

BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
STATE OF CALIFORNIA

In the Matter of the Immediate Suspension
and Dismissal of:

OAH No. 2012090854

ROBERT PEREZ, a permanent certificated
employee of the Los Angeles Unified School
District,

Respondent.

DECISION

This matter was heard by the Commission on Professional Competence (Commission) in Los Angeles, California, on May 26-28, 2015. The Commission consists of Deanna Clark (retired); Hannah Finnley (retired); and Administrative Law Judge Eric Sawyer, Office of Administrative Hearings (OAH), State of California, who presided.

Michele M. Goldsmith, Esq., Bergman Dacey Goldsmith, represented Complainant Los Angeles Unified School District (District).

Robert Perez (Respondent) represented himself.

The case was deemed submitted for decision at the conclusion of the hearing on May 28, 2015. The Commission thereafter deliberated in executive session.

FACTUAL FINDINGS

Parties and Jurisdiction

1. The Board of Education (Board) is the duly elected, qualified and acting governing board of the District, organized, existing and operating pursuant to the provisions of the California Education Code and other laws of the State of California.

2. Respondent is a permanent certificated employee of the District.

3. On August 29, 2012, Vivian K. Ekchian, in her official capacity as the District's Chief Human Resources Officer, verified on information and belief an Accusation and Statement of Charges against Respondent, alleging factual and legal grounds for

Respondent's immediate suspension without pay and termination of his employment as a result of separate incidents involving two students.

4. By a letter dated September 17, 2012, Respondent was advised that the Accusation and Statement of Charges had been filed with the Board, and that during a closed session of a Board meeting held on September 11, 2012, the Board decided to suspend Respondent without pay and dismiss him from employment. The dismissal would become effective within 30 days, unless he demanded a hearing. Respondent timely requested a hearing.

5. The District filed an Accusation and Statement of Charges with OAH and served the same on Respondent. Respondent timely filed a Notice of Defense, which contained a request for the hearing that ensued. The parties subsequently executed a written stipulation waiving the statutory requirement that the hearing be held within 60 days from Respondent's request for a hearing.

6. At the start of the hearing on May 26, 2015, the Administrative Law Judge granted Complainant's request for leave to file a First Amended Accusation and Statement of Charges, which added an allegation that Respondent's credential had expired.

Respondent's Background Information

7. Credential. Respondent had a valid multiple subject credential, which authorized him to teach all subjects in a self-contained class and, as a self-contained classroom teacher, to team teach or to regroup students across classrooms. Respondent also possessed a bilingual cross-cultural, language and academic development (BCLAD) certificate, which, when held in conjunction with a prerequisite credential or permit specified in the Education Code, authorized Respondent to provide specified services to limited-English-proficient pupils. As discussed in more detail below, Respondent's credential expired and has not been renewed.

8. Employment with the District. Scant evidence of Respondent's employment background was presented, other than his prior discipline discussed in more detail below. Respondent stated in a request to return from leave document (ex. 41) that he taught grades K-3 at West Vernon Elementary School from July 1990 through June 1994. According to the same document, Respondent taught grades 6-8 at Gage Middle School (Gage MS) beginning in July 1994. He continued teaching at Gage MS through the time the events discussed below began.

Charges 1 & 2: Student A [REDACTED] F.¹

9. In September 2008, Respondent was assigned to Gage MS teaching core sixth grade math and science classes, and one eighth grade social studies class.

¹ Last names are omitted to protect the privacy of the students.

10. At that time, the school site allowed teachers to develop their own bathroom policies, provided that they conformed to other District policies and procedures. Respondent's bathroom policy was to allow two students to use the restroom at the same time every day. Students could change their allotted bathroom time with other students if they wanted. Once a student had an allotted time, they were only able to use the bathroom at that time.

11. By September 2008, Respondent had concluded that A [REDACTED] F., a student in his eighth grade social studies class, had abused Respondent's bathroom policy for reasons not established. Respondent therefore "took away" A [REDACTED]'s bathroom "privileges" for one month, meaning he would not be allowed to use the restroom during his allotted time or any other time during Respondent's class.

12. On September 18, 2008, Respondent was teaching his eighth grade social studies class. A [REDACTED] asked to use the bathroom, but was refused by Respondent, who cited the fact that A [REDACTED] had previously lost his bathroom privilege. A [REDACTED] persisted and told Respondent that it was an emergency. By this time, the entire class was watching these events. Instead of giving him permission to access the bathroom to relieve himself, Respondent told A [REDACTED] he could urinate in a trash can, which was located inside the classroom. A [REDACTED] questioned whether Respondent was serious about using the trash can and Respondent questioned whether A [REDACTED] had an emergent need to use the restroom. After a few moments of this questioning, A [REDACTED] urinated in the trash can in the presence of the entire class. However, A [REDACTED] did so with his back to the class and it was not established that he exposed himself. At no time did Respondent attempt to stop A [REDACTED] from approaching the trash can or urinating in it.

