

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
AND A COMMISSION ON PROFESSIONAL COMPETENCE FOR
THE LOS ANGELES UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA**

In the Matter of the Dismissal of:

NICHOLAS JOHNSON,

a Permanent Certificated Employee, Respondent

OAH No. 2019090670

DECISION

The Commission on Professional Competence (Commission) heard this matter on March 2 and 5 through 12, 2020, at the Office of Administrative Hearings in Los Angeles, California, and on December 8 through 10 and 14 through 18, 2020, by videoconference. The Commission consists of Francine Buschel-Gomez, Jonathan Turner Smith, and Matthew Goldsby, Administrative Law Judge with the Office of Administrative Hearings and Commission Chairperson.

Kelly Kim, Assistant General Counsel II with the Los Angeles Unified School District (District), and Lee Patajo, Assistant General Counsel II with the District, appeared and represented the District.

Daniel J. Kolodziej, Attorney at Law, appeared and represented respondent Nicholas Johnson who was present throughout the hearing.

Oral and documentary evidence was received. The record was held open to January 20, 2021, for the parties to file concurrent closing briefs, which were timely filed and marked for identification. The record was closed and the matter was submitted for decision on January 20, 2021.

FACTUAL FINDINGS

Jurisdictional Matters

1. On September 4, 2019, Jose R. Cantu, Ed.D., acting in his official capacity as Assistant Chief Human Resources Officer for the District, served respondent with a written notice of the District's intention to dismiss respondent and to place him on immediate unpaid suspension. The notice included the written statement of charges against respondent.

2. On September 10, 2019, respondent timely submitted a Request for Hearing.

3. On September 18, 2019, the District filed with the Office of Administrative Hearings a request to set the case for hearing. The District filed notice of hearing as required by law.

4. Linda Del Cueto, acting in her official capacity as Chief Human Resources Officer, submitted the Second Amended Accusation against respondent on behalf of the District.

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Background and Employment History

5. Respondent grew up in Berkeley, California, the child of a professor of Classics at the University of California and an English teacher. After pursuing studies of geochemistry and filmmaking, respondent described catching “the teaching bug” while teaching freshman English classes as a graduate teaching assistant. In 1997, McNeese State University awarded respondent a Master of Arts degree in English and a Master of Fine Arts in Creative Writing.

6. In 1999, respondent applied for a teaching position with the District at Hamilton High School, in Los Angeles, California. The District employed respondent as a teacher and the California Commission on Teacher Credentialing (CTC) issued respondent a single subject credential in 2002, which remains current and active.

7. Respondent is currently a permanent employee of the District as a secondary teacher at Hamilton High School. An essential function of respondent’s position is to design “activities to engage students in cognitively challenging work aligned to standards.” (Ex. 11.)

8. The California Standards for the Teaching Profession (CSTP) 2009 itemize teaching standards in six categories: (1) engaging and supporting all students in learning, (2) creating and maintaining an effective environment for student learning, (3) understanding and organizing subject matter for student learning, (4) planning instruction and designing learning experiences for all students, (5) assessing students for learning, and (6) developing as a professional educator. (Ex. 12.)

9. The District has adopted the *LAUSD Teaching and Learning Framework* (Framework) establishing teaching standards for its teachers in planning and preparation, classroom environment, delivery of instruction, additional professional

responsibilities, and professional growth. (Ex. 69.) To meet standards in planning and preparation, the District expects teachers to design “coherent instruction” by way of “Standards-Based Learning Activities” among other things. (Ex. 68.) To meet standards in classroom environment, the District expects teachers to manage student behavior. To meet standards in delivery of instruction, the District expects teachers to communicate the purpose of each lesson and to use “discussion techniques and student participation.” (Ex. 68.)

10. For each year of his employment at Hamilton High School, respondent taught high school English, including one or two honors classes per year. Beginning in 2015, respondent taught a course in Mexican-American literature, which became his favorite subject to teach.

11. For the 2017-2018 school year, the District did not assign respondent any honor sections or any section of the Mexican-American literature class. Respondent was assigned to teach English courses to music academy students who were more focused on performing arts than English. Each class had approximately 40 to 42 students.

Classroom Observation - September 11, 2017

12. On September 11, 2017, respondent taught the fifth period English 10A class. Respondent prepared a written agenda, including a journal topic, a reading assignment, and questions respondent wrote on the board for students to copy and answer. (Ex. 222.) Respondent posted the lesson plan on the sideboard along the right wall as students entered the classroom and he reviewed it aloud at the beginning of the class.

13. At 11:28 a.m., Assistant Principal Daniel Blank (AP Blank) entered the classroom to observe respondent's performance. He was joined and assisted by Alexandra Wagner, a coordinator with the Certificated Performance Evaluation Support (CPES) unit of the District. They observed respondent for 72 minutes of the 90-minute class. During the observation, respondent wrote a journal prompt on the board and instructed the students to write a response in their journals. While students wrote in their journals, respondent passed out copies of *No Face* by Junot Diaz and instructed the class to read it to themselves after the journal exercise. Respondent wrote six questions on the board and instructed the class to discuss and answer the questions with a partner after they completed reading the story. He then led a group discussion of the story and the student answers.

14. AP Blank observed deficiencies in planning and preparation, delivery of instruction, and classroom environment. AP Blank criticized respondent for not planning for what students should do if they finished activities early, resulting in a loss of instructional time for some students. AP Blank did not observe respondent clearly communicate the instructional purpose of learning activities and why they were important. While observed, respondent failed to incorporate reading strategies to help students actively engage with the text. AP Blank did not observe respondent provide enough structure to the partner assignment, resulting in the majority of the class not working together in discussion groups. AP Blank noted that respondent did not consistently monitor and address the students' off-task behaviors.

15. AP Blank documented his observations in a conference memo and reviewed them with respondent on October 3, 2017. Respondent stated that he would respond in writing, but never did.

