BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: MARCOS ORTEGA, A Permanent Certificated Employee, Respondent.	OAH Case No. 2015010085

DECISION

Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), heard this case on May 18, 2015, at Los Angeles, California. Complainant was represented by Kristine E. Kwong, Musick, Peeler & Garrett, LLP, with Susan E. Hyman, Assistant General Counsel, Los Angeles Unified School District (LAUSD or District). Respondent Marcos Ortega appeared with his attorney, Ronald C. Lapekas. However, asserting a jurisdictional objection, Respondent and his attorney left the proceeding before any substantive evidence was taken.

On May 19, 2015, the ALJ wrote Respondent's counsel, informing him that Complainant had rested its case on May 18, and inquiring if Respondent would put on a defense. On May 20, 2015, Respondent's counsel notified the ALJ that Respondent, in light of his jurisdictional objection, was not going to testify or offer evidence in his defense.

The matter was submitted for decision on May 20, 2015. The ALJ hereby makes his factual findings, legal conclusions, and order.

INTRODUCTION AND STATEMENT OF THE CASE

In this proceeding the District seeks the termination of one of its tenured teachers, Marcos Ortega. Five statutory grounds were asserted as justifying termination: unprofessional conduct (Ed. Code, § 44932, subd. (a)(1); immoral conduct (Ed. Code, §§ 44932, subd. (a)(1), 44939); dishonesty (Ed. Code § 44932, subd. (a)(3); evident unfitness for service (Ed. Code § 44932, subd. (a)(5); and persistent violation of state laws or regulations for the governance of schools (§44932, subd. (a)(7).[1]

[1] All statutory citations shall be to the Education Code unless otherwise noted.

In the main, it is alleged that Respondent, while teaching at Van Nuys High School in 2012 and 2013, engaged in profane, threatening, and abusive behavior in the classroom and in the presence of students. It was alleged that he sold snacks and drinks in his classroom over three school years, claiming at times to be supporting a student club, in violation of District policies, and without providing benefit to any school organization. It was also alleged that Respondent threatened three students by driving his car at them while they were crossing the street, then braking suddenly, putting them in fear for their safety.

As noted above, Respondent failed to adduce any evidence to contravene the testimony and documentary evidence presented by the District, asserting a jurisdictional objection instead.

The evidence received was more than sufficient to support the termination of Respondent, who is clearly unfit to teach.

FACTUAL FINDINGS

The Parties, Jurisdiction, and Procedural History

1. Complainant Justo H. Avila executed the Accusation in this matter while acting in his official capacity as Chief Human Resources Officer of the District.

2. Respondent is a certificated teacher employed by the District. At the times relevant to this case he was assigned to teach at Van Nuys High School.

3. The District commenced this proceeding on November 14, 2014, when Complainant executed a Statement of Charges against Respondent. That Statement of Charges was filed with the District's governing board, which thereafter determined to terminate Respondent.

4. On December 3, 2014, the District gave Respondent written notice of its intent to terminate him, and served Respondent with a copy of the Statement of Charges. Respondent made a timely request for hearing, which led to the issuance of the Accusation. The Accusation was served on Respondent by mail on January 14, 2015. On February 2, 2015, Respondent filed a Notice of Defense, which asserted two affirmative defenses.[2]

5. On February 2, 2015, the parties submitted a written stipulation to OAH. By that stipulation, the parties agreed that the hearing, then set to commence on March 2, 2015, would be continued so as to commence on May 18, 2015. Respondent waived the "60 day rule," which would require the hearing to commence before May 18, 2015. The parties also

[2] This Notice of Defense was not received in evidence with the other jurisdictional documents. The ALJ takes notice of the copy in the OAH records, and will add a copy to the record as part of exhibit 10, where the Supplemental Notice of Defense is found.

waived the right to convene a Commission on Professional Conduct, and agreed to have the matter heard by an ALJ alone, pursuant to section 44944, subdivision (c)(1) (2014).

6. (A) On February 15, 2015, Respondent filed a Supplemental and Special Notice of Defense. There is no evidence that OAH or the ALJ then assigned to the matter authorized the filing of that Supplemental and Special Notice of Defense (Supplemental NOD) pursuant to Government Code section 11506, subdivision (b).

