

BEFORE A
COMMISSION ON PROFESSIONAL COMPETENCE
FOR THE SAN JACINTO UNIFIED SCHOOL DISTRICT

In the Matter of the Dismissal of:

JAMES RIZOR,

A Permanent Certificated Employee,

Respondent.

OAH No. 2018120769

DECISION

On March 18, 19, and 20, 2019, a Commission on Professional Competence (Commission) heard this matter in San Jacinto, California. The Commission consisted of the following members: Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings; Jessica Holbrook, Chino Valley Unified School District; and Sharill Cortez, Perris Elementary School District.

Mark W. Thompson, Attorney at Law with the law firm of Atkinson, Andelson, Loya, Ruud & Romo, APC, represented complainant, Matt Hixson, Assistant Superintendent, Personnel Services, San Jacinto Unified School District (SJUSD).

Carlos Perez, Attorney at Law with the Law Office of Carlos R. Perez, APC, represented respondent, James Rizor, who was present throughout the hearing.

The record was held open to permit the committee to deliberate and reach a decision. The record was closed and the matter submitted on March 29, 2019.

ISSUE

Did respondent's conduct concerning his interactions with students in the classroom during the first few days of the 2018-2019 school year warrant his dismissal based on unprofessional conduct; evident unfitness for service; persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed by the government of the public schools by the State Board of Education or by the governing board of the school district employing him or her; or willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing school district?

PROTECTIVE AND SEALING ORDER

The names of the minor students referred to in this matter are subject to a protective order. Any document received as evidence in this matter that contains the name of the minor student shall be redacted before any disclosure to the public. No court reporter or transcription service shall transcribe the name of any minor student, but shall instead refer to the student by their initials E.P., C.B., D.E., and C.C. Exhibit 1A, which contains the actual names of the minor students and their corresponding initials, is ordered sealed. A reviewing court, parties to this matter, their attorneys, and a government agency decision maker or designee, may review Exhibit 1A subject to this order, provided that the documents are protected from release to the public.

SUMMARY

Although several of the factual allegations were not established and the cause for dismissal regarding willful refusal to perform regular assignments was not established, all other factual allegations and causes for dismissal were established warranting respondent's dismissal.

FACTUAL FINDINGS

Procedural Background

PRE-HEARING MOTIONS

1. Prior to the hearing, both parties filed *motions in limine* seeking to exclude evidence. Many of the issues dealt with in the motions were already addressed in an October 12, 2019, Order by ALJ Mary Agnes Matyszewski. Those issues not resolved were as follows: respondent wished to ensure that allegations or instances of misconduct more than four years old would be limited to the purposes stated in ALJ Matyszewski's Order; complainant moved to strike/exclude virtually all of respondent's evidence and witnesses due to untimely disclosure under the statutory deadlines and discovery cutoff deadlines set forth in the Pre-Hearing Conference Order.

Respondent's motion was granted, in part. Complainant is permitted to raise facts and evidence concerning allegations of misconduct that occurred over four years before service of the Statement of Charges provided that the allegations and/or evidence are relevant to the Statement of Charges. In other words, given that there is an allegation of evident unfitness for service, persistent failure, and willful refusal to perform assignments, whether respondent received warnings or other counseling or discipline in the past is relevant to this case. However, no prior misconduct, allegations of misconduct, or discipline imposed that is over four years old is permitted to be used at present as a sole basis to dismiss respondent. Respondent was advised to make the necessary objections during the hearing if he believed

information being introduced or elicited through testimony was being used for an improper purpose.¹

Complainant's motion with respect to exclude more than three character witnesses was already granted by ALJ Matyszewski prior to hearing, and respondent represented that he did not intend to call more than three character witnesses. Complainant's motion with respect to exclusion of evidence was denied. Although some of respondent's evidence was, in fact, submitted after the statutory discovery cutoff and the discovery cutoff date set in the pre-hearing conference order, there was no evidence that complainant was unduly burdened or prejudiced by the late disclosure.²

JURISDICTIONAL MATTERS

2. Respondent is an English teacher currently assigned to San Jacinto High School (SJHS).

3. On October 8, 2018, complainant sent a document entitled, "Notice of Proposed Recommendation for Suspension Without Pay and Dismissal, and Statement of Charges (Statement of Charges)" to respondent notifying respondent of the district's intention to recommend to the governing board of the district that respondent be suspended without pay pending his dismissal from employment.

4. Respondent was given the opportunity to discuss the matter at a Skelly meeting on October 19, 2018, if desired, where he could be represented by a representative of his choice. Respondent did not elect to attend the meeting.³

¹ ALJ Matyszewski's Order stated that the Commission shall not make any decision relating to dismissal based on any matters occurring more than four years before the filing of the notice except as follows: (1) as allowed pursuant to Education Code section 44944, subdivisions (b)(2)(A)(i) and (b)(2)(B); (2) as required by Education Code section 44938 for complainant to proceed on a charge of unprofessional conduct; (3) for purposes of determining whether respondent persistently violated district policies and rules; (4) for purposes of determining whether respondent willfully refused to perform regular assignments; (5) if equitable principles apply; or (6) to impeach any witness.

² There were some photographs and documents that complainant did not see prior to the hearing, however, it was established that these photographs and documents were provided to complainant by an e-mail attachment. Complainant was unable to open the attachments or view them, however, so complainant was unaware of what the e-mail attachments contained. Complainant's objection was noted and counsel was given time to review the photographs and documents prior to hearing.

³ In *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 215, the California Supreme Court held that in order to satisfy due process, an agency considering disciplinary action against a public employee must accord the employee certain "pre-removal

5. On November 13, 2018, complainant presented the Statement of Charges to the board. The board approved the recommendation to suspend respondent without pay pending his dismissal. Respondent was given 30 days to request a hearing.