16. AP Blank gave respondent the following assistance and guidance to improve his performance: (a) use an LCD projector to project information or tasks to prevent erasing the blackboard multiple times; (b) plan additional standards-based tasks that students can complete if they finish early; (c) clearly communicate the instructional purpose of all lessons and activities so that students understand why they are doing something and how it connects to larger ideas in the content area; (d) when having students read, increase student engagement by employing a specific reading strategy with a clearly defined purpose; (e) when assigning partner or group discussions, develop a structure or protocol to facilitate their discussions; (f) consistently monitor and respond to students' off-task or disengaged behaviors when circulating around the room; and (g) make use of the Peer and Assistance Review (PAR) Consulting Teacher assigned to respondent with lesson planning and delivering rigorous instructions.

17. AP Blank furnished respondent excerpts from Charlotte Danielson's *Framework for Teaching: Six Clusters Supporting High Level Literacy Learning-Cluster 1 Clarity of Instructional Purpose* and advised respondent to read and implement the strategies described in the reading material.

18. AP Blank issued no directives as a result of the observation.

Classroom Observation - November 1, 2017

19. On November 1, 2017, respondent taught a Period 6 English 10A class. At 1:40 p.m., AP Blank and Ms. Wagner entered the classroom to observe respondent's performance for 48 minutes of the 90-minute class. During the observation, respondent lectured on Shakespeare's use of two terms and wrote notes on the board. Respondent projected segments of *The Merchant of Venice* to demonstrate the

difference between prose and verse. Students were selected to come to the board and count the number of syllables in three or four lines of the text to introduce the concept of iambic pentameter. At the end of the observed time, respondent had students read aloud in assigned roles.

20. AP Blank again observed deficiencies in planning and preparation, delivery of instruction, and classroom environment. AP Blank criticized respondent for not being aware of where he left off reading Shakespeare's *The Merchant of Venice*, and for wasting time writing on the whiteboard instead of typing material in advance and providing a copy to each student.

21. AP Blank criticized respondent for not having students share their responses or make connections between the prompt and the rest of the activities. During the observation, respondent did not incorporate a variety of instructional strategies "in order to cognitively engage students and promote their active learning of the differences between prose and verse, resulting in increased student disengagement." (Ex. 25, p. A381.)

22. AP Blank noted that respondent did not effectively monitor and address the students' off-task and disengaged behaviors, failing to circulate around the classroom and walking by students who were on their phones or asleep. AP Blank observed respondent paying disproportionate attention to students on one side of the room. AP Blank also observed five students with their heads down and their books closed and at least one of the students was asleep for over 20 minutes.

23. AP Blank documented his observations in a conference memo and reviewed them with respondent on October 3, 2017. Respondent stated that he would respond in writing, but never did.

24. AP Blank gave respondent the following assistance and guidance to improve his performance: (a) consider pacing based on the needs of each group of students; (b) use an LCD projector to project information or tasks to prevent having to erase the blackboard multiple times throughout the day; (c) allow time for students to share their journal prompts and explain how the problems connect to their past or future learning; (d) plan and deliver cognitively engaging lessons that include a variety of strategies to increase student learning; (e) submit weekly lesson plans to AP Blank on the first day of every week; (f) check for understanding of new terms and key concepts before moving on to a new activity; (g) consistently monitor and respond to students' off-task or disengaged behaviors; and (h) make use of the assigned PAR Consulting Teacher with lesson planning and delivering rigorous instruction.

25. AP Blank furnished respondent a schedule of peer assistance and review for courses related to teaching performance.

26. AP Blank directed respondent to plan and deliver lessons "that include strategies to cognitively engage students" and to "monitor and respond to students off task and disengaged behaviors." (Ex. 25, p. A383.) The conference memo contained the following warning: "Failure to follow an administrative directive may lead to disciplinary action, such as but not limited to a Notice of Unsatisfactory Act/Service, Notice of Suspension, and/or dismissal from the Los Angeles Unified School District." (Ex. 25.)

Classroom Observation - December 8, 2017

27. On December 8, 2017, the day before final examinations, respondent taught a Period 6 English 10A class. At 2:15 p.m., AP Blank and Ms. Wagner entered the classroom to observe for 30 minutes of the 90-minute class. During the

observation, students again read aloud from *The Merchant of Venice*, and respondent intermittently paused to ask questions and talk about key points.

28. AP Blank observed deficiencies in planning and preparation, delivery of instruction, and classroom environment. AP Blank criticized respondent for not pacing his long-term plans appropriately after hearing a student complain, "We have been on this book for years." (Ex. 26, p. A385.) AP Blank did not observe respondent set a clear purpose for reading and make connections to past lessons or big ideas in the content area. During the observation, respondent did not incorporate a variety of instructional strategies to cognitively engage students and increase student participation in class discussions. Only a few students actively participated during the duration, and respondent did not provide opportunities for the students to engage in structured conversations with one another. AP Blank observed respondent lecturing and not instructing students to take notes.

29. AP Blank observed that most of respondent's questions did not require the students to explain their thinking or use evidence from the text to support their claims. Respondent only occasionally asked the students for an example from the text they were reading.

30. AP Blank noted that respondent attempted to redirect students' off-task behaviors but saw that many still appeared to be disengaged during the assignment.

31. AP Blank noted that respondent did not have a clear procedure for students when they left the classroom. During the observation, one student left the classroom when summoned by another student and a second student returned from using the restroom after having been gone for a long time.

32. AP Blank documented his observations in a conference memo and reviewed them with respondent on January 17, 2018. Respondent stated that he would respond in writing, but he did not.

33. AP Blank gave respondent the following assistance and guidance to improve his performance: (a) continue to submit weekly lesson plans to AP Blank; (b) plan and deliver "cognitively engaging lessons" that include a variety of strategies to increase student participation and analysis of the text; (c) incorporate "questions that are higher-level" and require the students to explain their thinking or cite evidence from the text; (d) establish, implement, and monitor clear procedures for students leaving the classroom; (e) find ways to make texts relevant to the students' experiences; (f) make use of the assigned PAR Consulting Teacher with lesson planning and delivering rigorous lessons; and (g) attend two free professional development classes from the schedule given to respondent at the previous conference. (Ex. 26, p. A387.)

