release questions"

¹ "Or growth of 1 point from [the] previous year."

provided by the CST author. He gave practice tests and worked out problems on the blackboard with the entire class. He read test directions and explained words that the students did not understand. He simplified questions and taught students how to “solve a problem.” He taught students various steps or stages to work through the test. He taught them to write their answers on scratch paper before they were entered on the score sheets. He walked around the classroom during the practice test-taking sessions; he checked the students’ answers, and told them when to go back and correct their answers. In his testimony, Respondent said, “My kids know how to take those tests.”

The May 2010 CST

6. Between May 17 and May 28, 2010, Respondent administered the 2010 CST to the students then enrolled in his class, other than those students excused for special education purposes. He understood he was required to follow all testing protocols and procedures and had received District training regarding proper administration of the CST.² Three of the students who took the 2010 CST administered by Respondent testified at the hearing. All three seemed to appreciate Respondent for what they had learned in his class and for his encouragement to do well on the CST. L■■■■ V.³ said she learned about integers, metaphors, and similes; and “Respondent made English fun.” The students’ testimony appeared to be free of bias, other than their obvious discomfort at having to testify about a matter that might cause trouble for Respondent, whom they liked. L■■■■ V. was particularly fond of Respondent, and she was extremely emotional and hesitant at first, but after taking a break, she was able to answer the questions forthrightly.

7. E■■■■ M. testified that Respondent looked at the scratch paper where E■■■■ M. had written his test answers and then “he told us to correct an answer.” E■■■■ M., however, seemed unable to specify when this occurred, i.e., whether Respondent provided this assistance during the actual CST or during a practice exam. L■■■■ V. provided testimony similar to that of E■■■■ M. L■■■■ V. said, “If we got [question] number 7 wrong, he told us to go back and check the answer.” L■■■■ V., however, said that this occurred during the administration of the CST. She affirmatively stated that this occurred “less than 10 times.”⁴

² Respondent attended District training and he knew that he was not permitted to assist students during administration of the CST to correctly answer CST questions by providing hints, advising students of information necessary to answer CST questions, checking student answers for correctness, advising students to recheck test answers, or advising students their test answers were correct or incorrect. Respondent had signed an affidavit agreeing to abide by all state testing protocols and procedures.

³ Initials are used in place of surnames to protect the students’ privacy.

⁴ There is a slight possibility that L■■■■ V. misunderstood Respondent’s counsel’s question when she uttered this affirmative statement, but otherwise her answer was unequivocal.

The third witness, S [REDACTED] P., said that Respondent “would tell you to fix it; we would go back to that question,” but like E [REDACTED] M., S [REDACTED] P.’s testimony was ambiguous regarding whether this had occurred during a practice test or during the actual CST.

8. In sum, Respondent provided L [REDACTED] V. with improper assistance during the administration of the May 2010 CST; however, none of the students who testified said that Respondent had provided them with the correct answers during the CST.

The District’s Investigation

9. The rumors that Hart Street students had inflated test scores circulated among the administrators and staff at Hart Street and at the different middle schools for which Hart Street was a feeder school. Johnson, who became Hart Street’s principal in 2010-2011, was told by members of the instructional team that Respondent’s students “miraculously” scored at or above benchmark. After Johnson reviewed the 2010 CST scores with the instructional team, some members dismissed Respondent’s students test results as the result of cheating. They told Johnson, “The previous administration was aware of it, but nothing was done.”

10. Johnson continued reviewing assessment data of students in numerous Hart Street classrooms and, in early 2011, he already had concerns regarding alleged improper assistance, e.g., Respondent’s classroom had done extremely well on the three math periodic assessments. Johnson addressed his concerns by having the instructional team administer the fifth grade math diagnostic test, and Respondent’s students’ scores spiked dramatically lower.

11. In May 2011, Johnson received a letter from Ed Hayek, principal of Woodland Hills Academy Middle School, stating that some middle school math teachers had expressed their concerns about apparent discrepancies between Respondent’s students’ 2010 CST scores and their actual performance and achievements as sixth grade math students during the 2010-2011 school year. Hayek also alerted the District regarding these concerns. Byron Maltez (Maltez), a 30 year veteran of the District and currently Lead Director of the Educational Service Center North, San Fernando Valley, was assigned to investigate allegations of discrepancies and of a number of Hart Street classrooms producing higher student scores as the result of teacher misconduct during administration of the 2010 CST.

