

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS AND A
COMMISSION ON PROFESSIONAL COMPETENCE
FOR THE WILLIAM S. HART UNION HIGH SCHOOL DISTRICT
STATE OF CALIFORNIA**

In the Matter of the Dismissal of:

JAMES DUNCAN,

A Permanent Certificated Employee,

Respondent.

OAH No. 2022090888

DECISION

This matter was heard by the Commission on Professional Competence (Commission) by videoconference on August 21 through 25, 2023. The Commission members were Carlos Davis, Ge'Yanni Polk, and Erlinda Shrenger, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, who presided.

Michelle M. Holmes and James A. Becerra, Littler Mendelson, P.C., represented the William S. Hart Union High School District (District).

Carlos R. Perez and Alejandra Gonzalez-Bedoy, Law Office of Carlos R. Perez, represented James Duncan (respondent), who was present throughout the hearing.

Oral and documentary evidence was received. The record was held open for the District's counsel to upload to Case Center video clip excerpts from respondent's deposition, marked on the record as Exhibits 31 through 39, and to upload a Clip Index, marked on the record as Exhibit 43, by August 28, 2023, and for respondent's counsel to file and serve a written response or objections by September 1, 2023. Additionally, by August 28, 2023, the District's counsel was to upload to Case Center Volume 1 of the transcript of respondent's deposition. Respondent's counsel did not object to the uploading of the deposition transcript. Volume 1 of respondent's deposition transcript was marked as Exhibit Z5, and Volume 2 of the deposition transcript was marked as Exhibit Z4.

On August 28, 2023, the District timely uploaded to Case Center Exhibits 31 through 39 and 43. On August 29, 30, and 31, 2023, the District uploaded to Case Center duplicate copies of the District's security video footage, respondent's 24-second video, and Exhibits 31 to 39. (These duplicate copies are located in Case Center in Section A: District Evidence, documents 41 through 58.)

On September 1, 2023, respondent filed Respondent's Objections to Exhibits Uploaded by District on August 28, August 29, August 30 and August 31, 2023, which was marked as Exhibit Y. The ALJ considered respondent's objections. The videos uploaded to Case Center on August 29, 30, and 31, 2023, are excluded. The ALJ did not grant leave to the District to upload evidence to Case Center after August 28, 2023.

Exhibits 31 to 39 are compilations of video excerpts from respondent's deposition and Exhibit 43 is an index of the deposition excerpts. The District presented the video deposition excerpts in lieu of examining respondent to elicit his live testimony. Respondent objected, orally and in writing, to the District's use of the video deposition excerpts at the hearing. The ALJ took respondent's objections under

submission and allowed the video excerpts to be presented. The Commissioners found the video excerpts were cumbersome, difficult to follow, and of limited probative value. The Commissioners found an undue consumption of time was required to review the excerpts. Although respondent's objections are well-taken, under the circumstances, the objections are overruled, and Exhibits 31 to 39 and 43 are admitted.

The record was also held open for the parties to file and serve written closing briefs by September 22, 2023. The parties timely filed their closing briefs. The District's closing brief was marked as Exhibit 44 and admitted as legal argument. Respondent's closing brief was marked as Exhibit Z11 and admitted as legal argument.

The District uploaded to Case Center the Reporter's Transcript of Proceedings for the five days of hearing held on August 21 through 25, 2023. The Reporter's Transcript for each of the five days of hearing were marked for identification as Exhibits Z6 through Z10, respectively.

The record closed and the matter was submitted for decision on September 22, 2023.

FACTUAL FINDINGS

Jurisdictional Matters

1. Respondent is a permanent certificated employee of the District.
2. On August 19, 2022, the District served respondent with a Notice of Intention to Dismiss, which notified respondent of the District's intent to dismiss him within 30 days unless he made a written request for a hearing. (Exh. 24.) The Notice of

Intention to Dismiss included a Statement of Charges, a Request for Hearing form, and copies of relevant Education Code sections. (*Id.*)

3. On September 6, 2022, respondent served the District with a Request for Hearing, which contained his request for a hearing to determine whether cause exists to terminate his employment. (Exh. 25.)

4. All jurisdictional requirements have been met.

Respondent's Background

5. Respondent holds a bachelor's degree in applied geophysics and a master's degree in administration for education. Respondent is credentialed in physics and earth science. He also has a Cross-Cultural, Language, and Academic Development (CLAD) certificate.

6. Respondent has been a teacher at Valencia High School since the fall of 1995, approximately 28 years. He has not taught at any other school in the District. At all relevant times, respondent was a physics teacher at Valencia High School. He is also one of the teachers involved with APEX, which is an online program for credit recovery.

7. Respondent presented his performance evaluations from Valencia High School dating from approximately 1995 to March 2019. In those performance evaluations, respondent received an overall rating of "Meets" standards. (Exh. D.) Respondent has no history of prior discipline with the District.

Valencia High School

8. Valencia High School opened in 1994. Peter Getz has been the Principal at Valencia High School since approximately 2020.

9. For the 2020-2021 school year, Valencia High School was on remote learning due to the COVID pandemic. In the 2021-2022 school year, students and teachers began the transition back to in-person learning. By May 2022, most students and teachers returned to in-person classes on campus.

10. Valencia High School has a video security system for its campus. The system is a web-based platform that is connected to approximately 30 to 35 cameras on the campus. Each of the cameras is strategically located to give a full view of the campus. The cameras are primarily located throughout the center of campus and around the buildings.

11. The security video may be viewed through the web-based system. The security video is time stamped. The system allows the security video to be downloaded when needed. Permission to view and download the security video belongs to the principal's administrative team, the school resource deputy, and District office personnel, specifically the Director of Technology.

12. Excerpts of the downloaded security video footage of the May 13, 2022 incident that is the subject of this case were viewed during the hearing and admitted as Exhibits 8 through 13. A compilation of the individual security video clips was viewed during the hearing and admitted as Exhibit 30.