13. Once he realized A [REDACTED] had in fact urinated in the trash can, Respondent immediately ordered A [REDACTED] to take the trash can and leave the classroom and wait in the hallway alone and unsupervised.

14. Respondent used poor judgment in dealing with this student problem on many levels. Challenging a student is a poor behavior management strategy. Denying access to the restroom poses a health and safety concern. The continued exchange between the two in front of the entire classroom was a poor use of instructional time. Suggesting that a student urinate in a trash can in a public forum violates standards of decency and encouraged action that would humiliate middle school aged children whose personalities and sexual identities are emerging. Finally, Respondent did not model appropriate adult behavior for students.

15. Through the events described above, Respondent failed to provide for the health and welfare of students when he banned A [REDACTED] from using the bathroom for a month while in class. Denying access to the bathroom and encouraging A [REDACTED]'s urinating in the classroom were contrary to various District policies, including:

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A. Code of Conduct with Students, numbers 3 and 5, which prohibited Respondent from behaviors in the presence of students that were unprofessional or from making statements or comments which were not age-appropriate or professional, or which may have been considered demeaning.

B. Employee Code of Ethics, parts A.1 [failing to strive to set a good example for students] and A.2 [failing to create an environment of trust and respect].

C. School-Wide Positive Behavior Support, which affirmed that every District student has the right to be educated in a safe, respectful and welcoming environment.

Charges 3-5: Student V [REDACTED] A.

16. Approximately one month into the 2009/2010 school year at Gage MS, Respondent began an extended leave of absence. Due to the length of his leave, Respondent lost his contractual return rights to Gage MS. When he advised the District that he was ready to return to service in 2011, the District placed him on its “must place” list and subsequently assigned him to 68th Street Elementary School (68th Street ES).

17. The principal at 68th Street ES was given little information about Respondent’s background, but she was aware that he had primarily taught at the middle school level. So the principal placed Respondent in a fourth grade classroom. Respondent reported for duty in September 2011. The students in his class were off-track at that time, giving Respondent approximately three weeks to prepare. The principal was able to provide Respondent with extensive assistance to acclimate him to his new school and environment, doing what she could to insure his success at the school. Respondent began teaching his fourth grade class in October 2011.

18. On November 22, 2011, Respondent was teaching his 4th grade class at 68th Street ES. While his back was to the class, a student threw an object which struck Respondent in the back. When Respondent turned around, student V [REDACTED] A. was standing up. Some students identified V [REDACTED] as the person who threw the object. In his testimony during the hearing, V [REDACTED] denied doing so. Nonetheless, Respondent believed V [REDACTED] threw the object at him. Respondent approached V [REDACTED] and said to him words to the effect of, “Touch me one more time and you’ll see what happens.” V [REDACTED] intentionally touched his index finger to Respondent’s chest. Respondent pushed V [REDACTED] backwards with enough force to make him fall back, by pushing against V [REDACTED]’s upper chest with an open hand. As V [REDACTED] fell, he hit his side on a desk or chair. The entire class saw this.

19. While V [REDACTED] was on the floor crying, Respondent approached and offered to help him up. V [REDACTED] was angry at Respondent and refused his offer of assistance; he began kicking at Respondent. V [REDACTED] testified that Respondent gently took hold of his legs and that he stopped crying. It was not established by a preponderance of the evidence that Respondent restrained V [REDACTED]’s legs or would not allow him to stand up.

20. Through the events described above concerning V [REDACTED], Respondent violated the following District policies:

A. Code of Conduct with Students, numbers 3 and 6, which prohibited Respondent from behaviors in the presence of students that were unprofessional or from having physical contact with a student that was not age-appropriate or within the scope of an employee's responsibilities with the District.

B. Abolition of Corporal Punishment, which prohibited the use of corporal punishment as a disciplinary option at any grade level

C. Employee Code of Ethics, parts A.1 [failing to strive to set a good example for students] and A.2 [failing to create an environment of trust and respect].

D. School-Wide Positive Behavior Support, which affirmed that every District student has the right to be educated in a safe, respectful and welcoming environment.