12. Maltez’s first step was to review student test score data “for the last few years.” This data “indicated that several teachers [six, including Respondent] had statistically high increases in student performance.” Maltez next developed a series of questionnaires. Maltez assigned several District personnel to conduct interviews of the relevant teachers, students, and paraprofessionals, including 73 students at the middle schools and 94 elementary school students at Hart Street. The interviewers used only the written questions provided, and did not deviate from these questions. The interviewers handwrote the students’ responses to the questions on the questionnaires. The questionnaires are the only records of what the students told the interviewers. The written responses were compiled and a summary document was prepared by Maltez in May 2011. Maltez then

preliminarily concluded that students “in certain classes were provided assistance by their teachers on the CST.” Meanwhile, Johnson had taken steps to ensure that, for the most part, each classroom at Hart Street had a proctor overseeing the 2011 administration of the CST.

The Expert’s Conclusions

13. The District alleged that students who took the 2010 CST proctored by Respondent performed very poorly on their 2011 CST for both English Language Arts and math in comparison to their 2010 CST scores; and further, that these students’ actual 2011 CST scores differed significantly from their predicted scores, resulting in a high mean residual score.⁵ The District retained an expert to make some sense of these discrepancies, or “spikes,” in the mean CST scores of the students who matriculated in Respondent’s classroom in the 2009-2010 school year, which the District supposed was the result of Respondent’s “inappropriate and unauthorized assistance” of his students during the 2010 CST test administration. (See Amended Accusation, Exhibit 16, page 5.)

14. Steven Klein, Ph.D. (Klein),⁶ is a research scientist and statistician who has extensive experience with standardized testing and student scores. The District asked him to examine whether the scores of Respondent’s students supported the District’s allegations. The District provided Klein with student test score data for all fourth graders during the 2008-2009 school year, all fifth graders during the 2009-2010 school year, and all sixth graders during the 2010-2011 school year. Klein compared test scores of approximately 35,000 District students in 1,620 classrooms as these students progressed from grades four through six. Klein was asked to determine the likelihood that the observed score patterns of the students that took the 2010 CST proctored by Respondent were due to chance, and whether Klein’s analysis might expose other plausible alternate explanations for the dramatic spike in these students’ scores in 2011, e.g., whether Respondent’s students had done relatively poorly because they had been assigned to relatively incompetent sixth grade teachers in 2010-2011. Klein concluded that neither theory was supported by the data.

15. Klein conceded that his analysis was unable to establish the reason that Respondent’s fifth grade students’ mean 2010 CST scores were in the 99th percentile of all District classrooms, an “incredible improvement compared to these same students’ 4th grade scores a year earlier;” or why these students failed to repeat their extraordinarily high 2010 scores on the 2011 CST. These same students mean scores plummeted in 2011 to the 29th percentile of all District sixth grade classrooms and did not even come close to achieving their 2009 percentile rank of 60. Klein’s analysis, however, clearly showed that Respondent’s fifth graders did far worse on the sixth grade examination for reasons other than chance or ineptness of their sixth grade teachers. Klein concluded that the only

⁵ The difference between a classroom’s actual and predicted mean scores is called its “residual” score.

⁶ The District’s expert, Steven Klein, Ph.D., is no relation to the District’s employee, Sue Klein, Ph.D.

“plausible explanation that remains for the score swings shown in Table 1^{7]} is that Mr. Gonzales inappropriately assisted several if not most of his 5th graders during his 2010 administration of the exams. No other explanation fits the data.” (Exhibit 26.)

The District’s Flawed Investigation

16. The District’s 2011 investigation of allegations of misconduct made against a number of Hart Street teachers has failed to establish, in this proceeding against Respondent, most of the 34 alleged occurrences of cheating or improper assistance in Respondent’s fifth grade classroom. There were several problems caused by the District’s shallow approach to the issues raised by the aberrant test score data concerning the Hart Street students. The interviewers posed identical, non-specific questions to 167 students who had various Hart Street teachers. A major problem with the student interviews was the timing. More than one year had passed since the administration of the 2010 CST. Many middle school students’ memories of the 2010 CST were not sharp during their interviews. Further, these students had taken their 2011 CST mere days before being questioned about 2010. Many did not remember specific details about the preparation for, or administration of, the 2010 CST.

17. Another problem was the tenor and order of the questions. The students’ responses, at times, evidenced a misunderstanding of the context of the questions. For example, question number 4 of the questionnaire for E■■ M. asked, “What did your teacher do to prepare you for the test?” E■■ responded, “gave examples [¶] review packet.” Question number 5 asked, “What did your teacher do if you did not know the answer to the question?” E■■ M. responded: “--helped a little and give us hints; --pointed out main words and explain the question in different words; --help us which ones made sense and which ones are not part of questions: ‘look at A or C.’” (Exhibit 1.) It appears from E■■ M.’s responses, here and elsewhere in his questionnaire, that he believed question number 5 and some other later questions related to the discussions he had with Respondent during a test preparation session rather than during administration of the actual test. L■■ V.’s responses to the questionnaire had many similarities with E■■ M.’s responses. When asked, “If you got stuck on a question, who helped you? Explain how.” L■■ V. responded: “teacher told us the meaning of words; gave question in other words; teacher pointed out which answers to eliminate; teacher told us which paragraph to look for answer; teacher told us the steps and reminded us of steps to solve the math problems.” The students’ responses may