May 13, 2022 Incident

13. On May 13, 2022, at approximately 9:08 a.m. respondent photographed and videorecorded students on his phone as he walked through campus during the first brunch period (May 13 incident). Respondent photographed and videorecorded students without their consent.

14. Typically, students spent the first brunch period outside, gathered in groups, walking to the cafeteria for food, and/or engaged in other activities. This was the case on May 13, 2022. As respondent walked through the campus, he noticed a male and two female students walking together ahead of him. The male student was J.M. and one of the female students was D.S. The second female student was not identified by the evidence. Respondent felt the two female students were out of dress code (bare midriff), so he used his phone to take a picture of the three students from behind. (Exh. 2.)

15. Respondent continued to follow the three students as they walked ahead of him. The second female student left J.M. and D.S. to join another group of students. When he got closer, respondent used his phone to record a 24-second video of J.M. and D.S. as they continued to walk together. (Exh. 7.) The 24-second video shows J.M. and D.S. as respondent walked behind them, then passes by them, and then walks towards a shaded structure, where he circles back and faces students D.S. and J.M. and records them from the front. (Exh. 7.)

16. After recording the 24-second video, respondent stopped and took four pictures of students in the surrounding area. (Exhs. 3-6.) Respondent then left the area and walked to the Administration Building.

17. Respondent's actions during the May 13 incident were captured on security video cameras located throughout the campus. (Exhs. 8-13 and 30.)

18. Respondent does not dispute that he photographed and videorecorded students during the May 13 incident. At hearing, respondent claimed the 24-second video was taken inadvertently and accidentally. The Commission did not find respondent's claim convincing. In reviewing the 24-second video, the Commission saw

no indication it was recorded accidentally or inadvertently. The 24-second video appears to have been recorded as respondent held his phone upright in front of him and pointed it towards students J.M. and D.S. (Exh. 7.)

Investigation by Principal Getz

19. Principal Getz first learned of the May 13 incident when he returned to his office at the end of the first brunch period, at approximately 9:30 a.m. A group of three to five students went to Principal Getz's office and reported there was an older gentleman on campus who appeared to be filming and following students. Principal Getz immediately went outside to see if he could ascertain who was on campus and what was going on. Principal Getz did not get the names of the three to five students who had come to his office. When he got outside, most of the students were already going to their next class because the bell had rung. Principal Getz did not see any adult wandering around who should not be on campus or an adult filming or following students. Since there was nothing of immediate concern or an emergency, Principal Getz returned to his office.

20. Upon returning to his office, Principal Getz assembled his administrative team, comprised of Assistant Principals Jennelle Olivier, Martha Spansel, and David Miles. Principal Getz told them of the report of an adult male on campus who appeared to be following and filming students during the first brunch period. Principal Getz and the administrative team reviewed the campus security video from the first brunch period.

21. Based on their review of the security video, Principal Getz and the administrative team identified respondent as the adult male who was filming students. Principal Getz felt alarmed and deeply troubled by respondent's conduct because

there was no apparent reason for respondent's filming of students. The administrative team identified students from the security video who appeared to have been followed and/or filmed by respondent, and they interviewed some of the students.

22. At approximately 10:45 a.m., after the second brunch period, student D.S. went to see Principal Getz in his office. D.S. was in eleventh grade. During her conversation with Principal Getz, D.S. told him she was angry about having been dress coded by her teacher earlier that morning. ("Dress coding" is discussed in Finding 62, below.) When D.S. asked if she was dress coded off the video, Principal Getz replied, "what video?" D.S. then recounted what happened during the first brunch period. Principal Getz realized that D.S. was one of the students who was followed and filmed during the May 13 incident. D.S. prepared and signed a written statement dated May 13, 2022, in which she wrote: "At brunch there was an old man who was trying to film people, he was being discreet." (Exh. 15.)

23. In May 2022, student J.M. was in the eleventh grade. At hearing, J.M. testified he accompanied D.S. to Principal Getz's office after the second brunch period. D.S. spoke with Principal Getz about having been dress coded after the first brunch period. Principal Getz indicated the teacher who dress coded D.S. was the female teacher of her class right after first brunch. When J.M. and D.S. both mentioned that someone had been filming them during first brunch, Principal Getz questioned them about being filmed. J.M. prepared and signed a written statement dated May 13, 2022, in which he wrote: "At brunch some guy was filming people. He was walking around trying to be discreet, then he walked into the office. (Exh. 14.)

24. Principal Getz first attempted to contact respondent regarding the May 13 incident by sending him an email shortly after 11:00 a.m., asking if he was aware of an incident during the first brunch period. When Principal Getz did not receive a

response from respondent, he decided to schedule a meeting with respondent and a union representative for 1:00 p.m. to discuss the May 13 incident.

25. Greg Truex-Hill is a special education teacher at Valencia High School and has been an on-site representative for the teachers' union for the past five to six years. Mr. Truex-Hill knows respondent "reasonably well" because they have both taught at Valencia High School for many years. He described his relationship with respondent as cordial, but they do not socialize outside of school.

26. On May 13, 2022, Principal Getz and Assistant Principal Miles went to Mr. Truex-Hill's classroom during fifth period, sometime between 11:20 a.m. and 12:20 p.m., and requested a union representative for a teacher's meeting with Principal Getz at 1:00 p.m. They did not identify the teacher to Mr. Truex-Hill due to confidentiality reasons.

27. Mr. Truex-Hill waited outside of Principal Getz's office for the teacher's meeting at 1:00 p.m. Respondent arrived for the 1:00 p.m. meeting, after Assistant Principal Miles had gone to his classroom and notified him of the meeting. Mr. Truex-Hill and respondent spoke briefly, and confirmed respondent was the teacher involved in the meeting. Mr. Truex-Hill's role as a union representative at the meeting was to take notes, be a third pair of eyes, and advise the teacher but not speak for the teacher.