(B) The Supplemental NOD asserted a number of defenses. Most germane to the hearing was the claim that the District's governing Board did not have subject matter jurisdiction to initiate dismissal proceeding because it had not complied with sections 44934 and 44939. This claim was based on the assertion that the statement of charges was not duly signed and verified by the person making the charges. In turn, it was asserted that the Notice of Intent to Dismiss was therefore a nullity. It was alleged that the Accusation was improper because it did not assert section 44939. And, Respondent asserted that OAH lacked jurisdiction because the Accusation was not verified, and should have been.

7. As noted in the preamble, when the hearing commenced, Respondent orally reiterated the jurisdictional objections summarized above, and objected to the receipt of the jurisdictional documents, exhibits 1 through 12. The objections were overruled. Respondent then left the hearing, standing on his claim that there was no subject matter jurisdiction. Notwithstanding that objection, it is found that all jurisdictional requirements have been met. (See also Legal Conclusion 9.)

8. Before leaving the hearing, Respondent's counsel gave notice that he was going to appear in the Superior Court, County of Los Angeles, on the morning of May 19, 2015, on an ex parte basis, to obtain a stay or other relief. Complainant put on his case on May 18, and the hearing was dark on May 19, so that Complainant's counsel could attend the Superior Court proceeding. The ALJ set a telephonic status conference for May 19, 2015. At that time, Ms. Kwong reported that Respondent's counsel had decided not to go forward with his ex parte request for relief.

9. On the afternoon of May 19, 2015, the ALJ wrote to Respondent's counsel, informing him that Complainant had presented his case and had rested, and informing him that if Respondent wanted to offer testimony or other evidence, he should write to the ALJ by noon on May 20 so stating; otherwise the matter would be deemed submitted. (The letter was transmitted by fax.) Respondent's counsel replied in a letter faxed to the ALJ, in a timely manner, stating that Respondent would stand on his jurisdictional objections, and would not appear to proffer any evidence in his defense. Those letters will be added to the record as exhibit 47. The matter was therefore submitted for decision on May 20, 2015.

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Findings on the Allegations Made Against Respondent

10. Complainant did not adduce evidence on every allegation in the Accusation, and in some instances only adduced documentary evidence. For example, he did not offer evidence in support of charge number 10, which pertained to a conversation Respondent allegedly had in February 2014, after he had been removed from the classroom and assigned to the Educational Service Center. Complainant did, however, offer credible evidence on the vast majority of the charges, proving them.

Findings Pertaining to Charges 1a, 2, and 3—Respondent's Use of Racial Slurs

11. (A) It was established that in September 2013, student J[redacted]K., who is African-American, was transferred into Respondent's class. Another African-American student had transferred out of another class taught by Respondent. When J[redacted]K. came to class for the first time, Respondent said to him, in front of other students, "My other nigga just checked out to go to Period 6. Now I got another one in Period 5." Respondent is not African-American.

(B) During that same time period, Respondent wrote the word "nigga" on a whiteboard in his class. He later said to a class that he needed to erase it before his supervisor saw it, and took steps to fire Respondent for putting that word on the board.

(C) At various times between August 15, 2013 and October 4, 2013, Respondent referred to African-American students as "brotha" and "my nigga."

12. African-American students in the class were offended by Respondent's use of such racial slurs. J[redacted]K. did not want to go to Respondent's class, and instead went to the school office, and killed time there. J[redacted]K. didn't speak up about Respondent's conduct because he thought Respondent was "crazy."[3] Students who were not African-American were offended by the racial slurs as well, as evidenced by the statement and testimony of student C[redacted]A, and J[redacted]G.'s statements to his mother. (Finding 30.)

Findings Pertaining to Charges 1c, 1d, 1e, 1f, and 4a through 4d—Respondent's Use of Foul and Vulgar Language

13. Respondent would routinely use foul and vulgar language in the presence of students, aside from the racial slurs described in Factual Findings 11 and 12.

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[3] Another student, J[redacted]G., when answering questions by the ALJ stated he didn't know why Respondent did some of the things he did, except that Respondent "was crazy." Student C[redacted]A., in a written statement described Respondent as having an anger issue, further stating ". . . in a way the man is bi-polar." (Ex. 32, p. 1.)

14. At some point between August 15, 2013, and October 4, 2013, Respondent told the students that Mr. Rosales, one of his supervisors, wanted to fire him.[4] Respondent then told the students: "that motherfucker can't fire me."