⁷ Klein provided the following Table 1, entitled “Mean Scores and Percentile Equivalents of the Mean Scores of Mr. Gonzales’ Students When they were in 4th, 5th, and 6th Grade”:

	<u>2009 4th Grade</u>		<u>2010 5th Grade</u>		<u>2011 6th Grade</u>	
<u>TEST</u>	<u>Mean</u>	<u>%ile</u>	<u>Mean</u>	<u>%ile</u>	<u>Mean</u>	<u>%ile</u>
<u>ELA</u>	358	54	414	98	325	37
<u>Math</u>	390	63	519	99	314	24
<u>Total</u>	374	60	467	99	320	29

easily have been affected by a particular interviewer's manner when asking questions. The interviewers rigidly stuck to the written questions and did not follow up on the students' responses. The remarkable similarities between the responses of E ■ M. and L ■ V. also may have resulted from the way the particular interviewer recorded their responses.

18. The most significant problems occurred because the District did not conduct adequate follow up interviews with specific students, which could have eliminated unlikely scenarios and confirmed whether a specific pattern or practice of teacher misconduct had occurred. The District's reasons why it failed to be more careful in this regard are not clear. Instead, the District chose to take its compilation of 34 untested, often unreliable, and mostly inconsistent or uncorroborated responses purportedly made by 13 students (including E ■ M., L ■ V., and S ■ P.) who took the 2010 CST in Respondent's classroom and, without further interviews or investigations, to repeat these students' questionnaire responses in the Accusation as though they were facts. The District had ample time between the initial student interviews and the filing of charges to test and corroborate these statements. In the end, it was unable to produce but one student who could affirmatively state that Respondent had assisted her on the CST examination. In sum, the District rushed to judgment and failed to muster solid evidence in support of its case.

Respondent's Background, Reputation as a Teacher, and Mitigation Evidence

19. Respondent had never been disciplined by the District before this proceeding. He emigrated from Mexico in 1984 when he was 13 years old. He persevered in school and obtained his Bachelor of Science degree from California State University, Northridge, in mechanical engineering. He spent several years working as a project engineer and an industrial engineer until 1996, and he continues to work toward a Master's degree in industrial engineering.

20. Respondent has a reputation as a dedicated and hard-working teacher. As previously noted, the vast majority of Hart Street's students are English language learners who come from disadvantaged socio-economic backgrounds. Respondent relates well to the students and the parents of his class. He has met "standard performance" in all areas in recent evaluations. Principal Johnson wrote the following comments in Respondent's May 23, 2011 evaluation: "[He] pushes his students to be critical thinkers and problem solvers. He engages them in the problem solving cycle. . . . [He establishes learning goals that] are deeply rooted in state grade level standards. . . . His rules and expectations are known and followed. . . . [He] motivates students to do their best." (Exhibit 103.)

21. Two teaching colleagues at Hart Street testified on Respondent's behalf. Claudia Cassidy has taught at Hart Street since 1996. She said that Respondent had a reputation for honesty and professionalism, and he was well-liked by children and parents. Alberta Palomares has been a teacher at Hart Street for 18 years. He has observed Respondent teaching English learners and helping his students during reading time after school. Respondent "cares about the best interests of students. He's an exemplary role model for our community." Palomares does not believe that Respondent would cheat.

The “Morrison” Factors

22. Respondent’s conduct must be evaluated in terms of his fitness to teach pursuant to the pertinent criteria, first set forth by the Supreme Court in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229-230 (*Morrison*).⁸ Complainant has failed to demonstrate that Respondent’s misconduct renders him unfit to teach under the *Morrison* factors. Complainant has established a single instance in which he assisted a student to achieve a higher score on the CST, an act that clearly is reprehensible. This conduct involved dishonesty and violated school policies and procedures, but the District failed to establish that Respondent engaged in a pattern and course of such misconduct. The adverse consequences of Respondent’s misconduct also were made clear by the evidence. He deprived L ■■■ V. of an opportunity to know what she had learned in school and how much progress she had made. He set her up for frustration, confusion and disappointment when she failed to continue at the same high level of achievement the following year in sixth grade. These were serious consequences for L ■■■ V. There is nothing praiseworthy about Respondent’s misconduct.