May 13, 2022 Meeting

28. On May 13, 2022, at approximately 1:00 p.m., Principal Getz held a meeting in his office with respondent and on-site union representative Mr. Truex-Hill (May 13 meeting). According to Principal Getz, the purpose of the May 13 meeting

was to discuss the May 13 incident and to hear respondent's explanation for his conduct. The May 13 meeting lasted approximately 25 minutes.

29. During the May 13 meeting, respondent requested to have John Minkus, the head of the teachers' union, attend the meeting as his union representative. At hearing, Principal Getz denied respondent made such a request. However, Mr. Truex-Hill confirmed that respondent asked for Mr. Minkus as his union representative, but Mr. Minkus was not available to attend the meeting. Respondent stayed for the duration of the May 13 meeting of his own accord, with Mr. Truex-Hill serving as his union representative.

30. During the May 13 meeting, Principal Getz asked respondent if he was aware of any adult on campus who was following and filming students. Respondent answered "no" and did not disclose he had taken pictures and recorded a video of students. (Exh. 16.) At hearing, Mr. Truex-Hill was asked did respondent, during the May 13 meeting, "deny that he had either photographed or filmed students?" (Exh. Z8, p. Z744.) Mr. Truex-Hill responded, "Not in so many words." (*Id.*)

31. During the May 13 meeting, Principal Getz reviewed the security video of the May 13 incident with respondent and Mr. Truex-Hill. Respondent acknowledged he was the person shown in the video. According to Principal Getz, respondent made the following comments while viewing the security video: "Yes, that is a bit weird," "I can see why this would be concerning," and "This is odd for sure." (Exh. 16.) At hearing, respondent denied making the specific comments attributed to him by Principal Getz, but he admitted pointing out that the security video was grainy and it was hard to see things. During the May 13 meeting, respondent did not provide an explanation for his conduct shown on the security video.

Paid Administrative Leave

32. Michael Vierra testified at the hearing. Dr. Vierra has been employed by the District since January 2013. He was the Assistant Superintendent of Human Resources from January 2013 until the summer of 2022, when he became the Deputy Superintendent Over Educational Services, which is his current position.

33. At the time of the May 13 incident, Dr. Vierra was the District's Assistant Superintendent of Human Resources. Dr. Vierra became involved in the investigation of the May 13 incident after being contacted by Principal Getz and receiving some documents from him. Dr. Vierra was informed a student reported an adult male took pictures or filmed her on campus without her authorization. The student did not know who the adult male was, but Principal Getz was able to identify him as respondent from the campus security video. Dr. Vierra was informed respondent did not acknowledge or explain his conduct at the May 13 meeting with Principal Getz.

34. Respondent was placed on paid administrative leave on May 13, 2022. Dr. Vierra sent a letter to Principal Getz to hand deliver to respondent. The letter notified respondent he was placed on paid administrative leave, he was to turn in his keys, he was not to be on the Valencia High School campus or any other District facility without permission through Dr. Vierra's office, and he was not to alter, destroy, or get rid of any records or pictures regarding the May 13 incident.

35. At hearing, Dr. Vierra testified his decision to place respondent on paid administrative leave on May 13, 2022, was based on the available information provided to him. Students reported being followed and filmed without their authorization. Principal Getz reviewed the campus security video, which showed respondent following a group of students (two females and one male, but one female

student in particular) while holding his camera phone in an upright position. Respondent appeared to be filming or taking pictures and, at one point, he circled and came back with the camera phone in his hand and filmed the students from the front. Dr. Vierra decided to put respondent on paid administrative leave because of the potentially serious situation caused by respondent's conduct, and the District needed to conduct an investigation without respondent being on campus.

May 20, 2022 Meeting

36. On May 20, 2022, Dr. Vierra held a meeting with respondent regarding the May 13 incident (May 20 meeting). Also present at the May 20 meeting were John Minkus, respondent's requested union representative, Michael Crawford, a principal who was transitioning to the position of Director of Human Resources, and Erica Galicia, who was Dr. Vierra's administrative assistant and in charge of playing the security video at the meeting. Dr. Vierra prepared written notes summarizing the discussion at the May 20 meeting. (Exh. 22.)

37. At the May 20 meeting, respondent produced five pictures and one video he took of students during the May 13 incident. The May 20 meeting was also the first time respondent explained that the reason he took the pictures and the video was to document dress code violations he observed on campus during the first brunch period. The dress code violations were female students with bare shoulders and midriffs. Dr. Vierra's meeting notes summarized the discussion as follows:

[Respondent] then produced five pictures and said that he took these five pictures of students habitually in dress code violation. He followed a group of three students and he took five pictures and one 24 second video (accidentally) of

students. When asked he said that the dress code violation was a bare midriff. [Respondent] stated the video was inadvertently taken. He did not mean to take it

[Respondent] said there were only five pictures and one 24 second video. . . . He further clarified that these students were not habitual violators, but that the school has persistent violations and he was going to present the issue to admin with the pics.

[¶ . . . ¶]

[Respondent] was asked if he told Principal Getz about these pictures during their meeting on the day it occurred. He said he did not. [Respondent] said that he was pulled out of his room by AP Miles, and that he did not mention [it]. Admin called the site union rep, but he wanted John Minkus present. . . .

[Respondent] said that he took a picture of this group of three students (two girls / one boy). The boy was not in violation, but the girls had midriff and shoulders showing. He said that later we would see he snapped pictures like a panorama of various students in violation of dress code.

(Exh. 22, pp. A28 to A29.)

38. At hearing, respondent testified he disclosed to Dr. Vierra at the May 20 meeting that his purpose in taking pictures of students was to “document pervasive dress code violations” and he felt the dress code situation at Valencia High School was

getting worse. Respondent did not know any of the students whose pictures he took during the May 13 incident. Respondent was aware of the campus video security cameras and the posted signs about the video cameras.