Charge 6: Respondent's Teacher Credential

21. By the time the hearing commenced, Respondent's teacher credential had expired, meaning he currently does not hold a valid credential as required by the Education Code for teachers in California. Pursuant to Education Code sections 44065, 44830 and 45034, once Respondent's credential expired, the District could not to return him to a classroom to teach and he could not hold or be paid in the position of a teacher there.

22. Before his credential expired, Respondent received two warning letters from the District advising him that his credential would soon expire.

23. Respondent testified that he will not apply to renew his credential until the Decision in this case is issued. Respondent's willingness to let his credential expire demonstrates a lack of serious commitment to his profession.

Prior Discipline and Assistance

24. As a result of the events in September 2008 with A [REDACTED] F., Respondent participated in a conference with his assistant principal. Respondent was provided with oral and written guidance on how to improve his performance. On October 22, 2008, the District issued to him a Notice of Unsatisfactory Act(s) regarding those events, and Respondent was suspended without pay for five days.

25. On June 30, 2009, Respondent was given a Below Standard Performance Instruction Personnel Evaluation (or Stull evaluation), based on his overall performance that school year. The principal recommended that Respondent be evaluated the following year, as well as be provided with assistance and resources in order to improve.

26. In July 2010, Respondent was given another negative Stull evaluation, but because it was not based on his observed performance in the classroom but rather because Respondent was on his extensive leave, we do not find this evaluation to be probative.

27. On November 3, 2011, the principal at 68th Street ES held a conference with Respondent to go over her concerns with his teaching. The principal offered assistance and guidance to Respondent so he could improve his performance.

28. On March 16, 2012, the principal of 68th Street ES held an additional conference with the Respondent, this time at Local District 7 with a UTLA representative also present. The principal offered assistance and guidance, provided directives regarding Respondent's future behavior and noted that there would be a continued investigation of the classroom incident involving V [REDACTED] on November 22, 2011.

29. On April 18, 2012, and as a result of the events with V [REDACTED] in November 2011, Respondent was issued a Notice of Unsatisfactory Act(s) and was suspended without pay for 15 days, ending May 8, 2012.

30. A *Skelly* meeting was scheduled for Respondent on June 8, 2012.² Respondent was advised that at the meeting, he could present any statements or documents responding to the charges set forth in the aforementioned Notice of Unsatisfactory Act(s), and to explain why he should not be immediately suspended and/or terminated. No appearance was made by or on behalf of Respondent. The *Skelly* officer, Dr. George J. McKenna III, recommended to the Board that Respondent be immediately suspended without pay and his employment with the District terminated.

Other Relevant Facts

31. In connection with his return to work and his reassignment to 68th Street ES, Respondent altered material medical information on a return to work release form completed by his health care provider, including changing the date of return, removing restrictions and changing his work status from part-time to full-time. In his deposition, Respondent tried to justify his behavior by saying he did so to provide for his family. By doing this, Respondent put his own self-interest over those of the District and his students, since it was not clear that he was medically ready to resume work when he did. By altering a medical document, Respondent also acted dishonestly.

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² Pursuant to the California Supreme Court's decision in *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, before being subjected to punitive action a civil service employee is entitled to notice of the proposed action, the reasons therefore, a copy of the charges, and a right to respond, either orally or in writing.

32. Respondent has never provided a full explanation of his actions discussed above. He intimated some facts about the A [REDACTED] F. incident during his office conference with his assistant principal, but never submitted a detailed response in writing. He essentially provided no explanation to his principal about the Valente incident. Respondent failed to appear or explain himself in connection with his *Skelly* hearing. During the hearing of this matter, Respondent failed to refute or modulate the charges. Respondent provided no witnesses or exhibits, he minimally questioned the District's witnesses and he refused to testify on his own behalf, instead simply choosing to answer questions of the District's counsel. Overall, Respondent exhibited no remorse or contrition. He has demonstrated no efforts to improve his future performance as an employee of the District.

LEGAL CONCLUSIONS

1. The District has the burden of proving cause for discipline in this matter by a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1038-1039.)

2. The governing board of a school district may dismiss a permanent certificated employee if one or more of the causes enumerated in Education Code sections 44932, subdivision (a), and/or 44933,³ is/are established. In addition, a governing board may immediately suspend a certificated employee without pay pursuant to section 44939 upon the filing of a statement of charges alleging immoral conduct.

3. A. It was established by a preponderance of the evidence that cause exists for the dismissal of Respondent for unprofessional conduct pursuant to sections 44932, subdivision (a)(2), and 44933.