23. It also is aggravating that Respondent continues to deny his misconduct; however, it was not established that Respondent’s motivation for the misconduct was self-serving. Respondent demonstrated that he is a highly motivated teacher who wants to help students like himself, from disadvantaged circumstances, become successful. He appears simply to have been extremely mistaken about whether he could better educate a student by improperly assisting her on an important measure of her learning. The strong push by Dr. Klein, Hart Street’s principal, to raise all students’ test scores, is no excuse. It is, however, an extenuating circumstance. The District spent substantial time and money to uncover the truth of numerous allegations of wrongdoing at Hart Street. The District preliminarily found that six Hart Street teachers were providing improper assistance to their students on the CST. This suggests that Respondent acceded to a school culture of misconduct. This is important because, coupled with other circumstances, such as Respondent’s unblemished record, it suggests Respondent is unlikely to repeat the misconduct under the present circumstances.

⁸ The Court set forth the following factors: 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. Not all factors may apply in each case and only the pertinent ones need to be examined. (*West Valley-Mission Community College District v. Conception* (1993) 16 Cal.App.4th 1766, 1777; *Governing Board v. Haar* (1994) 28 Cal.App.4th 369, 384 (*Haar*).) The determination of fitness for service required by *Morrison* is a factual one. (*Board of Education v. Jack M.* (1977) 19 C.3d 691, 698, fn. 3; *Fontana Unified School District v. Burman* (1988) 45 Cal.3d. 208, 220-221; *Haar, supra*, 28 Cal.App.4th at p. 384.)

24. Respondent's violations of the District's rules and procedures are not the result of an inadequacy or defect in character. Respondent has demonstrated a willingness to do everything in his power to help his students. Rather, Respondent needs further guidance to ensure that he understands the wrongfulness of his conduct.

25. The District failed, after it provided Respondent with notice of the unprofessional conduct and unsatisfactory performance in October 2011, to furnish him an opportunity to correct his faults and overcome the grounds for these charges, as required by Education Code section 44938.

26. Except for those previously found to have merit, all other allegations in the Amended Accusation and Statement of Charges and all other contentions of the parties at the hearing, are found to lack merit or to be surplusage.

LEGAL CONCLUSIONS

1. The District has the burden of proof. The standard of proof is preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1038-1039.)

2. "Immoral conduct," of which Respondent has been accused, 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, or conduct showing moral indifference to the opinions of respectable members of the community, or as an inconsiderate attitude toward good order and the public welfare. (*Board of Education v. Weiland* (1960) 179 Cal.App.2d 808, 811 (*Weiland*).)

3. "Evident unfitness for service," within the meaning of section 44932, subdivision (a)(5), requires that the unfitness for service be attributable to a defect or inadequacy in temperament, presumably not remediable merely on receipt of notice that the teacher's conduct fails to meet the expectations of the employing school district. (*Woodland Joint Unified School District v. Commission on Professional Competence (Zuber)* (1992) 2 Cal.App.4th 1429, 1444-1445.)

4. "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 [*Burman*].)

5. Cause exists for dismissal under Education Code⁹ sections 44932, subdivision (a)(1) and (a)(3), and 44939, for immoral conduct and dishonesty, as set forth in factual finding numbers 1 through 21 and legal conclusion numbers 2 and 4. The District has established that Respondent violated the rules and policies adopted by the District.

6. Cause does not exist for dismissal under section 44932, subdivision (a)(1), for unprofessional conduct, as set forth in factual finding numbers 1 through 21 and 25. Respondent was not given an opportunity to remediate his conduct following receipt of a notice of unprofessional conduct.

7. Cause does not exist for dismissal under sections 44932, subdivision (a)(5), and (a)(7), and 44939, because Complainant failed to establish Respondent's evident unfitness for service, or Respondent's persistent violation of or refusal to obey the school laws or reasonable regulations, or willful refusal to perform regular assignments, as set forth in factual finding numbers 1 through 21 and 24, and legal conclusion number 3.

8. The California Supreme Court in *Burman* has made it clear that the Commission may retain a teacher even if it finds grounds for dismissal for dishonesty. This acknowledges the "collective wisdom" of the Commission in making such determinations. Under the totality of the circumstances, there is insufficient evidence to establish that Respondent engaged in misconduct that warrants his dismissal as an elementary school teacher with the District.

ORDER

The Accusation and Statement of Charges are dismissed. Ricardo Gonzales shall not be dismissed from his position as a permanent certificated employee of the Los Angeles Unified School District.

Dated: January ____, 2013

Ruthie Fagerstrom, Commission Member

Dated: January ____, 2013

Regina Donahue, Commission Member

Dated: January 14, 2013

Mark Harman, Commission Member

⁹ All further statutory references are to the Education Code, unless indicated otherwise.