39. John Minkus has been employed by the District since 1998. He is currently in his fourth year as the President of the Hart District Teachers Association. Mr. Minkus knows respondent because they worked together for a long time. Mr. Minkus met respondent at Valencia High School in 1998 and they have been friends since that time.

40. At hearing, Mr. Minkus testified the dress code was discussed during the May 20 meeting, and the dress code was the "whole point." Respondent was upset about the dress code and about not getting any responses or action regarding his concerns. During the May 20 meeting, respondent explained the dress code was the reason for his taking pictures and filming students. Mr. Minkus testified respondent did not refuse to answer any questions posed by Dr. Vierra. Mr. Minkus testified the security videos were reviewed during the May 20 meeting, and respondent walked through the videos with Dr. Vierra and explained what was happening.

41. After the May 20 meeting, a Statement of Charges was prepared and a notice was sent to respondent potential discipline against him was being considered, and a meeting would be set to provide him an opportunity to respond. Ultimately, a recommendation for respondent's dismissal was made to the District's Governing Board.

42. At hearing, Dr. Vierra explained the basis for his recommendation that respondent's conduct warranted his dismissal from employment. Students are on campus to learn but, in this case, were being filmed from behind by respondent

without their knowledge. Respondent initially provided no explanation or acknowledgement of the pictures and video he had taken. It was not until later that respondent finally admitted to taking pictures and a video, which he explained were for documenting dress code violations. Dr. Vierra found the video was “clearly on one girl’s – her behind for quite a while.” Dr. Vierra felt respondent’s conduct “could be construed as harassment, and just was not a good environment for students.” The Commission does not agree with Dr. Vierra’s characterization of the 24-second video as clearly on one girl’s behind for quite a while. The video did not focus or fixate on any specific body part. (Exh. 7.)

43. The Commission finds respondent’s claim that he took pictures and recorded a video of students to document dress code violations for administrators was not sufficient to mitigate or justify his conduct. The May 13 meeting provided respondent his first opportunity to present the pictures, the video, and an explanation to an administrator (Principal Getz), but he did not do so. The first time respondent provided the pictures, the video, and his dress code explanation was one week later at the May 20 meeting. These circumstances suggest the dress code explanation was created after-the-fact during the week between the May 13 and May 20 meetings. However, equally plausible is respondent’s explanation that he made no disclosures at the May 13 meeting because he wanted a different union representative to attend the meeting. Mr. Truex-Hill corroborated respondent’s testimony that he requested Mr. Minkus as his union representative for the meeting.

Impact on Students

44. After the May 13 meeting with respondent, Principal Getz contacted the families of students identified as being involved in the May 13 incident to notify them that an adult staff member appeared to have followed and filmed their student.

Principal Getz felt that no family would find it acceptable that respondent followed and filmed their student at school without their knowledge or consent. Principal Getz felt respondent's conduct caused a serious situation that warranted contacting students' families.

45. On May 16, 2022, Principal Getz met with student D.S. and her parents to discuss the May 13 incident (May 16 meeting). During the meeting, Principal Getz showed them the campus security video of respondent following and filming D.S. during the May 13 incident. D.S.'s family was upset after watching the security video. Principal Getz had no explanation for respondent's conduct. D.S. was upset after watching the security video. D.S.'s mother cried and was dissatisfied that a teacher would do this. D.S.'s father was angry the incident happened, and the school allowed it to happen. D.S.'s father indicated the family would consult an attorney about pursuing their claim outside of the school.

46. At hearing, D.S. testified regarding the May 13 incident. She was walking with her friend from the back of the school to the benches near the brunch area. D.S. testified: "I then stopped when I was walking to the brunch area and noticed a tall guy filming me." The May 16 meeting was the first time D.S. learned that respondent was the man who was filming her. D.S. never had a class with respondent as the teacher, she did not know who respondent was, and she did not recognize him as a teacher at Valencia High School. D.S. spoke to her parents about the May 13 incident. She testified her parents "freaked out," they were worried about her safety, and they "were not okay with what happened." At hearing, D.S. testified that, when she watched the security video of respondent's conduct, she felt scared, "very weirded out," and "creeped out in a way."

47. During the May 16 meeting, D.S. prepared and signed a second written statement dated May 6, 2023. (Exh. 17.) The second statement is more detailed than her first statement dated May 13, 2022. (Exh. 15.) At hearing, D.S. explained: "The first one, I wasn't really comprehending what was happening until I had been shown the security camera footage to realize what actually was happening. I – it just put in more perspective when I saw the security footage and how it really made me feel when I found out that was happening and that was the reason why." (Exh. Z7, p. Z697.) D.S. testified if she had to be around respondent now, she would feel nervous, uncomfortable, and "a little bit scared." (*Id.*)

48. Student J.M. testified regarding the May 13 incident. J.M. and D.S. were walking from the quad to the cafeteria. When they walked back, a group of students told them someone had followed and recorded them. J.M. testified: "I didn't know it was happening until after. But we just heard someone was recording us, and we thought it was weird, and we looked over, and people were pointing out the person recording, which we just thought was weird, but we didn't think much of it." (Exh. Z6, p. Z492.)

49. J.M. testified he did not notice someone was recording him while it was happening. He found out about the recording after talking to other students. J.M. learned respondent was the person who had followed and filmed him and D.S., after speaking with a group of students and one of them identified respondent. On cross-examination, J.M. testified: "I remember I saw [respondent] kind of walking around the quad area and then walk into the office after that." (Exh. Z6, p. Z501.) J.M. saw respondent had a phone in his hand and "[i]t looked like he was recording people." (*Id.*)

50. J.M. did not know who respondent was at the time, because respondent was not one of his teachers. J.M. thought it was “really weird” that respondent was filming D.S., because a teacher should not be filming a student without the student’s knowledge. D.S. told him respondent’s conduct made her feel “pretty uncomfortable.” J.M. testified respondent did not touch, or say anything to, him or D.S.