6. On November 28, 2018, respondent timely requested a hearing on both his suspension without pay and dismissal.

7. The Statement of Charges alleges that respondent engaged in conduct that was unprofessional conduct; evident unfitness for service; persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed by the government of the public schools by the State Board of Education or by the governing board of the school district employing him or her; and willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing school district.

The conduct underlying these charges is summarized as follows:

Paragraph 5 of the Statement of Charges: In or about August 2018, respondent regularly used the words “fuck,” “shit,” “ass,” “asshole,” and “bullshit” while in class leading instruction, none of which related to the lesson plan.

Paragraph 6 of the Statement of Charges: In or about August 2018, during instruction and in front of his class, respondent used inappropriate language related to sexual behavior, genitalia, and bodily functions. Specifically, respondent a) made a joking reference about a female’s menstrual cycle; b) told student Z.M. that he has “no balls”; c) told his students that some of them were here only because their parents “bought a bottle of wine” and d) told an African-American student that he should check his DNA because of respondent’s sexual history, there might be a genetic relationship.

Paragraph 7 of the Statement of Charges: On several occasions in August 2018, respondent wasted student instructional time for inappropriate purposes unrelated to any approved lesson plan, as follows: a) demonstrated to students how to do “water shots”; b) described in detail the process of how students can drop-out of school; c) told students that the school practices social promotion in lieu of adequately preparing students for the future.

Paragraph 8 of the Statement of Charges: In or about August 2018, respondent made several female students uncomfortable due to unwanted touching. Specifically, several students reported respondent inappropriately touched one or more female students’ shoulders, hair, and arms.

safeguards,” including “notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline.” The Supreme Court’s directive gave rise to an administrative procedure known as a *Skelly* hearing, in which an employee has the opportunity to respond to the charges upon which the proposed discipline is based.

Relevant Prior Employment History

8. On December 11, 2007, respondent received a letter of reprimand and notice of unprofessional conduct for continued use of class time to discuss inappropriate topics that were not germane to the lecture. Specifically, he was reprimanded for discussing suicide and drug use. Respondent was warned to conduct himself in an appropriate and professional manner at all times and focus classroom discussion on topics that were directly or indirectly linked to the topic of instruction.

The specific incident connected to this prior history occurred on October 4, 2007, while respondent was teaching Language Arts. During that class, respondent made comments concerning what is the best method for committing suicide, such as a heroin overdose, and also stated if he were to commit suicide he would do so on a boat rigged with explosives. None of these comments were related to the planned lesson for the day.

9. On December 6, 2010, respondent received a six-day suspension for using course, obscene, and/or sexually vulgar language, including making references to masturbation and male genitalia while leading classroom instruction; and making sexualized comments. Specifically, respondent was alleged to have called students “bitches” during class; making inappropriate, condescending, and demoralizing statements to students about graduation requirements (*i.e.* that they were in the class because they were low performers); telling students they are headed to the prison system; telling female students that teenage boys just want to get them pregnant; telling students that girls sit in class and put on makeup all day and boys play with themselves all day; telling boys if they ever got his daughter pregnant he would “cut their dicks off”; and telling students – while reading a passage written by Benjamin Franklin – that Benjamin Franklin “liked to fuck.”

Because respondent had already been suspended in the past, the district offered respondent an opportunity to reform his conduct and placed him on a workplace assistance plan, commencing April 27, 2011. Respondent was given directives, as follows: conduct himself in an appropriate and professional manner at all times; cease from using inappropriate language, including the words fuck, dick, bitch, or any other swear words; cease and desist from any conduct which might be construed as humiliating, belittling, insulting, and or demeaning; cease and desist from any and all inappropriate communications and avoid overly personal communications; focus on the topic at hand during instructional time; avoid any situation that may cause any student to feel uncomfortable; immediately assume the proper role of a teacher and discontinue any teaching style in which you have assumed the role of friend, buddy, peer, or other such relationship with students; and attend and participate in any harassment, sensitivity, or other training suggested by the district.

10. On September 23, 2013, respondent received a letter of reprimand and notice of unprofessional conduct for conduct between August 2013 and September 2013. Specifically, respondent was alleged to have made comments rife with sexual innuendo and allusions to the female anatomy in class; insulted students by referring to a student as a male anatomical body part; and inappropriately made physical contact with a female student.

According to the letter of reprimand, respondent told a student to “stop moaning because the student was “not experiencing great pleasure or pain”; told students a story about when he lived in Germany, where he disrobed in front of an attractive woman; told students he thinks of female breasts when he looks at the domes of the San Onofre power plant; told a male student to stop being a dick; and hugged a 10th grader to greet her and kissed her on the top of the head.

Respondent was given directives as follows: conduct yourself in an appropriate and professional manner at all times; use appropriate verbal and visual examples in class and at no time make any references that are sexually explicit or suggestive; do not make inappropriate physical contact with students; and follow all previous directives given to him by administrators.

Evidence Presented by the District

11. Testimony of all the district’s witnesses is summarized below.

TESTIMONY OF MATT HIXSON

12. Matt Hixson is the Former Assistant Superintendent of Personnel for the SJUSD. Mr. Hixson has served the SJUSD as an Assistant Superintendent of Personnel, Director of Technology, Principal, and Assistant Principal. His duties while serving as an Assistant Superintendent of Personnel included recruitment, training, retention, and discipline, up to and including termination.

Mr. Hixson has known respondent for approximately 16 years. During the 2018-2019 school year, respondent taught English five periods per day. A teacher’s job is to teach the curriculum required. That academic year, school began in August. During the first week of school, Mr. Hixson received a phone call from a parent concerning a female student in respondent’s class. The father complained that respondent was making inappropriate comments, using sexual innuendo, having students model alcohol shots, and touching students inappropriately. After receiving the parent complaint, Mr. Hixson spoke with his direct executive, Dr. Sharon Raffiee. He reported to Dr. Raffiee what the parent had alleged and asked Dr. Raffiee to go to SJHS to investigate.