15. Respondent told students that they should not bend over to pick something up off the floor, as they might be anally raped. He tied this comment into a statement about life in prison.

16. Respondent would routinely yell at the class to "shut the fuck up." According to one student witness, this would happen, in that student's class, about four times per week.

17. Respondent regularly used words such as "bitch," "shit," "fuck," and "motherfucker." One student testified that Respondent called some kids "a piece of shit." Another recalled Respondent saying, "I'll teach your guys about this shit later." On October 3, 2013, student C[redacted]A. surreptitiously called his father on his cellphone, and Mr. A. could hear Respondent speaking in class. Respondent was soon yelling and ranting at the class, and in the course of that rant referred to "fucking niggers" and "motherfucking spics."

18. On October 4, 2013, student C[redacted]A. again dialed his father with his cellphone, so that Mr. A could hear what Respondent was saying. Respondent called one student "a piece of shit." At another point, he asked a student "what is wrong with your parents, homie?" When student C[redacted]A. asked him a question, Respondent asked the student if he was a tough guy. Both C[redacted] and his father believed that Respondent was trying to induce the student into a fight, as the teacher was aware that C[redacted]A. trains as a boxer and MMA fighter. Respondent told C[redacted]A. and the rest of the class that he—Respondent—was a "bad motherfucker." Looking at C[redacted], Respondent said "I don't fight fair." At another point, Respondent said he was the devil.

19. (A) Mr. A. was so alarmed by what he was hearing, that he drove from Sylmar, California, where he works, to Van Nuys High School at a rather high (and at times illegal) speed. He was concerned that his son and other students were in danger; he had formed the opinion on October 3 that Respondent was about to snap.[5] Mr. A. thought that Respondent was indeed going to snap as he listened to Respondent's rant on October 4, which lasted from the time Mr. A. answered the phone, until he arrived at the administrative office of the high school, a duration of 15 to 20 minutes.[6]

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[4] According to one student witness, Respondent said: "That motherfucker [Rosales] wants to fire me."

[5] This is found in Mr. A.'s written statement. Mr. A. also expressed respect for teachers, as he did during the hearing, and he went on to state that he hoped Respondent would "get the help that he needs." (Ex. 33, p. 2.)

[6] The ALJ has lived in the San Fernando Valley most of his life, and is aware of the distances involved, and usual traffic conditions. (See Gov. Code, § 11425.50, subd. (c).)

(B) When Mr. A. entered the office, he spoke to Marc Strassner (Strassner), an assistant principle. In his testimony, Strassner confirmed that Mr. A's phone was open, and he could hear Respondent yelling and screaming, cursing and ranting at the students. Strassner asked for a copy of what he thought was a recording, and Mr. A. told him he could not provide one, because what they were hearing was live. Shortly after Mr. A.s' arrival, administrators went to Respondent's classroom, to send him home.[7]

Findings Pertaining to Charge 5—the October 1, 2013 Confrontation in the Quad

20. On October 1, 2013, Respondent saw two students, a boy and a girl (J[redacted] O.), in the school quad. The boy had a stick or tree branch, and he poked at the girl with it. Respondent perceived that the boy had poked the girl in her private parts, which J[redacted] later denied.

21. Respondent began yelling at the two students, threatening the boy with jail, demanding his student I.D., which the boy could not produce. (According to J[redacted], the boy had lost his I.D.) Respondent was angry because he thought that the male student had touched J[redacted] improperly, something she denied to him.

22. Eventually, he took the students to the school office. He then left the office for a classroom. Meanwhile, an office staff person contacted a school police officer, Officer Aleman. The officer contacted Respondent, who took the officer to the quad to show what happened. After he went through the story, wherein he admitted that he had been upset and caused a scene, the officer asked why he just didn't take the two students to the office at the outset. Respondent then became upset with Officer Aleman, yelling at her, and her words, "ranting" about how nothing was going to be done about a serious situation. (Ex. 31, p. 2.)

23. Apparently, Respondent perceived that J[redacted] was being violated in some way. He kept referring to the fact that he had a daughter at the school, and he would not want her violated in some way.