51. In addition to the written statements by D.S. and J.M., the District presented written statements dated May 16, 2022, prepared and signed by three other students, which described respondent’s conduct as recording or filming students. (Exhs. 18-20.)

52. At hearing, respondent expressed it was difficult for him to listen to D.S.’s testimony because he recognized that he did not consider her point of view in relation to his conduct during the May 13 incident. He also did not realize how his conduct would look to other students. Respondent testified he can now see how D.S. and her parents would be upset. He wishes he could apologize to D.S. and her parents, assure them it was a misunderstanding, and he would not do the same conduct again.

Analysis of District’s Allegations

53. It was established, as alleged in paragraph 4 of the Statement of Charges, that respondent photographed and videotaped female students at Valencia High School on May 13, 2022.

54. It was not established, as alleged in paragraph 4 of the Statement of Charges, that respondent stalked female students at Valencia High School and elsewhere in the District. The dictionary definition of the word “stalking” is “to pursue excessively and to the point of harassment.” (merriam-webster.com.) Here, respondent’s conduct towards D.S. did not constitute stalking. Prior to the May 13

incident, respondent and D.S. did not know each other. Respondent never had D.S. as a student in any of the classes he taught. D.S. never had respondent as a teacher and was not even aware he was a teacher at Valencia High School. Other than the May 13 incident, respondent and D.S. had no previous interaction with each other. Under these circumstances, respondent conduct vis-à-vis D.S. did not constitute stalking.

55. It was not established, as alleged in paragraph 7 of the Statement of Charges, that respondent repeatedly sat in his car at various swim meets and watched students. Principal Getz initiated an investigation of this allegation and determined it was not credible.

56. It was not established, as alleged in paragraph 10 of the Statement of Charges, that respondent's conduct constituted sexual harassment, as defined under Education Code section 200 et seq., and District Board policies and regulations. The District's evidence was insufficient to establish this allegation. No evidence was presented respondent photographed and videorecorded students for purposes of sexual gratification. Respondent's pictures and video did not focus on students' specific body parts. Respondent recorded the 24-second video with student D.S. centered in the frame; he filmed D.S. from behind but did not focus or fixate on any specific part of her body.

57. The Commission finds the District's evidence was insufficient to establish respondent engaged in similar conduct (taking pictures of students) prior to the May 13 incident. In deposition, respondent admitted taking a picture of a female student prior to the May 13 incident because the student was not dressed adequately for the weather. The Commission was provided insufficient evidence of that situation to consider it as part of its decision in this case.

Other Findings

UNFAIR TREATMENT

58. At hearing, respondent testified he had concerns about being treated unfairly by Principal Getz and Dr. Vierra. He claimed his concerns resulted from how the District handled his prior workers' compensation claim, but he failed to provide details. He also claimed to have concerns about unfair treatment because his brother, who also worked at Valencia High School, was placed on paid administrative leave "under similar circumstances" which he did not explain. Respondent also claimed Dr. Vierra tried to fire him for not having a CLAD certificate, which he now has. The District notes the Collective Bargaining Agreement for the teachers union required the CLAD certificate and Dr. Vierra merely notified respondent of that requirement. The Commission finds that respondent's concerns about unfair treatment were unconvincing and/or were not established by sufficient evidence.

DRESS CODE ISSUES

59. The District's Board Policy Manual includes Regulation 5132: Dress And Grooming, which was originally adopted by the District in 1993 and last reviewed on June 28, 2000. (Exh. J.) Regulation 5132 states in part: "In cooperation with teachers, students, and parents/guardians, the principal or designee shall regularly review school rules governing dress and grooming. [¶] The following guidelines shall apply to all regular school activities: [¶ . . . ¶] 4. Clothes shall conceal undergarments at all times. See-through or fish-net fabrics, halter tops, off-the-shoulder or low-cut tops, and bare midriffs, and skirts or shorts shorter than mid-thigh are prohibited." (Exh. J.)

60. Principal Getz testified Valencia High School did not have an adopted dress code for the 2021-2022 school year. Principal Getz testified that Valencia High

School did not openly promote the use of the dress code stated in Regulation 5132 during that time. Principal Getz testified that Regulation 5132 gives schools sites the ability to have flexibility within the dress code. Regulation 5132 states, in part: "Nothing in this policy restricts the principal and school site council from establishing specific dress standards to meeting individual school needs or specific circumstances." (Exh. J.)

61. Principal Getz, in testimony, agreed that Valencia High School had an "informal dress code," in that clothing with violent symbols or inappropriate language, or promoted drugs, alcohol, or illegal or dangerous activities, were prohibited. During the 2021-2022 school year, Valencia High School administrators were not focused on bare midriffs or off-the-shoulder clothing; rather, they were focused on helping students and teachers rebuild and reconnect in their relationships and transition back to in-person learning on campus. Enforcing dress code standards was not a priority at the time.

62. Generally, if a teacher observed a violation of the dress code, the protocol was for the teacher to send the student to the office and call the office to let the office staff know the student was being sent for a dress code violation. At the office, the student would speak with an administrative assistant. The administrative assistant might give the student a shirt if they were not properly dressed.

63. Respondent testified Mr. Miles attended the Science Department's monthly meetings. The issue of dress code came up frequently during the monthly meetings. The discussion about the dress code involved the teachers asking Mr. Miles about the status of dress code issues and how dress code violations were being handled. According to respondent, the teachers expressed frustration and made

comments like “why bother reporting dress code violations because the administration was not going to do anything anyway.”

64. Christopher Spann testified at the hearing. He is a former science teacher at Valencia High School. Mr. Spann began teaching at Valencia High School in the 2008-2009 school year and retired in June 2022. Mr. Spann never served as an administrator at Valencia High School or as a District-level administrator.