Dr. Raffiee investigated the allegations and recommended paid disciplinary leave because several students provided information that corroborated the female student’s father’s allegations. Mr. Hixson prepared the Statement of Charges according to what he was provided by Dr. Raffiee.

Mr. Hixson, Dr. Raffiee, district counsel, and a union representative met with respondent on August 27, 2018. The purpose of that meeting was for respondent to respond to the allegations.

Regarding the use of the words “fuck” “dick” “shit” “ass” “asshole” and “bullshit,” respondent admitted using foul language to connect with students and to get a rise out of

students. At one point in the conversation, respondent referenced a book by a nationally known scholar who, he claimed, encouraged teachers to reach students at the ground level. Respondent told them he considers himself someone who thinks outside the box.

Regarding the allegation that respondent made sexualized comments, respondent asked for clarification and did not automatically acknowledge making sexualized comments. Respondent said he may have told a student that he “had no balls.”

Regarding the comment that respondent told an African-American student to check his DNA because respondent was active in his younger days and the student could be related to him, respondent said he did not use the exact words alleged but that he may have made a statement to students that they should be aware of their backgrounds.

Regarding the allegation that respondent modeled alcohol shots in class using water, respondent said that it was a hot day and he was trying to have the students hydrate themselves in a fun way.

Regarding the allegations that respondent talked about dropping out of school, Mr. Hixson did not recall respondent’s response.

Regarding the allegation of inappropriate touching, respondent said that in the course of teaching he may engage a student by touching them to get their attention, but did not recall touching anyone’s hair.

Approximately two weeks after the initial meeting, everyone met a second time. The purpose of the second meeting was to tell respondent that the investigation had concluded and the district was recommending resignation or termination. Respondent never acknowledged wrongdoing during either the first or the second meeting and never gave assurances that he would not repeat the offending conduct. In fact, respondent laughed, and said he had been asked to stop before.

TESTIMONY OF STUDENT E.P.

13. E.P. is a senior at SJHS. This school year started in August 2018. E.P. is familiar with respondent because he was her second period English teacher at the start of this school year. After several days, she reported inappropriate conduct to her parents. Specifically, she told her parents respondent was using foul language in class and being “inappropriate” with students.

One of the incidents she reported was that respondent had students do “water shots” in class. She said respondent told students that they were going to do some water shots and asked one of the female students to do a demonstration with him. He put water in small cups and handed it out. When he and the other female student had her water cup, respondent locked arms with her and they both drank the water. E.P. was not sure why respondent did

this, and no alcohol was used. Nobody in class said anything about it and most of the students drank their water.

Another incident she reported had to do with respondent using the words “fuck,” “ass,” and “shit” on three different days. E.P. said respondent told them he used that language with them because they are seniors and he is comfortable with them.

E.P. also recalled an incident when respondent was explaining to students that they should not have to ask to go to the bathroom because if students ask to leave class he will have to ask them why – and then a female student would have to say “it’s that time of the month.”

E.P. recalled an incident where respondent told some students that they were only in existence because of “a bottle of wine.”

E.P. testified that respondent also told students that they did not have to get a degree; they could drop out of school, and a “lot of dropouts make a lot of money.”

None of these incidents had anything to do with the lesson at the time.

TESTIMONY OF STUDENT C.B.

14. C.B. is a senior at SJHS and had respondent for second period English the first few days of the 2018-2019 school year, which started in August. C.B. testified that respondent used foul language in class, specifically, he said “fuck” about 10 times.

C.B.’s testimony regarding the use of “water shots” was consistent with the testimony of E.P.

C.B. also recalled that respondent told students to drop out of high school and made a comment about putting cameras in the bathrooms.

C.B. recalled that respondent touched other female students in class by placing his hands on their shoulders. He did it to her once, during a lesson, where he was saying something. It lasted about two seconds and it just happened one time. She described it as a “quick tap.” She did not recall respondent touching any students on their hair.

C.B. testified that respondent told the class, on one occasion, something about “fuck you fuck your family.” C.B. said this statement was made in connection with telling students to drop out of school because they could make more money without a high school diploma.

None of these incidents had anything to do with the lesson at the time.

TESTIMONY OF STUDENT D.E.

15. D.E. is a senior at SJHS and had respondent for her second period English class at the beginning of the 2018-2019 school year. She testified that respondent used the words “shit, fuck asshole and bullshit” in class on several occasions, and never gave any explanation as to why he was using foul language.

D.E.’s testimony was consistent with C.B. and E.P.’s testimony concerning “water shots.”

D.E. testified that respondent told one student that if he did not want to be in class he could drop out of school. She thought respondent was serious, but also not that he was advocating to drop out of school. Respondent did not tell students how to drop out of school. These comments bothered her because she did not think a teacher should tell students to drop out of school for any reason.

None of these incidents had anything to do with the lesson at issue.

TESTIMONY OF RYAN COGDILL

16. Mr. Cogdill is a special-needs aid at SJHS. He attended respondent’s second period English class at the beginning of the 2018-2019 school year, which began in August 2018.

Mr. Cogdill heard respondent use the words “shit, damn, and fuck” at least 5 to 10 times. He was shocked that respondent would use profanity. It drew a response from the students that varied from shock to comical.

Mr. Cogdill did recall respondent touching students on the shoulder as he might be walking through the classroom, but it was just a tap on the shoulder and only happened about five times. There was no inappropriate intent and no students ever said they were offended. No students pulled away. No students ever said anything to respondent about it.

Mr. Cogdill’s testimony regarding the “water shots” was consistent with that of the other students who testified.

On one occasion, while respondent was speaking to an African American student, respondent told that student something along that lines that the student could be related to him and he should check his DNA.

Finally, on another occasion, respondent told students that high school was not for everybody, and if they did not like being there, they could leave and get a career. Respondent also told students about a friend of his who went into construction and made a lot of money. Mr. Cogdill was surprised respondent would make such a comment because it was like he was advocating dropping out of school.