Findings Pertaining to Charge 6—Use of Profanity During a Phone Call with a Parent

24. On a date not clear from the record, Respondent spoke by telephone with a parent of one of his students, L[redacted]B[redacted] (B[redacted]). B[redacted] was concerned about her child's grades in Respondent's class, and in another. She phoned each teacher, left a message, but did not hear back from them.

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[7] In his testimony, Strassner described escorting Respondent across the campus from the classroom to the offices as a "spectacle," with Respondent yelling out the "F-word" and flailing his arms.

25. B[redacted] then sent a note to each teacher. Respondent phoned her. During the course of the conversation, Respondent used profanity, yelled at B[redacted], and he hung up on her.

Findings Pertaining to Charge 7—Respondent's Interaction with Ms. DeMarcos

26. Ms. DeMarcos is the mother of J[redacted] G., who was a student in one of Respondent's classes in October 2013. On October 3, 2013, Ms. DeMarcos contacted Respondent because she was concerned about her son's grade in Respondent's class.

27. When she was able to get Respondent on the phone, he was very aggressive with her. He asked if she had come to the open house at the high school. When she replied that she had not, because of her job, he said "too bad,"or words to that effect. As the conversation continued, Ms. DeMarcos asked about her son's ability to compete in the class, Respondent said, "I don't know! Why don't you ask him [her son] or come to the open house!"

28. When Ms. DeMarcos expressed her displeasure with the way Respondent was talking to her, he said that he wasn't her son's baby sitter, and further said "I don't care if he goes to therapy or has ADHD [Attention Deficit Hyperactivity Disorder] or he is special ed, the hell with that!" In fact, J[redacted] G. does have ADHD and is a special education student.

29. When Ms. DeMarcos told Respondent he was being rude, he said "I don't give a fuck!"

30. J[redacted] G. had heard his mother talking on the phone with Respondent. He did not want her to do so. He told his mother that Respondent would put him in the front of the room, and make fun of him; he told his mother that Respondent had, on another occasion made fun of him. J[redacted] informed his mother of some of Respondent's other antics, such as his use of the word "nigga," Respondent's references in class to anal rape, and that Respondent had told the class he needed to erase "nigga" from the board before his supervisor saw it.

31. Ms. DeMarcos contacted her son's counselor the next day, informing the counselor that her son was not going back to Respondent's class, and that if he was not immediately transferred from Respondent's class, he would not be coming to school. The boy was transferred to another class, and he went from a failing grade in Respondent's class to an A with his new teacher.

Findings Pertaining to Charge 8--Respondent's Sale of Food and Drinks in His Classroom

32. On October 4, 2013, after Respondent was removed from his classroom, administrators discovered a substantial amount of snack food products, such as potato chips, cookies, and candy, as well as various beverages, such as soda and juice. Respondent used

District bookcases and storage closets for his inventory. He had installed a commercial grade refrigerator in his classroom to keep some of his products cold.

33. Respondent sold the items to students before, during, and after class sessions. He claimed that he was doing so to raise money for some student clubs. That was not true. The District has policies and protocols for such fund raising, and he had not followed them. While he had ostensibly the sponsored a club in the 2012-2013 school year, he was not listed as sponsor in any club for the 2011-2012 school year, or for the 2013-2014 year. (Ex. 27, pp. 1-6.)

34. Respondent never remitted any sale proceeds to the District or a school organization. J[redacted]K., as did other student witnesses, confirmed that Respondent was selling the food in his classroom. J[redacted]K. saw Respondent put the proceeds of sales in his wallet. On October 4, 2013, Respondent took a metal cash box with him before he was escorted from his classroom. He did not leave any money behind.

35. The food products that Respondent was selling are banned from District campuses because they are not healthy. He had been told by the administration that he could not sell such products. The District would not have authorized Respondent or any other teacher to sell such products to raise money for a club or for other student activities.[8]

Findings Pertaining to Charge 9—Respondent's Threatening Conduct Toward Students

36. On February 14, 2014, about four months after Respondent was removed from his classroom, C[redacted]A. and two female students were walking from school to a local store. The girls are cousins, B[redacted]C. and C[redacted]C. B[redacted]knew who Respondent was, but had never had him as a teacher. C[redacted]had been in his class. The three were walking to the store because one of the girls wanted to buy her mother a Valentine's Day present. As they were walking, the three saw Respondent driving his car. He had apparently come to school to pick up his child, who was a student there.