34. AP Blank furnished respondent an article entitled *Five Productive Talk Moves* to read and implement in his delivery of cognitively engaging lessons.

35. AP Blank directed respondent again to plan and deliver lessons "that include strategies to cognitively engage students" and to continue to submit weekly lesson plans. (Ex. 26, p. A387.) The conference memo contained the following warning: "Failure to follow an administrative directive may lead to disciplinary action, such as but not limited to a Notice of Unsatisfactory Act/Service, Notice of Suspension, and/or dismissal from the Los Angeles Unified School District." (Ex. 26.)

Classroom Observation – February 27, 2018

36. On February 27, 2018, respondent taught a Period 1 English 10B class. From the start of the period at 7:56 a.m., AP Blank and Ms. Wagner observed respondent for 40 minutes of the 90-minute class. During the observation, respondent gave the students a journal prompt, which was discussed after the writing concluded. Respondent then explained the concept of synesthesia using the text *The Easiest Way to Get a Better, Smarter Brain*. Four students read aloud from the text and respondent intermittently asked the class questions about it. Respondent then drew a chart with columns labeled “emotion, sound, colors, and taste” and provided a model for how to complete the chart. After responding to some questions, respondent instructed the students to complete the chart.

37. AP Blank observed deficiencies in planning and preparation, delivery of instruction, and additional professional responsibilities. Although respondent had previously shown AP Blank a system to keep track of his pacing, respondent was not aware of where he left off and discovered that his agenda mistakenly presumed the students had already read the subject material. Respondent had to modify his agenda to take into account the mistake.

38. AP Blank observed that respondent did not appropriately pace his activities, by allocating 17 minutes for students to copy projected information and to write a response to a journal prompt. AP Blank observed that respondent did not clearly communicate the instructional purpose of the assigned activity nor how to connect it to past learning.

39. AP Blank noted that respondent was not using the school’s tardy log or implementing a different system to accurately document the arrival times of tardy

students. At Hamilton High School, students were expected to report to each class on time. (Ex. 395.) On the observed date, at least six students entered the classroom after the bell rang and went directly to their seat.

40. AP Blank documented his observations in a conference memo and reviewed them with respondent on March 13, 2018. Respondent again stated that he would respond in writing, but again never responded.

41. AP Blank gave respondent the following assistance and guidance to improve his performance: (a) continue to submit weekly lesson plans to AP Blank; (b) “consistently use a system to keep track” of his lessons to ensure that respondent knows in advance what he should teach each day in each period; (c) pace all learning activities appropriately; (d) clearly communicate the instructional purpose of all lessons and activities; (e) establish a clear system for monitoring tardy students; and (f) attend free professional development sessions from the course schedule previously given to respondent. (Ex. 27, p. A392.)

42. AP Blank again furnished respondent a schedule of peer assistance and review for courses related to teaching performance along with a copy of the school’s tardy log and other reading material.

43. AP Blank directed respondent to “clearly communicate the instructional purpose of all activities” and to implement the school’s tardy log. (Ex. 27, p. A392.) The conference memo again warned respondent that the failure to follow the directives may lead to disciplinary action.

Classroom Observations – April 6, 2018

44. On April 6, 2018, respondent taught a Period 3 English 10B class. At 8:40 a.m., AP Blank and Ms. Wagner entered the classroom to observe respondent's performance for 46 minutes of the 90-minute class. During the observation, students completed a writing assignment creating titles for two projected photographs of New York City in the 1980's. Students then wrote stories based on the titles created by other students, using a narrative format taught earlier in the week. Respondent then reminded the class that they were to convert the stories into a "stage play format." He then distributed and projected the play *All in the Timing* to demonstrate the play's format. Students read from the play while respondent intermittently asked questions.

45. AP Blank observed deficiencies in delivery of instruction. Respondent did not thoroughly explain the different elements of "stage play format" to ensure the students understood their purpose and why they would need to use them when writing their own scenes. He further noted that respondent did not provide closure to the activities at the end of the period or maximize the use of instructional time. Respondent alternated between whole group discussion and individual work time without any opportunities for student-to-student interaction or sharing of ideas.

46. AP Blank documented his observations in a conference memo and reviewed them with respondent on April 17, 2018. Respondent declined to comment during the conference.

47. AP Blank gave respondent the following assistance and guidance to improve his performance: (a) continue to submit weekly lesson plans to AP Blank; (b) ensure sufficient time to explain and reinforce key ideas; (c) close each lesson in order to review the learning objective, assess student understanding, and provide time for

students to reflect on their learning; and (d) provide structured opportunities for students to talk to one another about the content to increase the amount of students who share ideas. (Ex. 28, p. A396.)

48. AP Blank directed respondent to “provide structured opportunities for student-to-student interaction.” (Ex. 28, p. A396.)

2017/2018 - Below Standard Evaluation

49. On May 3, 2018, respondent received a Teacher Evaluation Plan for the 2017-2018 school year. The evaluation was based on the six classroom observations and conferences described above at Factual Findings 12 through 48. The evaluator commented: “During the Formal Observation this year, your practice was consistently in the range of ‘Developing Practice’. Though you demonstrated some growth in a range of areas we discussed this year, the growth was inconsistent across the various observations.” (Ex. 35, p. A440.)

50. As the Designated Evaluator, AP Blank gave respondent an overall Below Standard Evaluation based on 12 specified deficiencies similar to the deficiencies noted in the conference memoranda described at Factual Findings 12 through 48.

51. The Below Standard Evaluation recited recommendations and assistance as previously provided in the conference memoranda described at Factual Findings 12 through 48.

Classroom Observation – May 18, 2018

52. On May 18, 2018, respondent taught a Period 3 English 10B class. Respondent prepared a written agenda with the objective of exploring the characters of the play *Waiting for Godot*. The agenda included a journal topic, a reading

assignment, and the plan to continue watching a televised production of the play. (Ex. 238, p. B303.)

53. At 8:20 a.m., AP Blank and Ms. Wagner entered the classroom to observe respondent's performance. They observed respondent for 34 minutes of the 90-minute class. AP Blank observed deficiencies in delivery of instruction and classroom environment.