Mr. Cogdill said none of the above-referenced incidents had anything to do with the lesson at the time.

TESTIMONY OF SHARON RAFFIEE

17. Sharon Raffiee, Ph.D., is the Executive Director of Personnel Services for the SJUSD. She has held various positions within the district for 14 years. Her duties include hiring, recruitment, training, and discipline. The district expects all teachers to adhere to the required curriculum, state standards, policies, and to teach the skills necessary to prepare students for college.

At the beginning of the 2018-2019 school year, she was notified by Mr. Hixson regarding inappropriate conduct by respondent that had been reported by a student and that student's father. The parent was upset about "vulgarity, inappropriate sexualized conversations, and student touching." The incidents had occurred the first three days of the school year; on the fourth day, she immediately went to SJHS because she believed it was imperative to do so. Dr. Raffiee took statement from approximately 17 students, wrote a report, and discussed her findings with Mr. Hixson. She also later assisted Mr. Hixson with preparation of the Statement of Charges.

She met with respondent, Mr. Hixson, two union representatives, and district counsel on August 27, 2018, regarding respondent's conduct.

Regarding the allegation in paragraph 5 in the Statement of Charges concerning the use of profanity in class, respondent admitted that not only did he use profanity, but he did so consciously. Respondent also said that he used profanity to engage students and "help get them ready for life." He also said it was a form of communication.

Regarding the allegation in paragraph 6d in the Statement of Charges that he told an African American student that the student should check his DNA because he might be related, respondent said that the comment was "in context" because he was building the concept of family among the students; Dr. Raffiee said this made no sense to her because students had reported respondent was talking about his younger days and being wild. Respondent did not have a response for any of the other allegations in paragraph 6.

Regarding the allegations in paragraph 7a in the Statement of Charges concerning the "water shots," respondent simply said he gave students water because it was hot.

Regarding the allegations in paragraph 7b in the Statement of Charges concerning allegations that he told students they should drop out of school, respondent told her that he simply wanted the students to know they had choices.

Regarding the allegations in paragraph 7c in the Statement of Charges that SJHS practices "social promotion (i.e. just moving students along)," respondent did not have a response.

Regarding the allegation in paragraph 8 in the Statement of Charges concerning touching student's arms, hair, or shoulders, she did not recall respondent's response.

None of these incidents have anything to do with regular teaching assignments.

At one point during the meeting, she told respondent that he is not upholding the core values of the district. Respondent responded that teaching is a "dark place" and sometimes when you shine you have to go to the "darkest places." Respondent also stated in the meeting that he did not really want to be a teacher.

At the end of the meeting, Mr. Hixson made it clear that remediation was not an option because respondent had been warned about unprofessional conduct in the past. At a second meeting two weeks later, respondent was informed the district would proceed with his dismissal.

Evidence Presented by Respondent⁴

TESTIMONY OF STUDENT C.C.

18. C.C. is a senior at SJHS and was in respondent's second period English class at the beginning of the 2018-2019 school year, which started in August 2018. She recalled respondent, for the three days he was in class, as a very "outspoken" teacher but one who was "confident in himself." She felt he was a good teacher. She was never offended in his class. She never saw him touch a student inappropriately. She said respondent may have patted a student on the shoulder very briefly, but no student ever complained. Respondent never yelled at students and never assaulted or bullied anyone. C.C. did recall drinking "cups" of water once, but said that respondent just gave them the cups of water to cheer for them since it was their senior year. Respondent did make a comparison of the water to alcohol, but it was done in a "positive" way – like a toast to them. Respondent never encouraged anyone to drop out of school; to the contrary, respondent encouraged them to stay in school. Respondent was very inspirational – he even brought backpacks to school for students who did not have them. Respondent was active in an after school club as well. C.C. found respondent to be very considerate and exciting. He encouraged students to be who they wanted to be and told students they needed to do what they need to do for themselves. Respondent told students that some of them may not enjoy school and there are many different options without school. C.C. said respondent did use the words "shit" and "fuck" in class, but she would not consider them a "common" part of his language.

TESTIMONY OF PAUL HENDRY

19. Mr. Hendry currently teaches English at SJHS. Respondent has been a colleague of his for eight years. Mr. Hendry was also a department chair while at SJHS. He and respondent had also been filmmaking partners in France. Mr. Hendry believed

⁴ All witness testimony is summarized and paraphrased.

respondent was an excellent teacher because he was always prepared, always interacting with students, and always developing a great rapport with students. Mr. Hendry often saw students coming to respondent's classroom to eat lunch in his room or simply to visit or get help. Respondent has a party every year at his house as an Earth Day fundraiser because respondent is very socially aware about the environment. Respondent is active on campus in an environmental club, and also works to save local parks. Of all the teachers he has worked with in 32 years, respondent is the most dedicated teacher he has ever seen.

TESTIMONY OF KENNETH REED

20. Mr. Reed used to be the history/social science department chair at SJHS and retired in 2005. He and respondent, aside from being colleagues, are also active in the Lion's Club, a nonprofit organization focusing on things like conservation, hunger, ecosystems, ecology, and pediatric cancer. Mr. Reed thought respondent was a very good teacher. He thought respondent did an excellent job and was well regarded as a teacher. Mr. Reed saw how respondent interacted with students and respondent had the students very involved in the classroom and out of the classroom. Mr. Reed was "shocked" when he found out about the Statement of Charges; he admitted that he has not seen respondent in the classroom since 2005.

TESTIMONY OF FRANKLIN PEREZ

21. Mr. Perez met respondent a number of years ago when respondent was his sophomore English teacher in 2001 at SJHS. He testified that respondent was a very good English teacher and was personable and authentic. He did not recall respondent using profanity, except maybe the word "shit." Respondent knew how to motivate students who were slacking. Mr. Perez testified about how he was a football player who was failing out of school, and respondent worked hard with him so he could qualify for spring training. Mr. Perez recalled very few positive interactions with teachers in his education, but respondent's class was one of those positive experiences. Mr. Perez continued with his education and now teaches world history, U.S. history, civics, and government. He is working towards his Ph.D. in ethnic studies. Respondent was one of the reasons he chose to pursue a higher education to improve the educational system, because respondent really showed him what a difference a teacher who cares can make in a student's life.