B. "Unprofessional conduct" may be defined as conduct that violates the rules or ethical code of a profession or that is unbecoming a member of a profession in good standing. (*Board of Educ. of City of Los Angeles v. Swan* (1953) 41 Cal.2d 546, 553 *overruled on other grounds by Bekiaris v. Board of Education* (1972) 6 Cal.3d 575.)

C. In this case, Respondent acted unprofessionally by forcing a middle school student, Antonio, to relieve himself in a classroom, which violated common decency, the District's Code of Conduct with Students and Employee Code of Ethics, and which humiliated Antonio in the process. Respondent acted unprofessionally with regard to V [REDACTED] by resorting to physical force to respond to a behavior management problem, being unable to control his own emotions to control his classroom, and violating various District policies. A basic tenet of the teaching profession is to not touch a student unless defending oneself. Respondent was not defending himself. Respondent's conduct was unbecoming of a member of the teaching profession in good standing. (Factual Findings 7-23.)

³ All further statutory references are to the Education Code unless noted otherwise.

D. It was not established by a preponderance of the evidence that Respondent acted unprofessionally by allowing his credential to expire. At most it demonstrated a lack of commitment to his profession.

4. A. It was established by a preponderance of the evidence that cause exists for the immediate suspension and/or dismissal of Respondent for immoral conduct pursuant to sections 44932, subdivision (a)(1), and 44939.

B. The term “immoral conduct” has been defined to include conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, dissoluteness; or as willful, flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare. (*Board of Ed. of San Francisco Unified School Dist. v. Weiland* (1960) 179 Cal.App.2d 808, 811.)

C. In this case, Respondent encouraged public urination by a student, A [REDACTED]. With regard to V [REDACTED], Respondent used excessive force in responding to a minor confrontation, i.e., enough force to cause a child to fall to the floor and injure himself on the way down. As a teacher, Respondent abused his position of authority and trust by using force against a child under circumstances not warranting that level of response. These events demonstrate flagrant or shameless conduct showing moral indifference to the opinions of respectable members of the community, and an inconsiderate attitude toward good order and the public welfare. By engaging in such acts in front of his class, Respondent demonstrated an inconsiderate attitude toward good order and the public welfare to his students. (Factual Findings 7-23.)

5. A. It was established by a preponderance of the evidence that cause exists for the dismissal of Respondent for evident unfitness for service as a teacher pursuant to section 44932, subdivision (a)(6).

B. “Evident unfitness for service” means clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444.) “‘Evident unfitness for service’ connotes a fixed character trait, presumably not remediable merely on receipt of notice that one’s conduct fails to meet the expectations of the employing school district.” (*Id.*)

C. In this case, the two events in question show Respondent engaged in extreme overreactions to minor student conflict, showing a temperamental defect. Respondent was provided with assistance and guidance in 2008, 2009 and 2011, but did not improve, which demonstrates Respondent’s problems are not remediable. Respondent failed to show that he has confronted his inadequacies or accepted responsibility for them. Respondent expressed minimal or no concern for his students V [REDACTED] or A [REDACTED] or their classmates. These problems demonstrate that Respondent is evidently unfit to teach. (Factual Findings 7-23.)

D. Respondent's failure to renew his credential only shows he is unqualified to teach, not that he is unfit.

6. A. It was not established by a preponderance of the evidence that cause exists for the dismissal of Respondent pursuant to section 44932, subdivision (a)(8), for persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him.

B. Cause for discipline here may be based on the violation of school rules. (*San Dieguito Union High School Dist. v. Commission on Professional Competence* (1985) 174 Cal.App.3d 1176, 1180-1181.) However, there must be a "showing of intentional and continual refusal to cooperate." (*Id.* at p. 1196.) The violation must be persistent or "motivated by an attitude of continuous insubordination." (*Governing Board of the Governing Board of the Oakdale Union School Dist. v. Seaman* (1972) 28 Cal.App.3d 77, 81-82.) Isolated events or incidents involving an issue unresolved over a period of time are generally not considered persistent. (*Bourland v. Commission on Professional Competence* (1985) 174 Cal.App.3d 317.)

C. In this case, Respondent violated several District policies as a result of the events involving Valente and Antonio, but it was not established that Respondent's failure was "intentional," "continual," or "persistent" for purposes of this statute or the cited cases. The violations were a consequence but not the intention. Respondent was responding to split-second events. It was not that he acted insubordinately. His misconduct is related to his temperamental defect, rather than a plan or intent to ignore his supervisors or the District. (Factual Findings 7-23.)