54. AP Blank observed limited evidence that respondent had prepared standards-based activities for students who finished a summary assignment early. AP Blank saw some students sitting without a task to do or engaging in nonacademic activities, including sending text messages. AP Blank noted that respondent failed to use "a variety of discussion techniques or participation protocols" to engage more students, relying entirely on eight volunteer students to participate. (Ex. 29, pp. A399-400.) AP Blank felt that respondent missed the opportunity to extend the level of rigor, failing to require students to cite evidence from the material or explain their reasoning.

55. AP Blank saw inconsistent procedures for students to leave the classroom. Two students requested and were granted permission to leave, but did not take a hall pass, whereas another student left the classroom and took a hall pass.

56. AP Blank documented his observations in a conference memo and reviewed them with respondent on May 31, 2018. Respondent declined to comment during the conference.

57. AP Blank gave respondent the following assistance and guidance to improve his performance: (a) continue to submit weekly lesson plans to AP Blank; (b) plan standards-based activities to maximize the use of instructional time; (c) use

discussion techniques to encourage equitable participation of all students; and (d) establish consistent procedures for students leaving the classroom. (Ex. 29, pp. A400-401.)

58. AP Blank furnished respondent with the *Common Core State Standards for English Language Arts, Grades 9-10*, to help him plan standards-based and rigorous lessons.

Classroom Observation – September 14, 2018

59. On September 14, 2018, respondent received a Notice of Unsatisfactory Service (NOUS) with an 8-day suspension. The District issued the NOUS and suspension on the grounds of unsatisfactory performance, willful refusal to perform regular assignments without cause, and persistent violation of and refusal to obey school rules and policies. (Exs. 15-16.) The action was based on the observations described at Factual Findings 12 through 48 and 53 through 58, plus other allegations not at issue here.

60. Earlier on the same day, respondent taught an American Literature and Composition class. Before the class started at 7:56 a.m., respondent knew that he would be issued the NOUS and suspension later in the day, which caused him to feel “sick, nauseous, and depressed” and was “a huge distraction.” As he entered the classroom, respondent was not expecting AP Blank and Ms. Wagner to be present for another observation.

61. AP Blank and Ms. Wagner observed respondent for 54 minutes of the 90-minute class, from the beginning of class at 7:56 a.m. until 8:50 a.m. AP Blank observed deficiencies in planning and preparation, delivery of instruction, and classroom environment.

62. AP Blank watched respondent spend “the first four or so minutes of the class period” copying his agenda and journal prompt on the front board, during which time students waited quietly or engaged in nonacademic conversations or used their cell phones. (Ex. 30, p. A403.) Respondent did not post a learning objective, or any applicable standards described in the written materials furnished to respondent at the previous conference. Respondent demonstrated no system for keeping track of his various assigned periods, assigning students to read material they told respondent they had already read.

63. Respondent failed to employ any discussion or participation techniques to engage more students in the discussion. AP Blank observed that respondent missed an opportunity to add rigor to the lesson by failing to require students to cite evidence from the text of *Open Mind* to support what they wrote in the graphic organizer.

64. Three days before this class, AP Blank provided respondent with a sample Tardy Student Log. (Ex. 267.) Respondent posted a tardy log on a clipboard by the door but failed to require students to sign it when they arrived late. The evidence indicates that six students signed the tardy log on the date of the observation (Ex. 266), but AP Blank saw other students walk in and sit down without any reminder or instruction from respondent.

65. AP Blank documented his observations in a conference memo and reviewed them with respondent on October 1, 2018. Respondent made no comment during the conference.

66. AP Blank gave respondent the following assistance and guidance to improve his performance: (a) continue to submit weekly lesson plans to AP Blank; (b)

prepare the whiteboard in advance or project the agenda and learning objective to avoid using instructional time to write it out; (c) develop a system to keep track of where respondent leaves off each class; (d) employ strategies to encourage student participation in discussions; (e) provide more opportunities for students to cite evidence to support their ideas; and (f) use the PAR teacher for help in planning and delivering instruction. (Ex. 30, p. A405.)

67. AP Blank directed respondent to “clearly communicate the instruction purpose of all activities,” provide structured opportunities for student-to-student interactions and submit a detailed weekly overview of his lessons.

Classroom Observation – October 17, 2018

68. On October 17, 2018, respondent taught an honors class in American Literature and Composition. AP Blank and Ms. Wagner observed the class for 68 minutes. During the observation, respondent alternated between having students read aloud the novel, *The Hummingbird’s Daughter*, and facilitating short discussions about the text. He used a sample of the text to explain magic realism and queried students about the application of the concept to other selections of the text. Before the observers left the classroom, respondent directed the students to form groups to engage in a literature circles activity. AP Blank observed deficiencies in planning and preparation as well as delivery of instruction.

69. AP Blank noted that respondent posted a learning objective on the board that did not clearly describe what standards-based concepts respondent wanted the students to learn. AP Blank noted that respondent did not clearly communicate the instructional purpose of learning about magic realism or “explain the purpose of reading aloud . . . to help the students understand the significance of being able to

identify examples of magic realism in the text.” (Ex. 31, p. A409.) AP Blank considered the warm-up a “low-level” activity that did not effectively help students understand magic realism. When respondent directed students to talk to one another about the passages they identified as examples of magic realism, AP Blank viewed the instructions to be without a “clearly defined structure” resulting “eight or so” students who did not speak to one another. (Ex. 31, pp. A409-410.)

70. AP Blank documented his observations in a conference memo and reviewed them with respondent on November 5, 2018. Respondent made no comment during the conference.

71. AP Blank gave respondent the following assistance and guidance to improve his performance: (a) continue to submit weekly lesson plans to AP Blank; (b) clearly communicate the instructional purpose and learning objective of each lesson at the start of the period; (c) maximize the use of instructional time by planning and implementing rigorous activities from bell to bell, including the warm-up activity; (d) provide ample structure for student-to-student interaction; (e) observe an English teacher at University High School during the fall semester, including time to debrief with AP Blank after the observation; and (f) use the PAR teacher for help in planning and delivering rigorous instruction. (Ex. 31, p. A410.)