37. The three students were in the crosswalk when Respondent yelled profanities at C[redacted]A, which included yelling "fuck you" at the boy, and giving him the finger.

38. Respondent then suddenly accelerated his car toward the three students. Each of the three thought Respondent was going to hit them with his car. C[redacted]A. tried to push the two girls out of the way so they would not be struck, which behavior indicates he thought Respondent was going to hit them.

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[8] Strassner testified that at one point kids on the campus were seen eating hot Cheetos, but the administration could not find the source of that snack; the sales were surreptitious, and Strassner's story had the feel of an effort to find a drug dealer. It later became evident that Respondent had been the source of the hot Cheetos.

Findings on Charge 10—Respondent's Alleged Misbehavior After Reassignment

39. Charge number 10 was not established, as there was no evidence submitted on the claim.

Other Findings Regarding Respondent's Conduct

40. The witnesses attested to other misconduct by Respondent, similar to that charged, but not exactly charged. He would use words like "bitch" as a noun; one student recalled Respondent telling a student, "don't be braiding that bitch's hair." He once told his students that Van Nuys High was a "ghetto ass school." He referred to some students as "cholos."

41. C[redacted] C., one of the girls Respondent scared with his car, testified that she did not learn in Respondent's class, because he did not teach, and she recalled him telling the class some story about his wife looking for him in the garage, where he was watching porn. The lack of instruction was echoed by other students, such as K[redacted] A., who said Respondent was always off-topic and screaming. J[redacted] K. testified that there was not much instruction, in part because Respondent spent time talking about himself and his family. T[redacted] T., another of the African-American students, testified he passed the class by reading the material; he wasn't learning from Respondent.

42. Respondent made denigrating statements about the students and their families. When one girl, in response to inquiries, said that her father did not speak English well, Respondent said that her father was the idiot in her family. At an open house he inquired of the parents regarding their racial and ethnic backgrounds. When one of the parents objected to that, he retaliated against her daughter in class, as her daughter, who is college bound as of the hearing date, received a D in the class.[9] When she retook the history class in the summer, the girl earned an A. Respondent told his class that the students born here had no future, but the children of immigrants did, because the latter children worked harder.

43. Respondent has had other encounters with parents where he was at best tactless, but his conduct is better described as hostile and rude. He plainly did not want to be questioned by the parents. More than one parent complained to Van Nuys High administrators about his behavior toward them. More than one concluded that if he would be rude or profane toward them, then his classroom atmosphere had to be very poor.

44. Respondent had more than adequate notice that his behavior was not acceptable. Aside from yearly distribution of materials to the teachers regarding their obligations toward the students and the District, Respondent had been counseled by his supervisors, including in 2012 and in March and September 2013. Indeed, in February 2012,

[9] The daughter, K[redacted] A. testified that Respondent brought up the open house, and said he got in trouble over it. He said that the person responsible had a C, but was going to get a D. She took his statements as a threat.

he was counseled by Strassner because a student had complained about Respondent's statements. Strassner pointed out that even where Respondent's intentions were good, he had to be careful about perceptions. Plainly, Respondent did not care about perceptions of his comments, which became increasingly pernicious and hurtful.

Credibility Findings

45. All of the witnesses were credible in their demeanor. All were credible in terms of the content of their testimony, which was consistent internally, and consistent with the testimony of other witnesses. C[redacted] A. and his father were especially credible. Given what Respondent put them through, they did not exhibit any rancor; Mr. A. believes Respondent needs some sort of help.

The Morrison Factors

46. Where there is conduct that might justify termination of a teacher, an examination must be made of whether or not that conduct indicates that the teacher in question is unfit to teach. This requirement was first set forth in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229. There the Supreme Court held that factors that may be examined to determine fitness include the likelihood that the conduct may have adversely affected students or fellow teachers; the degree of such adversity anticipated; and, the proximity or remoteness in time of the conduct. Other factors may include the type of certificate held by the teacher; extenuating or aggravating circumstances; the praiseworthiness or
blameworthiness of the motives resulting in the conduct; the likelihood that the conduct in question will recur; and, the extent that discipline will cause an adverse or chilling impact on the constitutional rights of the teacher involved, or other teachers.

47. (A) *Adverse consequences on students and teachers, and the degree thereof*:

There were adverse consequences for students and teachers. Many students were negatively affected by Respondent's conduct, as they were deprived of instruction while insulted or denigrated. When J[redacted] G. or other students were transferred out of Respondent's class, then other teachers had to absorb extra students into their classrooms.