RESPONDENT'S EXTRACURRICULAR ACTIVITIES AND DOCUMENTARY EVIDENCE

22. Respondent provided his most recent personnel evaluation. The evaluation showed he either met standards or was progressing towards the standard in all areas, but that no areas showed he exceeded standards. Respondent said that he thinks he is an exceptional teacher and he "does not put much faith" in evaluations.

23. Respondent submitted awards and certificates that he has won over the years, which included, in part, teacher of the year, certificates of achievement, certificates of recognition, and the Crystal Apple Award.⁵

24. Respondent submitted a character reference letter from SJHS Principal Luke Smith, dated June 12, 2017. The letter speaks highly of respondent, noting that respondent is highly motivated, dedicated, and an outstanding teacher. Mr. Smith also stated that respondent used innovative approaches in the classroom, and had the ability to connect and build relationships with students. The letter described the contributions respondent made outside the classroom during his entire academic career, including leading clubs and organizations such as EcoMind, Leo Club, Shakespeare Club, Ramona Pageant, Journalism, and more. Finally, Mr. Smith described respondent as a highly impactful and capable teacher. Mr. Smith's letter pre-dated the conduct at issue in this case and thus, did not reference if Mr. Smith's opinion is the same in light of the present allegations of misconduct. Mr. Smith did not testify.

25. Respondent submitted several photographs showing himself engaged in various community activities. He also testified regarding his activities such as being advisor of the Leo's Club, a club on campus for various social causes. He is also president of the Lion's Club, the adult version of the Leo's Club. Respondent also submitted photographs of minor students from various events that were not admitted, but, the photographs appeared to depict what respondent represented they were: a community college field trip; students enjoying misters he installed in the hallways; and a yearbook photograph from a club.

RESPONDENT'S TESTIMONY

26. Respondent's educational background includes community college, where he obtained an Associate of Arts degree in general education; another community college, where he obtained an Associate of Arts in Fire Science; California State University, Fullerton, where he obtained a Bachelor of Arts in English; and California State University, San Bernardino, where he obtained a multi-subject teaching credential and is also authorized to teach single subject English.

Respondent served as a seasonal-on call firefighter for 12 years until he was injured. Around 1997, respondent became very ill and had a near-death experience, which caused him to take pause regarding his life. Respondent decided to pursue the teaching profession instead. He started out as a substitute. He came to SJUSD as a high school English teacher in 1998. That is where he has been assigned until present. He has taught English the entire time, except one year he taught the TIGER academy which covered a wide curriculum. Respondent has also had other small assignments like leadership academies. Respondent has

⁵ Respondent included a "screen shot" that he said was sent to him by a friend, nominating him for teacher of the year for the school year 2018-2019. However, respondent only taught for one full day of the 2018-2019 school year before he was removed from the classroom. So, this unauthenticated "screen shot" can be given little weight.

taught junior, sophomore, and senior English, although once he taught freshman English. Respondent is married and has one son.

The 2018-2019 school year began on a Thursday in August. It was a very short introductory day, and Friday was a minimum day. The following Monday, the third day of school, was the first full day of the school year.

Regarding the allegations concerning the “water shots,” respondent said he did it as an “ice breaker.” It was for the students to meet and greet and get to know each other. He bought paper Dixie cups and supplied the water. It was very hot that day and he explained to the students that the purpose of the water was to cool off because they had been helping him bring plants and supplies into the classroom. Respondent designated students to pour the water into the cups and some students said they looked like shot glasses. Respondent said he had no thought of that, so he told the students that they would make a toast to them being seniors. Respondent said he did show the students a “locking arms” motion like when the Russians meet each other and lock their arms in a toast. Respondent said he may have put students in an awkward situation because students at that age have difficulty communicating and interacting beyond their cell phones.

Regarding the comment about a female’s menstrual period, respondent said he did make reference to that once on the Monday after school started. He said that he was going over policies and procedures at the beginning of class. He was standing by the classroom windows and he told students “you’ll notice that is the boy’s and girl’s bathroom” but “you are seniors, [and] I want you to have some agency at this point in your life.” Respondent told the students he does not want them to have to interrupt classroom time and say “I am on my period” or something like that. He is against hall passes and told the students he just wants them to quietly excuse themselves. Respondent said he may have also told students that he did not want to have a student tell him that it was her “time of the month.”

Regarding the use of profanity, respondent said he may have let it slip out. He said sometimes teachers think they are giving a great lecture and a student’s hand goes up. The teacher thinks the student is engaged. But then, the student may ask to just go to the bathroom, and a teacher will think “fuck.” Respondent said that is what happened and it only happened once on the Monday after school started. Respondent denied saying “fuck you and fuck your family” to students. Respondent also said he may have used the words “shit” or “asshole” – and possibly “bullshit” – the previous Friday. Respondent admitted that was “a lot of swearing for that short span of time.”

Respondent said he never told a student that he had “no balls.” Respondent said he did tell a student something like “you gotta have some balls in this life.”

Regarding the comment about some students only being born because of a bottle of wine, respondent said that he told students that he knew some of them realized they were only here because of an “accident.” Respondent said he was telling students that their lives

are not about how they were born, but how they live. It was during a conversation about classroom procedures and purpose.