72. AP Blank again directed respondent to “clearly communicate the instructional purpose of all activities,” provide structured opportunities for student-to-student interactions, and submit a detailed weekly overview of his lessons. (Ex. 31, p. A411.)

Classroom Observation – February 4, 2019

73. On February 4, 2019, respondent taught a Contemporary Composition class. AP Blank and Ms. Wagner observed the class for 56 minutes, entering approximately 30 minutes after the start of class. During the observation, respondent reviewed *Turbulence*, a story previously read in the class that used flashbacks as a literary technique. Respondent instructed students to reorganize the story by identifying different segments, cutting them out, and putting them into chronological order. After a brief discussion on the structure of *Turbulence*, respondent distributed copies of the story *Cyclops* to see how the same author uses different kinds of structure.

74. AP Blank observed deficiencies in planning and preparation, and delivery of instruction.

75. AP Blank observed that respondent had not verified that he would have enough scissors on hand for the assignment and many students sat idle while waiting for a volunteer student to retrieve scissors from another location. Respondent did not adhere to the time-limits on his agenda for the warm-up activity which left insufficient time to review questions about *Cyclops*.

76. In AP Blank's opinion, respondent did not clearly communicate the instructional purpose of the assignments to help the students understand the reason for doing them. AP Blank also considered respondent's discussion techniques to be ineffective at promoting student engagement and participation in discussions.

77. During the observation, a paraprofessional was in the classroom, but respondent did not use the paraprofessional to provide direct support to students. AP Blank observed the paraprofessional seated at respondent's desk in the back of the

room without interacting with the students and without any direction from respondent.

78. AP Blank documented his observations in a conference memo and reviewed them with respondent on February 20, 2019. Respondent stated that he would respond in writing but did not respond.

79. AP Blank gave respondent the following assistance and guidance to improve his performance: (a) continue to submit weekly lesson plans to AP Blank; (b) prepare materials in advance to maximize instructional time; (c) closely monitor pacing to allow enough time to “dig deep into the content;” (d) clearly communicate the instructional purpose and learning objective of each lesson at the start of the period; (e) use a variety of strategies to promote equitable participation in discussions; (f) monitor and respond to students’ off-task behaviors; (g) establish and implement a cell phone policy in the classroom; (h) provide clear instruction to paraprofessionals assigned to the class; (i) read and implement the strategies described in *Reaching All Students and Ratio*, reading material furnished to respondent; and (j) use the PAR teacher for help in planning and delivering rigorous instruction. (Ex. 31, p. A410.)

80. AP Blank again directed respondent to “clearly communicate the instructional purpose of all activities,” provide structured opportunities for student-to-student interactions, and monitor students’ off-task behaviors. (Ex. 32, p. A417.)

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Classroom Observation - March 13, 2019

81. On March 13, 2019, respondent taught an Honors English 10B class. At the outset of the class, respondent projected the following agenda:

Purpose(s)/Objective(s): To improve our mechanics, we will study and practice the correct uses of relative clauses; we will produce a compare/contrast essay that introduces two topics & thesis statement; organizes complex ideas, concepts, and information so that each new element builds on that which precedes it to create a unified whole.

1. Warm-up: Mechanics>Grammar>Relative Clauses

2. Analyze use of clauses in "Black and Yellow"

3. Write Essay #11

(Ex. 293.)

82. At 8:19 a.m., Principal Brenda Pensamiento entered the classroom to observe. Also in attendance were AP Blank and a union representative. They observed the class for 39 minutes. During the observation, respondent focused on an essay entitled *Black and Yellow* and instructed students to identify and label modifiers in the text. Students volunteered to come up to the front board to mark the modifiers on the projected copy of the essay. Respondent then instructed students to write an essay on the differences between a cake and a pie.

83. Principal Pensamiento observed deficiencies in delivery of instruction and classroom environment. She observed that respondent did not deliver "rigorous

instruction that cognitively engaged the students in challenging thinking.” (Ex. 33, p. A420.) She noted that respondent did not provide sufficient opportunities for students to explain their thinking or to apply the concept of using modifiers to prevent redundant writing.

84. Principal Pensamiento observed that respondent did not effectively pace his activities to maximize the use of instructional time, continuing a warm-up assignment for 32 minutes, and allocating too much time for students to independently identify the modifiers in the first paragraph of the essay. Principal Pensamiento did not hear respondent clearly communicate the instructional purpose of the essay assignment or state a clear connection between the modifier activity and the next essay writing assignment.

85. Principal Pensamiento did not observe respondent consistently or effectively address cell phone use for nonacademic purposes. She observed one student intermittently sending text messages on his device for three to four consecutive minutes. A few other students used their phones during the observation, but respondent only told some of them to stop.

86. Principal Pensamiento documented her observations in a conference memo and reviewed them with respondent on April 2, 2019. Respondent stated that he would respond in writing, which he did as described in more detail below.

87. Principal Pensamiento gave respondent the following assistance and guidance to improve his performance: (a) continue to submit weekly lesson plans to AP Blank; (b) deliver rigorous and standards-based instruction on a daily basis that engages students in challenging thinking; (c) monitor the pacing of all activities and limit warm-up activities to 10 to 15 minutes; (d) use a variety of strategies to promote

equitable participation in class discussions; (e) prohibit the use of cell phones unless for an instructional purpose required by the teacher; and (f) use the PAR teacher for help in planning and delivering rigorous instruction. (Ex. 33, p. A423.)

88. Principal Pensamiento directed respondent to “clearly communicate the instructional purpose of all activities,” provide structured opportunities for student-to-student interactions, and monitor students’ off-task behaviors. (Ex. 33, p. A423.)