(B) *Proximity in time*: Most of the misconduct occurred in the late summer and fall of 2013, and is therefore recent.

(C) *Type of certificate held by Respondent*: Not fully disclosed by the record, but it must be inferred that he holds at least a single subject certificate allowing him to teach history to high school students.

(D) *Likelihood of recurrence*: The chance of recurrence is very high. Respondent's behavior toward Coalton A. and his two classmates in February 2014, months after his removal from the classroom, indicates his lack of insight and self-control. Exhibit

45, a letter Respondent wrote to District administrators in late May 2014, indicates a lack of remorse. It blames others, claims that some conspiracy existed against him, and denies that C[redacted] A. was in class on October 4. That latter claim is refuted by the testimony of the boy and his father.

(E) *Implication of constitutional rights*: No constitutional rights, of either the Respondent or other teachers, are implicated if Respondent is terminated. A teacher has no right to denigrate his students and their families, to use foul language on a routine basis, fail to instruct, or run a bodega out of his classroom.

(F) *Extenuating or aggravating circumstances*: In aggravation, Respondent's misconduct occurred more than once, and appears to have become routine by the fall of 2013.

48. Under all the circumstances, Respondent's ongoing conduct establishes that he is unfit to teach in the District, within the meaning of the *Morrison* decision, and he should be terminated as a teacher.

LEGAL CONCLUSIONS

Legal Conclusions Generally Applicable To All Claims:

1. The Code prescribes the procedures to be followed when a school district wishes to dismiss, suspend or otherwise discipline a tenured teacher. (*Wilmot v. Commission on Professional Competence* (1998) 64 Cal.App.4th 1130, 1132, (*Wilmot*); *Paramount Unified School Dist. v. Teachers Assn. of Paramount* (1994) 26 Cal.App.4th 1371, 1378 ; see § 44660 et seq.) Among the statutes pertinent to this case are sections 44932, which sets out grounds for termination, and section 44944, which sets out procedures for termination.

2. "Unprofessional conduct" as used in section 44932, subdivision (a)(1), may be defined as conduct which violates the rules or ethical code of a profession or is such conduct that is unbecoming of a member of a profession in good standing. (*Board of Education v. Swan* (1953) 41 Cal.2d 546, 553.) However, the conduct in question, to amount to unprofessional conduct, must indicate unfitness to teach. (*Perez v. Commission on Professional Competence* (1983) 149 Cal.App.3d 1167, 1174.)

3. "Evident unfitness for service" as used in section 44932, subdivision (a)(5), properly means "'clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies." 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. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, at 1444.) Examples of conduct establishing evident

unfitness to teach may be found in *Palo Verde etc. Sch. Dist. v. Hensey* (1970) 9 Cal.App.3d 967 (*Hensey*).

4. "Immoral conduct," of which Respondent has been accused, is not confined to sexual matters. It has been defined to mean that which is hostile to the welfare of the general public and contrary to good morals. It includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, and dissoluteness. Or, it can be conduct that is willful, flagrant, or shameless, 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 Education of the San Francisco Unified School District v. Weiland* (1960) 179 Cal. App.2d 808, 811 (*Weiland*); *Hensey, supra,* 9 Cal.App.3d at 973-977; *San Diego Unified School Dist. v. Commission on Professional Competence* (2011) 194 Cal.App.4th 1454, 1466.)

5. (A) The factual scenarios in *Weiland* and *Hensey* are helpful in understanding the types of actions that can constitute "immoral conduct" and "evident unfitness for service" as bases to dismiss a teacher. In *Weiland*, a teacher of an evening class was aware that when the number of students in a class was down to 15 participants in three successive evenings, the class would be automatically dropped off the roll and the teacher would lose her position. The teacher testified that she falsified records by adding the names of three persons who were absent. Although the teacher argued that other teachers did the same and she did so "to expose the situation," nevertheless her conduct was not justified and the evidence "that the purpose of the falsification was to secure appellant's continued employment. The evidence was clearly sufficient to support the findings" of immoral conduct. (*Weiland, supra,* 179 Cal.App.2d at 811.)