Regarding the comment to an African American student about DNA, respondent said they were talking in class about policies and procedures responsibility, agency, and intention. Respondent said that he was telling students that his success as a teacher is dependent upon his success as a human being. He said he was telling students that part of his job is to create happy and healthy human beings and “not miserable idiots that think they can do whatever.” Respondent said he believes he told students, collectively, that they are a family. He told students that if there was an earthquake and the ceiling started shaking and pinned us down – he didn’t care how much you think that person next to you is a jerk, you would be closer than twins. Respondent looked at two African American students in class and told them that they might not think of him as family because of their skin color, but, if you check your DNA, you never know. Respondent did say something about being wild in his younger days. Yet, respondent said by making the comment he did not mean to say that he was directly related to the students or that their parents were sexually promiscuous.

Regarding dropping out of school, respondent said he did not tell students they “should” drop out of school but rather, that they “could” drop out of school if they wanted to. Respondent said that some students had told him in the past that they felt like they were just holding a spot. He felt that telling students they could drop out was consistent with his overall theme of personal responsibility and living with a purpose. He told students that if they did not want to be there, they need to find something else for themselves. He told them that they can take the GED when they turn 18. Respondent also told students about a friend of his who used to be a “ditch digger” who made a successful living.

Regarding the allegation that respondent told students the school district only practices social promotion, he said he did not make any comment in that regard.

Regarding touching students, respondent admitted that he would hold his clipboard and walk around class as he instructed and sometimes “tapped” a student on the shoulder as he was walking by. He said it may have been 3 or 4 students and the tap only lasted a second. He never pinched a student, but recalled that while talking about “shining” and “owning” oneself, he may have cupped his hand like Yoda did with Luke Skywalker in Star Wars and said something like “luminous beings we are.” Respondent also said he did not recall ever touching a student’s hair, but if he did, it may have been when he was telling a student “you are the light within you” and not your “face, your hair, your nails, etc.”

Regarding the August meeting between respondent, his union representatives, Mr. Hixson, Dr. Raffiee, and district counsel, respondent said he believed it was “more of a conversation” than anything having to do with discipline. He did not mean to indicate that profanity is acceptable in class. Respondent said he believed the meeting was more of a “philosophical discussion” and had he known it was something that would rise to the level that it has now, he would have just apologized and told them it would not happen again.

Prior to concluding his testimony, respondent was asked by counsel if there is anything he wanted to say to the Commission. Respondent said that the job of a senior English teacher is to prepare the kids for graduation. He said he tries to be a part of the flow of his classroom and that is what makes him an effective teacher. He does not consider himself a “vulgarian” but said that profanity can be a “tool of language” that arguably is effective. Respondent said he can comply with not using profanity in class. The whole process has “been an awakening.” He said if he had known someone would spend this much money regarding his use of profanity in class he would have been much more cautious. In the future, he will pay much more attention to his language.

Respondent acknowledged the prior warnings he had been given, and his suspension, regarding unprofessional conduct. Respondent said he thought most of the prior incidents were mischaracterizations. He said, specifically, that the December 11, 2007, letter notifying him of unprofessional conduct was unfair and motivated for political reasons.

Respondent feels he should remain a teacher in the district. He has been teaching for over 21 years. He and his wife decided to make San Jacinto their home. He is committed to the school, the community, and his family is established here. Respondent became one of the most senior teachers in the school district within six years of starting his job because there is such a high turnover rate. People cannot believe he stuck it out with the SJUSD and he is often asked “why do you stay in that dump.” Respondent said that despite the fact that there are “folks in leadership” that no longer want him in this school, it is, nonetheless, his school. Respondent wants his job back because he knows he is not a threat to his students and he is committed to serving his students.

Respondent said he has become a defining part of the school. He has helped revitalize the community and experiences gratitude working at SJHS. Respondent said that the charges are very serious in this case and he knows he “messed up.” He said he is “ashamed to be here” and he “should have known better.” He said he is “ashamed of wasting all the resources that have been wasted” on him.

Respondent said it has become clear to him that he cannot use foul language in front of minors. He said he knows if he does, he risks the district “squandering time and resources.” He will not let that happen again.

Respondent said he educates and inspires excellence and teaching is his passion. He knows he is a “menace to deal with from time to time” and thinks “this whole thing is shameful.” He is ashamed that he might have hurt someone’s feelings, but is more ashamed that the district has wasted so much time. He does not want to ever be in a position again to give the district “ammunition to squander public money.” He said he will not allow the district the opportunity to remove him from the classroom “over something that [he believes] was a mischaracterization.” Respondent said he will not make himself a target and will not “afford the district that luxury again.”

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. The standard of proof in a teacher disciplinary proceeding is a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1039-1040.)

2. “‘Preponderance of the evidence means evidence that has more convincing force than that opposed to it.’ [Citations.]” (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325.) The sole focus of the legal definition of ‘preponderance’ in the phrase ‘preponderance of the evidence’ is on the *quality* of the evidence. The *quantity* of the evidence presented by each side is irrelevant.” (*Ibid.*, italics emphasis in original.)

Applicable Law

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

4. When a school board recommends dismissal for cause, a Commission on Professional Competence may only vote for or against the dismissal; the Commission may not dispose of a charge *seeking* dismissal by imposing probation or an alternative sanction. (Ed. Code, § 44944, subds. (c)(1)-(3).)

5. A permanent certificated teacher may not be dismissed except for, among other things, unprofessional conduct, evident unfitness for service, persistent refusal to obey, willful refusal to perform regular assignments as prescribed by the reasonable rules and regulations of the employing school district. (Ed. Code, § 44932, subds. (a)(2), (a)(6) & (a)(8); 44939.)

UNPROFESSIONAL CONDUCT

6. “Unprofessional conduct” has been defined as “that conduct which breaches the rules or ethical code of a profession, or conduct which is unbecoming a member in good standing of a profession.” (*Shea v. Bd. of Medical Examiners*, (1978) 81 Cal. App.3d 564, at 575; *Bd. of Education v. Swan* (1953) 41 Cal.2d 546, 553.) Unprofessional conduct must also be considered in conjunction with the unique position of public school teachers, upon whom are imposed responsibilities and limitations on freedom of action which do not exist in regard to other callings. (*San Diego Unified School Dist. v. Commission on Professional Competence* (2011) 194 Cal.App.4th 1454, 1466.) The determinative test of a charge of immoral or unprofessional conduct is fitness to teach, which is a question of ultimate fact. (*Bd. of Education v. Jack M.* (1977) 19 Cal.3d 691.)