89. In response, respondent delivered a four-page letter to Principal Pensamiento to describe in detail the purpose, objective, and scope of the entire spring semester writing unit. With respect to the class observed on March 13, 2019, respondent described his activities and teaching strategies and expressed that he felt “this lesson ran without a hitch, and the design [was] simple and effective.” (Ex. 297.) Respondent furnished Principal Pensamiento with copies of student work from the March 13, 2019 class. He concluded: “Everything I did in this and every lesson of my writing units, culminates in typed revisions of the best writing each student is capable of producing. I’ve used and refined this unit for 19 years, used it in all grades I’ve taught and seen countless students’ composition soar over the course of three or four months. And I often receive thanks from former students for putting them through this writers’ boot camp.” (Ex. 297, p. B670.)

2018/2019 - Below Standard Evaluation

90. On April 30, 2019, respondent received a Teacher Evaluation Plan for the 2018-2019 school year. The evaluation was based on the four classroom observations and conferences described above at Factual Findings 60 through 89. Respondent rated mostly in the range of “developing practice” having demonstrated inconsistent growth from the initial observations. (Ex. 36, p. A454.)

91. As the Designated Evaluator, AP Blank gave respondent an overall Below Standard Evaluation based on 15 specified deficiencies similar to the deficiencies noted in the conference memoranda described at Factual Findings 60 through 89.

92. The Below Standard Evaluation recited recommendations and assistance as previously provided in the conference memoranda described at Factual Findings 60 through 89.

93. On the same date, respondent received a second NOUS with a 15-day suspension. The District issued the NOUS and suspension on the grounds of unsatisfactory performance, willful refusal to perform regular assignments without cause, and persistent violation of and refusal to obey school rules and policies. (Exs. 17-18.) The action was based on the observations described at Factual Findings 60 through 89.

94. On May 13, 2019, respondent sent Principal Pensamiento a response to the below standard evaluation, asserting that he had demonstrated growth in all areas and that he deserved a better evaluation and no suspension. (Ex. 256.) Respondent itemized all the areas he believed he improved in his teaching performance. He requested reconsideration of the evaluation and withdrawal or reduction of the suspension.

Evidentiary Considerations

95. On May 13, 2019, the Board sent respondent a notice that an administrative review meeting was scheduled on May 23, 2019, at 3:30 p.m. to discuss his possible dismissal and immediate suspension. The stated purpose of the meeting was "to permit [respondent] to present any statements or documents on [his] behalf responding to the charges" and to provide respondent the "opportunity to be heard as

to why [he] should not be suspended without pay immediately and ... dismissed from the District.” (Ex. 9.) Respondent did not attend the meeting, either personally or through a representative, and he did not provide a written response. (Ex. 10.)

96. This administrative hearing was scheduled in compliance with all jurisdictional requirements. (Factual Findings 1-4.) At the hearing, the District presented three witnesses, Principal Pensamiento, AP Blank and Ms. Wagner. Each witness was knowledgeable and competent in the teaching standards of the CSTP and Framework and had the opportunity to observe respondent’s application of those standards. No evidence was presented that any witness was biased or improperly motivated.

97. Each of the District’s witnesses expressed the opinion that, during the observations, respondent failed to clearly communicate the instructional purpose of the observed lesson and to cognitively engage students. However, each witness acknowledged that his or her opinion was not based on any review of student academic assessments, student work, or student opinion of respondent’s teaching performance.

98. Each District witness also expressed the opinion that, during the observations, respondent failed to provide structured opportunities for student-to-student interactions. However, these opinions were based on a total of approximately eight hours of observations over the course of two school years. Respondent estimated that he taught approximately five hours per day and that each school year was 180 days. Accordingly, the amount of observed time was less than one percent of respondent’s actual instructional time for the two years observed. Respondent credibly testified that, throughout both school years, he made reasonable attempts to engage student participation by using a “randomizer” application to ask students questions,

using a “revoicing technique,” circulating through the classroom, and regularly utilizing Socratic Seminars.

99. The District’s witnesses expressed the opinion that, during the observations, respondent failed to address students’ off-task and disengaged behaviors, including cell phone usage for nonacademic activities. In 2011, the District adopted the policy “to prohibit the use of cellular phones, pagers, or any electronic signaling device by students on campus during normal school hours or school activities, excluding the students’ lunchtime or nutrition breaks unless the school site council has adopted a stricter policy.” (Ex. 42.) Pursuant to the 2011 policy, any cell phone used by a student during school hours or activities was to be “confiscated until redeemed by a parent/guardian/caregiver or as determined by the school principal/designee.” (Ex. 42, p. A483.) During each of the observed school years, respondent distributed to students a written classroom policy consistent with the 2011 District policy, including the following rules: “Phones may *only* be used for in-class, academic purposes and *only* when I [respondent] expressly announce that they will be necessary. Phones used for non-academic purposes will be confiscated. Refusal to hand over your phone will lead to a phone call home.” (Ex. 285, emphasis in original.) However, confiscating cell phones posed liability issues that caused the District to “move away from the policy” of confiscating phones. Respondent testified that enforcing the confiscation policy caused students considerable stress and anxiety, and that detecting surreptitious phone use was made difficult by the large class size. Principal Pensamiento acknowledged that student cell phone use is a “persistent problem in all classrooms” and that the District is in the process of forming a committee to address the problem. By the date of the hearing, the District had adopted no other policy governing student use of cell phones.

100. Respondent testified as his only witness and presented documentary evidence, including testimonials admitted as administrative hearsay to supplement and explain direct evidence. (Gov. Code, § 11513, subd. (c).) Colleagues recommend respondent's continuing employment based on observations of his "dedication to students" and his "strong rapport with students." (Exs. 301-302.) Parents describe respondent as a "favorite teacher" and "a positive influence" on their children. (Exs. 313-314.) Students describe respondent as "one of the best teachers," a "favorite" teacher and a teacher who prepared his students for college. (Exs. 322, 324, 326.) Many students describe in detail how they improved under respondent's instruction and that they would "love to have [respondent] as a teacher again." (Exs. 326, 331, 340.) The testimonials characterize respondent as empathetic, caring, sensitive, inspirational, professional, thoughtful, reflective, and compassionate, and attest to his popularity among students and his interest in their well-being. (Exs. 341, 343, 345, 349, 369, and 380.)