65. At hearing, Mr. Spann testified he did not recall receiving a written memo or email from any District administrator for the 2021-2022 school year that there would be no dress code in place. He testified something like that would stand out in his memory because the dress code had always been an issue at the school. Mr. Spann claimed the school website for the 2021-2022 school year definitely contained a dress code. Mr. Spann testified he referred students for dress code violations “many times.” He followed the protocol of sending the student to the office to speak with the office staff.

66. Mr. Spann testified he could not recall any specific incidents during the 2021-2022 school year, or the preceding 2020-2021 school year, where he was present during discussions with the administration about the dress code and the need to enforce it. Mr. Spann testified enforcement of the dress code was an issue that was raised during Science Department meetings when an administrator was present. Assistant Principal David Miles was assigned to the Science Department and was generally the person who attended the meetings.

67. Mr. Spann testified Assistant Principal Miles typically said something to the effect of “Okay, we’ll look into it.” Mr. Spann testified he was frustrated by the administration’s response. Sometimes administrators would correct a simple dress

code violations. But other times, administrators would indicate they did not want to cause problems if the parents had no objection to their student's clothing and would ask teachers to "just put up with it." Mr. Spann testified he and respondent have chatted about the dress code not being enforced.

RESPONDENT'S CHARACTER WITNESSES

68. At hearing, Mr. Spann also testified as a character witness for respondent. Mr. Spann knew respondent during the time he and respondent worked at Valencia High School. Mr. Spann and respondent were the two physics teachers at the school. Mr. Spann and respondent collaborated quite a bit on lesson plans. Mr. Spann testified he might have sat in on respondent's class for a few minutes on a few occasions and admired respondent's knowledge of physics. Mr. Spann's opinion is respondent is "a very straightforward person," he has "a very strong sense of right and wrong," and "he's not afraid to tell you."

69. Randy Haycock testified at the hearing as a character witness for respondent. Mr. Haycock knows respondent because they have attended the same church for 25 years. Mr. Haycock is employed as an animator by Walt Disney Studios. He has worked as an animator for 33 years.

70. Mr. Haycock has served with respondent in different capacities in their church. Mr. Haycock is currently the president of the church's Sunday School. Respondent is one of the Sunday School teachers. Respondent teaches the class for 16- and 17-year old youth. There are between nine and 15 students in respondent's class, depending on the week. The Sunday School classes are co-ed, i.e., male and female students. The church has a policy of having two adults in each Sunday School class at all times.

71. As a Sunday School teacher, respondent is responsible for preparing lesson plans on gospel subjects, which he teaches for one hour every other Sunday, i.e., twice per month. Mr. Haycock has observed respondent in his role as a Sunday School teacher. He has found respondent comes prepared, takes his calling seriously, and does his best to teach the students both the intellectual and spiritual side of things. Mr. Haycock feels respondent has been a good Sunday School teacher.

72. Mr. Haycock testified, during the time he has been in charge of the Sunday School program, there have been no complaints from students or parents about respondent's behavior. Mr. Haycock testified nothing he has observed about respondent has given him any reason to question his honesty. Nor has respondent given him any reason to question his capacity to be a Sunday School teacher. Mr. Haycock testified respondent has a "pretty good" rapport with the students in his Sunday School class. Mr. Haycock has observed that respondent's students are respectful and pay attention in class.

73. Mr. Haycock described respondent as an intellectual and having a very academic mind, but at the same time also being a very spiritual person. Respondent has always been active in the church and held several callings, and has always been very responsible and reliable in those callings. He also described respondent as a devoted father and husband for his family.

74. Chris Thomas testified at the hearing as a character witness for respondent. Mr. Thomas is employed as a business officer for a private school in Southern California. Mr. Thomas works for Oakwood School, which is not a school within the District.

75. Mr. Thomas has known respondent for at least eight years. Their daughters played on the same soccer team, and he and respondent attend the same church where they have served in various capacities together. Mr. Thomas has always found respondent to be reliable and he has a very good opinion of respondent. Mr. Thomas testified respondent has never been dishonest with him nor given him any reason to think he was. Mr. Thomas testified no one within his social circle has ever complained about any conduct by respondent.

LEGAL CONCLUSIONS

1. The Commission has jurisdiction to proceed in this matter, pursuant to Education Code section 44944 and Factual Findings 1 through 4. All further undesignated statutory references are to the Education Code.

2. The District has the burden of proof in this matter and the standard of proof is preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal. App. 3d 1035, 1038-1039.) "Preponderance of the evidence" means evidence that has more convincing force than that opposed to it. (*Glage v. Hawes* (1990) 226 Cal.App.3d 314, 324-325.)

3. It is settled that the trier of fact—in this case the three members of the Commission—may "accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted." (*Stevens v. Parke Davis & Co.* (1973) 9 Cal.3d 51, 67.) The trier of fact may also "reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material." (*Id.*, at 67-68, quoting from *Neverov v. Caldwell*

(1958) 161 Cal.App.2d 762, 767.) The testimony of “one credible witness may constitute substantial evidence.” (*Kearl v. Board of Medical Quality Assurance*, 189 Cal.App.3d 1040, 1052.)

4. The grounds for dismissal alleged by the District against respondent are immoral conduct, dishonesty, evident unfitness for service, and persistent violation of or refusal to obey school laws or reasonable regulations. (Ed. Code, § 44932, subds. (a)(1), (4), (6), (8).)

5. Although the Commission believes respondent’s conduct could, arguably, be described as unprofessional, it cannot make such a finding in this case because the District did not allege unprofessional conduct as a ground for dismissal. (See, Ed. Code, §§ 44932, subd. (a)(2).)

Immoral Conduct

6. Cause does not exist for respondent’s dismissal pursuant to section 44932, subdivision (a)(1), for immoral conduct. This ground for dismissal was not discussed in the District’s closing brief.