EVIDENT UNFITNESS FOR SERVICE

7. Unfitness for service means “not fit; not adapted to a purpose, unsuitable; incapable; incompetent; and physically or mentally unsound.” (*Palo Verde etc. School Dist. v. Hensey* (1970) 9 Cal.App.3d 967, 972.) “Unprofessional conduct” and “evident unfitness for service” do not mean precisely the same thing. Although conduct constituting “evident unfitness for service” will often constitute “unprofessional conduct,” the converse is not always true. Evident unfitness for service requires that unfitness for service be attributable to defect in temperament, which is not necessary for a finding of unprofessional conduct. Nevertheless, lower courts may not disregard the criteria for unfitness set out in a California Supreme Court opinion, in which the court concluded “unprofessional conduct” meant conduct showing a teacher was unfit to teach. These criteria must be analyzed to determine, as a threshold matter, whether the cited conduct indicates unfitness for service. If the criteria are satisfied, the next step is to determine whether the “unfitness” is “evident”; i.e., whether the offensive conduct is caused by a defect in temperament. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444-1445.)

PERSISTENT VIOLATION OF SCHOOL LAWS OR REGULATIONS

8. The word “persistent” is defined by lexicographers as “refusing to relent; continuing, especially in the face of opposition . . . stubborn; persevering . . . constantly repeated.” And in the judicial decisions of this, as well as other states, the word has been interpreted to mean “continuing or constant.” (*Governing Board of the Oakdale Union School District v. Seaman* (1972) 28 Cal.App.3d 77, 82.) A single violation of a school board’s rules is not of itself cause for the dismissal of a permanent teacher. The subdivision pertains to unintentional as well as intentional transgressions, and hence the Legislature has decreed that a single violation is not sufficient to warrant dismissal, apparently to allow for correction; “it is the persistent disregard” of school rules that the subdivision is designed to regulate. (*Governing Board of the Oakdale Union School District v. Seaman, supra.*, 28 Cal.App.3d at p. 84.)

WILLFUL VIOLATION TO PERFORM REGULAR ASSIGNMENTS

9. Under Education Code section 44939, the willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing school district, provides cause for an immediate suspension and the filing of a notice of dismissal.

Evaluation

FACTUAL ALLEGATIONS AND FINDINGS

10. A preponderance of the evidence established the factual allegations contained in the Statement of Charges in paragraphs 5, 6, 7a and 7b.

Regarding the allegations in paragraph 5, respondent used profanity during the first four days of the school year, and witnesses were consistent as to that point. Even respondent admitted to using profanity.

Regarding the allegations in paragraph 6, although respondent may not have made the statements alleged in the Statement of Charges verbatim, he did make a reference to a female student's menstrual period; he did make a reference to a student that he needed to "have balls"; he did, according to students, tell some of them that they were only here because of a bottle of wine; and he did make reference to his wild youth and tell an African American student that they could be related. All of these proven allegations are close enough in description to the allegations contained in the Statement of Charges to be sustained.

Regarding the allegations in paragraph 7a, respondent did demonstrate "water shots" to students and make reference to the water being a toast or celebration to their senior year.

Regarding the allegations in paragraph 7b, respondent did make reference to students dropping out of school, pursuing alternatives other than school, and making reference to at least one individual he knew outside of the academic arena who did not go to school and who made money.

The conduct described in paragraphs 5, 6, 7a, and 7b all constitute unprofessional conduct, in violation of Education Code section 44932, subdivision (a)(2). Given the prior warnings respondent was given regarding his unprofessional conduct in 2007, 2010, and 2013, which also included a suspension without pay, respondent also is in violation of Education Code section 44932, subdivision (a)(8), persistent refusal to obey the school laws or the state or reasonable regulations of the school district employing respondent. The conduct also constituted evident unfitness for service, in violation of Education Code section 44932, subdivision (a)(6), for the reasons discussed in the Conclusion portion below.

The conduct described in paragraphs 5, 6, 7a, and 7b does not constitute willful refusal to perform regular assignments without reasonable cause, in violation of Education Code section 44939. While certainly respondent was not teaching English while he was engaged in the activity detailed in paragraphs 5, 6, 7a, and 7b, there was no evidence submitted that he failed to teach English or perform his assignments as an English teacher.

11. A preponderance of the evidence did not establish the allegations contained in paragraph 7c or 8.

Although respondent made reference to students dropping out of school, he did not mention the term or concept of social promotion or otherwise advocate that the SJUSD only passes students to move them along as opposed to giving them a quality education.

Although respondent may have tapped some students on the shoulder, and possibly the hair or the arm, the evidence did not establish that the touch was inappropriate, illegal, or otherwise made any student feel uncomfortable. No student testified that respondent tapping

them on the shoulder, hair, or arm made them uncomfortable and to the extent any such comment is contained in the written statements obtained by Dr. Raffiee, such a statement is administrative hearsay and cannot be used to make a finding of fact.

CONCLUSION

12. In *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 235, the Supreme Court held that “an individual can be removed from the teaching profession only upon a showing that his retention in the profession poses a significant danger of harm to either students, school employees, or others who might be affected by his actions as a teacher.” The court delineated the following criteria to determine whether a teacher’s conduct indicates that he or she is not fit to teach: (1) the likelihood that the conduct may have adversely affected students or fellow teachers; (2) the degree of such adversity anticipated; (3) the proximity or remoteness in time of the conduct; (4) the type of teaching certificate held by the teacher; (5) the extenuating or aggravating circumstances, if any, surrounding the conduct in question; (6) the praiseworthiness or blameworthiness of the motives resulting in the conduct; (7) the likelihood of the recurrence of the conduct in question; and (8) the extent to which disciplinary action may inflict an adverse impact or have a chilling effect upon the constitutional rights of the teacher involved or other teachers. (*Id.*, at pp. 229-230.)