Analysis of the Morrison Factors

7. In reaching the above, we also conclude that Respondent's misconduct relates to his fitness to teach, within the meaning of *Morrison v. State Board of Education* (1969) 1 Cal.3d 214. (Factual Findings 1-32.) The *Morrison* analysis applies to causes for discipline involving unprofessional or immoral conduct, as well as evident unfitness to teach. (*Id.* at p. 227-230.) We considered all the factors suggested by *Morrison* and compared them to the facts established above. Not all "*Morrison* factors" need be present for the *Morrison* test to be satisfied. (*Governing Board v. Haar* (1994) 28 Cal.App.4th 369.) Moreover, the *Morrison* analysis need not be conducted on each individual fact established, but rather can be applied to the accumulated facts established collectively. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1457.) In this case, we find as follows:

(A) The likelihood the conduct may adversely affect students or fellow teachers. Respondent's misconduct adversely affected two students. A [REDACTED] was humiliated by essentially being forced to urinate in the classroom. Respondent used physical force on V [REDACTED], which resulted in V [REDACTED] becoming injured, crying, and embarrassing himself in

front of peers. Respondent's classrooms were also exposed to inappropriate behavior, which meant the students were given a poor role model for their future behavior. Respondent undercut the decorum of the classroom and deprived students of instruction by engaging in behavior management with single students in front of the entire classroom. Respondent demeaned teachers on a whole by his behavior, which could impact students when interacting with teachers in other classrooms.

(B) The degree of such adversity. There was a moderate level of adversity.

(C) The proximity or remoteness in time of the conduct. The first event occurred in 2008. After almost two years away from teaching due to his medical leave, Respondent returned to the classroom in 2011 and immediately engaged in misconduct relative to Valente. This pattern touches on the temperament defect we discussed above. If Respondent's extended leave is not considered, then the two events of misconduct are proximate to each other, which shows a pattern of related misconduct.

(D) The type of teaching certificate held by the party involved. Respondent's credential allows him to work with children in grades K-8, but Respondent does not seem to be temperamentally suited to work with students of that age. Respondent currently has no credential, meaning he is not qualified to teach in a public school.

(E) The existence of extenuating or aggravating circumstances, if any, surrounding the conduct. Respondent presented no mitigating facts that explained or justified his actions. Aggravating circumstances were established, namely that Respondent altered his medical release form to return to work prematurely. He thereafter provided rationalization and excuses for that dishonesty. Respondent essentially provoked both students A [REDACTED] and V [REDACTED], and then he reacted and provoked further reactions by the students, instead of using appropriate classroom management techniques. Respondent has not demonstrated any remorse or contrition or recognized possible harm to his students. Letting his credential expire also shows a lack of commitment to teaching.

(F) The praiseworthiness or blameworthiness of the motives resulting in the conduct. We only have blame for the way Respondent instigated the conflicts and reacted inappropriately to the situations.

(G) The likelihood of recurrence of the questioned conduct. It is highly likely that Respondent would engage in future similar misconduct.

(H) The extent discipline may cause adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. We do not foresee this happening.

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8. A. “The Commission has broad discretion in determining what constitutes unfitness to teach . . . , and whether dismissal or suspension is the appropriate sanction.” (*California Teachers Ass’n v. State of California* (1999) 20 Cal.4th 327, 343-344.) Thus, even where cause for dismissal has been established, the Commission still has broad discretion to determine whether such discipline is actually warranted. (*Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208, 222.)

B. Since it was established that Respondent engaged in immoral conduct, the District had good cause to immediately suspend Respondent without pay pursuant to sections 44932 and 44933. (Factual Findings 7-23; Legal Conclusions 2, 4 & 7.)

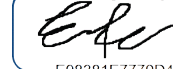
C. We affirm the Board’s decision to terminate Respondent’s employment with the District. The events concerning A [REDACTED] and V [REDACTED] demonstrated Respondent’s use of very poor judgment. As discussed above, we believe Respondent is not temperamentally suited to be in the classroom with students of that age. Respondent demonstrated a poor attitude, and neither remorse nor contrition. He has not shown that he has learned from these events. He did not previously benefit from counseling or progressive discipline by the District. Overall, Respondent did not show that he is willing to put the interests of his students over his own. Respondent gave us no reason to put him back in the classroom, even if his credential was renewed and valid. (Factual Findings 1-32; Legal Conclusions 1-7.)

ORDER

The immediate suspension without pay of Respondent Robert Perez is affirmed. Respondent Robert Perez is terminated from employment with the Los Angeles Unified School District.

DATED: July 7, 2015

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ERIC SAWYER

Administrative Law Judge

Office of Administrative Hearings

I concur.

DATED: _____

Deanna Clark, Commissioner

I concur.

DATED: _____

Hannah Finnley, Commissioner