LEGAL CONCLUSIONS

Standard and Burden of Proof

1. The District may dismiss a permanent, certificated employee only for those causes identified by state law. The charges in the Second Amended Accusation allege five grounds for dismissal authorized by the Education Code: (1) unprofessional conduct, (2) unsatisfactory performance, (3) evident unfitness for service, (4) persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district, and (5) willful refusal to perform

regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the District.

2. The District must prove the allegations of the Second Amended Accusations by a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035.)

3. Preponderance of the evidence means evidence with more convincing force than that opposed to it. (*In re Shelley J.* (1998) 68 Cal.App.4th 322.) If the evidence is so evenly balanced that one is unable to say that the evidence on either side of an issue preponderates, the finding on that issue must be against the party with the burden of proving it. (*People v. Mabini* (2000) 92 Cal.App.4th 654, 663.)

Unprofessional Conduct

4. A school district may dismiss a teacher who demonstrates unprofessional conduct. (Ed. Code, § 44932, subd. (a)(2).) Unprofessional conduct is "that which violates the rules or ethical code of a profession or such conduct which is unbecoming a member of a profession in good standing." (*Board v. Swan* (1953) 41 Cal.2d 546, 553, overruled on other grounds.)

5. After multiple observations, AP Blank issued the same directives to cure deficiencies he perceived in respondent's implementation of the standards in the CSTP and Framework. However, the failure to meet a teaching standard is not a violation of a rule or ethical code of the teaching profession. The evidence does not support a finding that the recurring directives were attributed to deliberate disobedience. Respondent's conduct indicated a bona fide and good faith belief that he was clearly communicating the instructional purpose of all activities, providing structured opportunities for student-to-student interactions, cognitively engaging students, and

submitting a detailed weekly overview of his lessons. Respondent was not effectively addressing students' off-task behaviors, including cell phone usage, but his inefficiency in this regard was not "unbecoming a member of a profession in good standing." On the contrary, the weight of the evidence exhibited a teacher who was knowledgeable about the subject matter of his assigned classes and who made his best efforts to provide meaningful education to his students.

6. The District failed to establish by a preponderance of the evidence that cause exists to terminate respondent's employment as a permanent employee for unprofessional conduct under Education Code section 44932, subdivision (a)(2).

Unsatisfactory Performance

7. A school district may dismiss a teacher who demonstrates unsatisfactory performance. (Ed. Code, § 44932, subd. (a)(5).) "Unsatisfactory performance" means, and refers only to, the unsatisfactory performance particularly specified as a cause for dismissal and does not include any other cause for dismissal specified in Education Code section 44932. (Ed. Code, § 44938, subd. (c).)

8. Respondent has worked for the District for approximately 20 years without a record of discipline and is currently a permanent, certificated employee of the District. As described in *Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist.* (2006) 145 Cal.App.4th 1260, 1293: "Tenure has been stated to be a relation between the teacher and the school district, guaranteeing job security to the teacher, . . . The purpose of a statute giving tenure to teachers is to insure an efficient permanent staff of teachers whose members are not dependent on caprice for their positions as long as they conduct themselves properly and perform their duties efficiently and well."

9. Although the District conducted multiple observations over two school years, each observation was for 30 to 60 minutes and never for the entire classroom period. It is unreasonable to expect any teacher to fulfill each standard in the Framework within a 30 to 60-minute snapshot of a class. The District is otherwise judging respondent's performance on a total of approximately eight hours of instructional time and disregarding any student work. The District reasonably argues that the evidence of one student who scores an A and another student who scores an F does not necessarily mean the teacher performed satisfactorily in one case and poorly in the other. However, the District's dissatisfaction with respondent's performance relates to a perceived deficiency in "clearly communicating" the instructional purpose of a lesson. Examining student work of the observed class would be relevant to a determination as to whether the student understood the purpose of the lesson.

10. The District's dissatisfaction with respondent's performance also relates to a perceived deficiency in providing structured opportunities for student-to-student interactions. A preponderance of the evidence established that respondent made reasonable attempts to engage student participation by using a randomizer application to ask students questions and using a "revoicing technique." He also circulated through the classroom, and regularly utilized Socratic Seminars. Respondent acknowledged that many students never participated, but credibly testified that class participation was adversely affected by class sizes, which regularly exceeded 40 students. On some of the observed dates, respondent's performance was reasonably impaired by circumstances. One observation occurred the day before final examinations and another on the morning of an anticipated suspension.

11. The charge of unsatisfactory performance, on its own, is capricious and founded entirely on subjective standards. Courts have held that unsatisfactory performance should be measured by the standard of fitness to teach. "Absent this objective measure of performance, the livelihood of the teacher is dependent upon an abstract characterization of conduct which will shift and change from board to board, district by district and year by year. Such discretion is required to be bridled by the restraints of the standard of fitness to teach." (*Perez v. Commission on Professional Competence* (1983) 149 Cal.App.3d 1167, 1174.)

12. The District failed to establish by a preponderance of the evidence that cause exists to terminate respondent's employment as a permanent employee for unsatisfactory conduct under Education Code section 44932, subdivision (a)(5).

Evident Unfitness for Service

13. A school district may dismiss a teacher who demonstrates evident unfitness for service. (Ed. Code, § 44932, subd. (a)(6).) 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.) Unlike unprofessional conduct, 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." (*Ibid.*) The Commission must look at the proven conduct in the aggregate. The *Woodland* court found it was unnecessary to determine if every act demonstrated unfitness for service. Rather, it was proper to examine the totality of the offensive conduct.

14. Respondent's fitness to teach must be examined under the factors in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214. There, the school district discovered that a teacher "engaged in a limited, non-criminal physical relationship [with a colleague] . . . of a homosexual nature." The California Supreme Court held that a school district cannot abstractly characterize conduct as immoral or unprofessional, but must show that retaining a teacher poses a significant danger of harm to students, school employees, or others who may be affected by the teacher's conduct. The misconduct must have some rational connection to the teacher's ability to teach as follows:

In determining whether the teacher's conduct thus indicates unfitness to teach the board may consider such matters as the likelihood that the conduct may have adversely affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness or blameworthiness of the motives resulting in the conduct, the likelihood of the recurrence of the questioned conduct, and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers.