13. In *Board of Education v. Jack M., supra*, the Supreme Court detailed the process to be considered in determining fitness to teach. In addition to the *Morrison* factors, the court provided additional factors that may be considered to determine if there is a nexus between the conduct and a teacher’s fitness to teach: (1) likelihood of recurrence of the questioned conduct; (2) the extenuating or aggravating circumstances, if any; (3) the effect of notoriety and publicity; (4) impairment of teachers’ and students’ relationships; (5) disruption of educational process; (6) motive; (7) proximity or remoteness in time of conduct. (*Id.*, at fn. 5.)

In reaching a conclusion that grounds exist to dismiss a certificated employee on the basis of evident unfitness for service, only the pertinent *Morrison* factors need be examined. (*Governing Board v. Haar* (1994) 28 Cal.App.4th 369, 384.) In this sense, the purpose of examining the *Morrison* criteria is to establish a nexus between the proven conduct and fitness to teach. However, even if the *Morrison* analysis shows a nexus between the conduct and fitness to teach, it must also be determined that the alleged conduct shows *evident* unfitness for service. (*Morrison, supra*, at p. 1445 [emphasis added].) “Evident unfitness for service” means clearly not fit for teaching, ordinarily by reason of *temperamental defects or inadequacies*; it connotes *fixed character trait*, presumably not remediable merely on receipt of notice that one’s conduct fails to meet expectations of the school district. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence, supra*, 2 Cal.App.4th at p. 1444 [emphasis added].)

In considering the relevant *Morrison* factors in conjunction with the sustained allegations contained in paragraphs 5, 6, 7a, and 7b, the following conclusions are reached.

Likelihood of adverse effects on the students: there was at least one complaint. No good can come from using profanity in class, using vulgar or obscene language in class, modeling alcohol shots, telling students they are the result of a bottle of wine, and promoting alternatives to school such as dropping out. Each of those actions can have an adverse effect on students.

The degree of adversity: this case does not represent the most extreme form of teacher misconduct, but is nonetheless, moderately serious. Students, especially high school seniors that are coming of age, are impressionable young adults. Exposing them to profanity, vulgarity, modeling of alcohol shots, and making comments with sexual connotations in class (i.e. referring to a woman's menstrual cycle, talking about "balls," referencing bottles of wine and how students came into existence, and telling a student they may be related because of respondent's wild days – all this behavior is adverse to an appropriate and productive learning environment. In addition, students come from different backgrounds and may have different comfort levels with having a teacher make such comments in front of their peers.

Proximity or remoteness in time: the allegations were made in August 2018 and the district took swift action, within four days of the commencement of the school year.

Extenuating/aggravating circumstances: respondent has repeatedly engaged in unprofessional conduct over the past decade, and refuses to take responsibility for his actions. Although respondent attempted to make amends in the hearing, his closing statement was astounding. Rather than recognize the inappropriateness of what the district alleged, respondent instead blamed the district for "squandering" public resources. This does not evidence the state of mind one would normally like to see if a person was truly remorseful for what they had done.⁶ To the contrary, respondent appears angry and bitter that the district is pursuing charges for conduct that he believes "mischaracterized" what truly occurred.

Most of the factors in the case of *Jack M., supra*, parallel those factors listed in *Morrison, supra*. However, two factors - impairment of the teacher/student relationship and disruption of educational process are relevant. Respondent's conduct impaired the student/teacher relationship and disrupted the educational process to the extent that he appeared to be acting more as a "buddy" or "one of them" rather than assume the proper role of a teacher. More importantly, while doing "water shots," talking about menstrual cycles, telling students about dropping out of school, using profanity, and engaging in all the other

⁶ Rehabilitation is a "state of mind" and the law looks with favor upon rewarding with the opportunity to serve, one who has achieved "reformation and regeneration." (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.) Fully acknowledging the wrongfulness of past actions is an essential step towards rehabilitation. (*Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 940.) While a candid admission of misconduct and full acknowledgment of wrongdoing is a necessary step in the rehabilitation process, it is only a first step; a truer indication of rehabilitation is presented if an individual demonstrates by sustained conduct over an extended period of time that he or she is once again fit to teach. (See *In re Trebilcock* (1981) 30 Cal.3d 312, 315-316.)

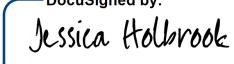
sustained instances of misconduct, respondent was disrupting the educational process – which was to teach English.

14. Respondent has been a teacher since 1997, and certainly has done much good for his community and while engaged in his public activities. He may, indeed, have been effective at teaching students over the years as well. However, ultimately, based on the *Morrison* factors and factors relevant from *Jack M.*, a nexus between respondent's conduct and his fitness to teach at SJUSD was well-established. On this record, it does not appear respondent's conduct is remediable because he has received notice on multiple occasions from the SJUSD to stop engaging in unprofessional conduct, yet continues to engage in unprofessional behavior. Such behavior therefore evidences either an inadequacy or fixed character trait that respondent either fails to recognize the conduct expected of him by the SJUSD or knows exactly what is expected of him but continues to willfully disregard those standards. Accordingly, on this record, the district's request to dismiss respondent must be upheld.

ORDER

Respondent James Rizor's appeal from his dismissal of employment by the San Jacinto Unified School District is denied. The district's request to dismiss respondent is upheld.

DATED: April 22, 2019

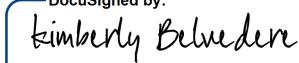
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JESSICA HOLBROOK
Assistant Principal
Chino Valley Unified School District

DATED: April 23, 2019

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SHARILL CORTEZ
Principal
Perris Elementary School District

DATED: April 23, 2019

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KIMBERLY J. BELVEDERE
Administrative Law Judge
Office of Administrative Hearings