7. 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.)

8. In this case, the preponderance of the evidence did not establish respondent’s photographing and videorecording students on May 13, 2022,

constituted immoral conduct. The Commission finds respondent's conduct was inappropriate, but it did not rise to the level of immoral conduct, as defined by case law. Respondent's conduct was not indicative of indecency or depravity. He did not hide or act surreptitiously when photographing and videorecording students. The evidence was insufficient to prove respondent's conduct constituted the stalking of female students, including D.S., or that he engaged in the conduct for his own sexual gratification. It was not established respondent stalked D.S., given that they did not know each other and never had any interaction except for the May 13, 2022 incident. In the 24-second video, respondent recorded student D.S. as he walked behind her and centered her in the frame, but he did not focus or fixate on any specific part of her body. The allegation in the Statement of Charges that respondent repeatedly sat in his car at swim meets and watched students was not proven at hearing.

Persistent Violation of School Laws and Regulations

9. Cause does not exist for respondent's dismissal, pursuant to section 44932, subdivision (a)(8), for persistent violation of school laws and regulations. This ground for dismissal was not discussed in the District's closing brief.

10. In order for a teacher to be terminated under section 44932, subdivision (a)(8), for violations of school laws or rules, the violations must be either "persistent" or "motivated by an attitude of continuous insubordination." (*Gov. Board of Oakdale Union School District v. Seaman* (1972) 28 Cal.App.3d 77, 81.) A single violation of a school board's rules is not of itself cause for dismissal; it is the persistent disregard of school rules that the subdivision is designed to regulate. (*Id.*, at p. 84.) Isolated events or incidents involving an issue unresolved over a period of time are generally not considered persistent violation of rules. (*Bourland v. Commission on Professional Competence* (1985) 174 Cal.App.3d 317.)

11. In this case, the preponderance of the evidence did not establish respondent engaged in the persistent violation of school laws and regulations. The District's assertion that it was "common knowledge" teachers should not photograph or videorecord students without their permission is not enough to establish this ground for dismissal. (District's Closing Brief, p. 14.) The Statement of Charges must allege the specific school law, regulation, or policy that respondent violated by his conduct; it does not do that. The District failed to provide any rules or policies regarding appropriate methods for reporting dress code violations. The Statement of Charges cites Education Code sections 200 and 201, which set forth general policies prohibiting harassment and discrimination of students. The Statement of Charges also cites "Hart District Board Policies 5000, 5131, 5145.3, and 5145.7, and implementing regulations." However, the District's evidence did not include copies of any of these policies. Although respondent's evidence included copies of these policies, only Board Policy 5145.7 (Sexual Harassment) was marked, offered, and admitted at the hearing. (Exh. I.) That Board Policy is not applicable and does not directly address respondent's conduct at issue.

Dishonesty

12. Cause does not exist for respondent's dismissal, pursuant to section 44932, subdivision (a)(4), for dishonesty.

13. Dishonesty "connotes a disposition to deceive" and "necessarily includes the element of bad faith." It means "fraud, deception, betrayal, faithlessness," and "denotes an absence of integrity; a disposition to cheat, deceive or defraud; deceive and betray." (*Midway School District v. Griffith* (1946) 29 Cal.2d 13.)

14. The District contends respondent engaged in dishonesty during the May 13, 2022 meeting with Principal Getz by “dishonestly stating” he did not film students and did not know anything about filming a group of students, and by failing to provide any explanation for his conduct when asked by Principal Getz. (Statement of Charges, ¶ 5; District’s Closing Brief, pp. 7-8.) Respondent contends he did not explain his conduct to Principal Getz during the May 13, 2022 meeting because he requested to have John Minkus as his union representative for the meeting instead of Mr. Truex-Hill. The District disputes that respondent made any request at the May 13, 2022 meeting for a different union representative, and contends he is only raising this claim now to conceal that he did not create the dress code excuse for his conduct until after the May 13, 2022 meeting.

15. The Commission finds the preponderance of the evidence established that respondent did make a request at the May 13, 2022 meeting to have John Minkus as his union representative for the meeting. Principal Getz testified respondent made no such request at the meeting, while respondent claimed that he did. Respondent’s testimony was corroborated by the testimony of Mr. Truex-Hill, which the Commission found credible. Mr. Truex-Hill had no apparent bias for or against respondent or Principal Getz and the District. Mr. Truex-Hill confirmed that respondent asked for Mr. Minkus as his union representative, but Mr. Minkus was not available.

16. The District argued that, although respondent had the right to a union representative for the May 13, 2022 meeting, he did not have the right to a specific representative for the meeting. The District failed to provide sufficient and convincing legal support for this argument. Government Code section 3543.1, which applies to school districts, provides that employee organizations (unions) have the “right to represent their members in their employment relations with public school employees.”

Section 3543.1 establishes the union's authority to represent its members but does not speak to whether a member has a right to choose their representative. The District's closing brief also cited statutes pertaining to public safety officers, which are not applicable. Further, there are no circumstances in this case that respondent's request for a different union representative delayed or prevented the District's investigation of the May 13, 2022 incident. Mr. Minkus was not available for the May 13, 2022 meeting, but he was available to attend a meeting one week later on May 20, 2022, which he did.

17. The Commission finds respondent's denial at the May 13, 2022 meeting that he followed and photographed or filmed students earlier that day, and his decision not to provide Principal Getz with an explanation for his conduct, were not, as the District contends, motivated by an intent to conceal that he created the dress code justification for his conduct after the May 13, 2022 meeting. The District failed to present sufficient and convincing evidence and argument to support this contention. Respondent acted within his right to have a union representative of his choice at the May 13, 2022 meeting.

18. Based on the foregoing, it was not established by a preponderance of the evidence that respondent engaged in dishonesty within the meaning of section 44932, subdivision (a)(4).