(*Morrison v. State Bd. of Education, supra*, 1 Cal.3d at p. 229.)

15. Teachers who fail to meet the standards of the CSTP and Framework are likely to adversely affect students. The District has a compelling interest to protect students from ineffective teachers. Respondent demonstrated inadequacies to his supervisors and rated as "developing" in many observed categories.

16. However, the degree of adversity from respondent's noted deficiencies was moderate, not severe. The below standard evaluations were proximate in time but based on limited and sporadic observations totaling less than one percent of the time respondent was delivering instruction during the two school years observed. No actual adverse impact was shown; on the contrary, respondent presented compelling mitigation evidence that he has generally had a positive impact on students. The District did not consider student assessments or student work in reaching its conclusions that respondent was not clearly communicating the instructional purpose or providing cognitively engaging lessons.

17. Respondent holds an appropriate credential for the subject matter he was assigned to teach and has 20 years of experience without prior discipline.

18. Respondent presented evidence of extenuating circumstances with respect to the observations conducted on the eve of final examinations and the morning of his first suspension. In aggravation, respondent failed to respond in writing to all but the last conference memo and he did not appear or respond to notice of administrative review. This inaction exhibits disregard to repeated directives.

19. Dismissing respondent for failing to strictly employ all standards may have a chilling effect on other teachers, but any such chilling effect does not rationally relate to any constitutional rights of respondent or his colleagues.

20. A preponderance of the evidence does not establish unfitness to teach under the *Morrison* criteria or show that a fixed and irremediable character trait caused respondent's inability to perform to the satisfaction of the District. The directives issued by the District to "clearly communicate" and provide "structured opportunities" to students were vague and unspecific. Respondent credibly testified that he was making a good faith effort to comply with all assistance, guidance, and directives. The copious testimonials from former students supplement and explain respondent's direct evidence.

21. The District failed to establish by a preponderance of the evidence that cause exists to terminate respondent's employment as a permanent employee for evident unfitness for service under Education Code section 44932, subdivision (a)(6).

Persistent Violations of School Laws or Regulations

22. A school district may dismiss a teacher who engages in a 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. (Ed. Code, § 44932, subd. (a)(8).) Such violations of the teacher must be "stubborn and continuing." (*San Dieguito Union High School District v. Commission on Professional Competence* (1985) 174 Cal.App.3d 1176, 1183.) The willful refusal of a teacher to obey the reasonable rules and regulations of the employing board of education is insubordination. (*Board of Educ. of City of Los Angeles v. Swan* (1953) 41 Cal.2d 546, 552, overruled on other grounds by *Bekiaris v. Board of Education* (1972) 6 Cal.3d 575.)

23. In this case, respondent received below standard evaluations in two of the last 20 years of his employment for the District. However, the evidence does not demonstrate that his failure to perform to the satisfaction of his supervisors was stubborn and continuing behavior. A debate between a teacher and principal about teaching objectives does not indicate the type of continual insubordination that may seriously affect the discipline in a school. (*Bourland v. Commission on Professional Competence* (1985) 174 Cal.App.3d 317, 321.)

24. The District failed to establish by a preponderance of the evidence that cause exists to terminate respondent's employment as a permanent employee for engaging in a persistent violation of or refusal to obey the school laws under Education Code section 44932, subdivision (a)(8).

Willful Refusal to Perform Regular Assignments Without Cause

25. A school district may dismiss a teacher who willfully refuses to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the District. (Ed. Code, § 44939.)

26. The District cites no case law applying or interpreting Education Code section 44939. Generally, the language of a statute is given its plain and ordinary meaning while considering each provision of the statute in context of the entire statutory scheme, avoiding any interpretation leading to absurd results. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382; *Hall v. Court Reporters Bd.* (2002) 98 Cal.App.4th 633.)

27. Establishing willfulness does not require a showing of any intent to violate the law, bad faith, or actual knowledge of the provision which is violated. (*Dahlman v. State Bar* (1990) 50 Cal.3d 1088, 1093.) However, under a plain and

ordinary meaning of Education Code section 44939, the District must first show a refusal to perform.

28. Here, respondent performed all regular assignments. Although he did not perform up to the standards expected by his supervisors, there is no evidence that respondent refused to perform any regular assignment. The failure to perform to the satisfaction of an employer is distinct from a refusal to perform a regular assignment given by an employer.

29. The District failed to establish by a preponderance of the evidence that cause exists to terminate respondent's employment as a permanent employee who willfully refused to perform regular assignments without reasonable cause under Education Code section 44939.

Conclusion

30. A Commission on Professional Competence has broad discretion in determining whether dismissal or suspension is the appropriate sanction. (*California Teachers Ass'n v. State of California* (1999) 20 Cal.4th 327.) A particular act or conduct of a teacher may constitute more than one cause for dismissal. (*Perez v. Commission on Professional Competence* (1983) 149 Cal.App.3d 1167.)

31. The District has already imposed suspensions for the deficiencies noted during 10 observations over the course of two school years. However, the District has failed to establish by a preponderance of the evidence that cause exists to dismiss respondent as a permanent employee under Education Code sections 44932, subdivision (a)(2), (5), (6), and (8), and 44939.

ORDER

Respondent Nicholas Johnson shall not be dismissed as a permanent employee of the District pursuant to the charges presented in the Second Amended Accusation. The District shall pay compensation to respondent from the effective date of any suspension without pay.

DATE: Feb 19, 2021

Francine Buschel-Gomez
Francine Buschel-Gomez (Feb 19, 2021 17:42 PST)

FRANCINE BUSCHEL-GOMEZ

Member, Commission on Professional
Competence

DATE: Feb 19, 2021

Jonathan Smith
Jonathan Smith (Feb 19, 2021 15:37 PST)

JONATHAN TURNER SMITH

Member, Commission on Professional
Competence

DATE: Feb 19, 2021

Matthew Goldsby
Matthew Goldsby (Feb 19, 2021 15:43 PST)

MATTHEW GOLDSBY

Chairperson, Commission on
Professional Competence