Evident Unfitness for Service

19. Cause does not exist for respondent's dismissal, pursuant to section 44932, subdivision (a)(6), for evident unfitness for service.

20. 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 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.*)

21. The case of *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229, sets forth the following factors for determining a teacher's fitness to teach: (1) the likelihood that the conduct may have adversely affected students or fellow teachers; (2) the degree of such adversity anticipated; (3) the proximity or remoteness in time of the conduct; (4) the type of certificate held by the teacher; (5) extenuating or aggravating circumstances surrounding the conduct; (6) the praiseworthiness or blameworthiness of the motives resulting in the conduct; (7) the likelihood that the conduct in question will recur; and (8) the extent that discipline will cause an adverse chilling impact on the constitutional rights of the teacher involved or other teachers.

22. The *Morrison* analysis need not be conducted on each individual fact established but, rather, can be applied to the accumulated facts established collectively. "When the camel's back is broken we need not weigh each straw in its load to see which could have done the deed." (*Woodland Joint Unified School District v. Commission on Professional Competence, supra*, 2 Cal.App.4th at 1457.)

23. Based on application of the *Morrison* factors, the Commission finds that respondent's conduct during the first brunch period on May 13, 2022, is related to teaching and respondent's fitness to teach. The *Morrison* factors apply in respondent's case as follows:

(1) The likelihood the conduct may adversely affect students or fellow teachers. Respondent's conduct adversely affected students and administrators. No

evidence was presented of any adverse effect on respondent's fellow teachers. Respondent's conduct made students, especially D.S., feel concerned and uncomfortable. Respondent's conduct also raised alarm among administrators of a potential threat to student safety.

(2) The degree of such adversity. Respondent's conduct involved students and occurred on campus during school hours and caused a high degree of adversity towards the involved students.

(3) The proximity or remoteness in time of the conduct. Respondent's conduct was not remote in time, having occurred on May 13, 2022.

(4) The type of teaching certificate held by the party involved. Respondent is credentialed in physics and earth science. None of the District's allegations are related to his teaching physics and other courses.

(5) The existence of extenuating or aggravating circumstances, if any, surrounding the conduct. The Commission finds no aggravating or extenuating circumstances surrounding respondent's conduct in this case.

(6) The praiseworthiness or blameworthiness of the motives resulting in the conduct. The Commission finds no praiseworthiness or blameworthiness in respondent's motives for his conduct.

(7) The likelihood of recurrence of the questioned conduct. The Commission finds there is a minimal or no likelihood of recurrence of respondent's conduct. Respondent testified that if he is given a directive to not photograph or videorecord students' dress code violations, he would comply. Respondent has no

history of prior discipline with the District, and his performance as a teacher has consistently been rated as meeting standards.

(8) The extent discipline may cause adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. Not applicable.

24. Having determined that respondent's conduct relates to teaching, the Commission must next determine whether respondent's conduct demonstrates he is unsuitable for teaching because of a temperamental defect or inadequacy. Here, the Commission finds the preponderance of the evidence did not establish respondent's conduct was due to a temperamental defect. No evidence was presented that respondent photographed and videorecorded students on May 13, 2022 for purposes of sexual gratification. The evidence did not establish respondent's conduct constituted stalking of student D.S. Respondent's conduct during the May 13 incident was an isolated incident. No evidence was presented of respondent having engaged in similar conduct after being counseled or directed by administrators not to do so. The preponderance of the evidence did not establish respondent's conduct during the May 13 incident resulted from a defect in temperament. Therefore, cause for dismissal for evident unfitness for service under section 44932, subdivision (a)(6), was not established.

Disposition

25. "The Commission has broad discretion in determining what constitutes unfitness to teach . . . , and whether dismissal or suspension is the appropriate sanction." (*California Teachers Association 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 District v. Burman* (1988) 45 Cal.3d 208, 222.)

26. The Commission concludes none of the grounds for dismissal alleged in the Statement of Charges were established by a preponderance of the evidence. The Commission has no choice but to order that respondent shall not be dismissed from employment. (See Ed. Code, § 44944, subd. (d)(1).) Under these circumstances, further discussion of the *Morrison* factors is unnecessary.

27. The Commission wants to make clear that this decision is the result of the District's failure to meet its burden of proof. Neither party should construe this decision as approving or condoning respondent's conduct on May 13, 2022. The Commission finds respondent's conduct on May 13, 2022, was inappropriate and reflected poor judgment. Respondent's conduct was disruptive and raised concern and alarm among students and administrators. The Commission also finds respondent's conduct was unnecessary if done for the purpose of documenting dress code violations to show to administrators. The video surveillance cameras located throughout the campus were already recording students, and those videos could be reviewed for the prevalence of dress code violations claimed by respondent. As a less intrusive alternative, if dress code violations were as prevalent as respondent claimed, he could have pointed out dress code violations to other administrators who were also outside during the first brunch period. Respondent could have achieved the objective of documenting dress code violations for administrators by less intrusive means that do not adversely affect students and the campus community.

28. The Commission's impression is respondent's purpose in photographing and videorecording students was to embarrass the administration about its ineffectiveness in enforcing the dress code. For the good of his students and his

professional career, the Commission strongly encourages respondent to focus on carrying out his responsibilities and obligations as a teacher consistent with promoting the welfare of students and the school community.

ORDER

Respondent James Duncan shall not be dismissed from employment with the William S. Hart Union High School District. The Statement of Charges against respondent James Duncan is dismissed.

DATE: 12/22/2023


Carlos Davis (Dec 22, 2023 10:55 PST)

CARLOS DAVIS

Commissioner

Commission on Professional Competence

DATE: 12/22/2023




GE'YANNI POLK

Commissioner

Commission on Professional Competence

DATE: 12/22/2023


Erlinda Shrenger (Dec 22, 2023 14:29 PST)

ERLINDA SHRENGER

Administrative Law Judge

Office of Administrative Hearings