(B) In *Hensey*, dismissal was justified for a junior college teacher who used vulgar language and engaged in questionable acts in his classes. It was not necessarily each individual act or comment but, rather, the totality. He tore out a loudspeaker in his classroom. He referred to the school's bell system as sounding like a worn-out phonograph in a whorehouse and made numerous references throughout the year to whores and whorehouses. He warned Mexican-American students of super-syphilis in a town on the Mexican border. He stated that the district superintendent spent too much time licking up the board and simulated licking the classroom wall with his tongue. Although he explained that he meant "face licking," the expression "means in common parlance licking an entirely different portion of the anatomy" and was obviously so intended. He also referred to the school walls looking as though someone had peed on them and then smeared them with baby crap. The court stated "while it could be assumed that both male and female students of that age were familiar with the words used, a classroom, even on a junior college level, is not the time or the place for the use of such language." (*Hensey, supra*, 9 Cal.App.3d at 974, 975.) The different actions and statements were described as creating a dangerous situation (loudspeaker), bearing on his fitness to teach (whorehouse), humiliating and embarrassing to the Mexican-American students and showing a lack of restraint and a tendency to vulgarity and bad taste (super-syphilis), and disruptive conduct, an impairment of the teaching process,

and not an example of the responsible dissent which should be fostered in the classroom (licking). "All of the incidents taken in the aggregate serve as a substantial basis for the trial court's determination that the charges of 'immoral conduct' and 'evident unfitness for service' were true and constituted cause for dismissal." (*Ibid.*)

6. In order for a teacher to be terminated under section 44932, subdivision (a)(7), for persistent disobedience of applicable rules and regulations, it must be established that there has been continuous and constant refusal to obey, or behavior motivated by an attitude of continuing insubordination; a single instance of disobedience is insufficient. (*Governing Bd. of the Oakdale Union School Dist. v. Seaman* (1972) 28 Cal.App.3d 77, 81-82.)

7. "Dishonesty" needs no especial definition, as it is an ordinary term known to the ALJ. However, within the context of these proceedings, not every act of dishonesty will constitute grounds for discipline. (*Fontana Unified School District v. Burman* (1988) 45 Cal.3d 208 (*Fontana*).)[10]

8. Even where unprofessional conduct, immoral conduct, evident unfitness for service, or refusal to follow rules and regulations is or are established, it must also be established that such conduct renders the Respondent unfit to teach. (*Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229-230 (*Morrison*); *Fontana, supra,* 45 Cal.3d 208; *Woodland Joint Unified School District v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444-1445; see *Bourland v. Commission on Professional Competence* (1985) 174 Cal.App.3d 317, 321.)

9. (A) It is settled that the trier of fact 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.) Further, the fact finder may reject the testimony of a witness, even an expert, although not contradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.) And, the testimony of "one credible witness may constitute substantial evidence," including a single expert witness. (*Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, at 1052.)

(B) The rejection of testimony does not create evidence contrary to that which is deemed untrustworthy. That is, disbelief does not create affirmative evidence to the contrary of that which is discarded. That the trier of fact may disbelieve the testimony of a witness who testifies to the negative of an issue does not of itself furnish any evidence in

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[10] As stated in *Fontana*, "Dishonest conduct may range from the smallest fib to the most flagrant lie. Not every impropriety will constitute immoral or unprofessional conduct, and not every falsehood will constitute 'dishonesty' as a ground for discipline." (*Fontana, supra*, 45 Cal.3d at 220, fn. 12.)

support of the affirmative of that issue, and does not warrant a finding in the affirmative thereof unless there is other evidence in the case to support such affirmative. (*Hutchinson v. Contractors' State License Bd.* (1956) 143 Cal.App.2d 628, 632-633, quoting *Marovich v. Central California Traction Co.* (1923) 191 Cal.295, 304.)

(C) Discrepancies in a witness's testimony, or between that witness's testimony and that of others, does not necessarily mean that the testimony should be discredited. (*Wilson v. State Personnel Bd.* (1976) 58 Cal App.3d 865, 879.)

(D) "On the cold record a witness may be clear, concise, direct, unimpeached, uncontradicted -- but on a face to face evaluation, so exude insincerity as to render his credibility factor nil. Another witness may fumble, bumble, be unsure, uncertain, contradict himself, and on the basis of a written transcript be hardly worthy of belief. But one who sees, hears and observes him may be convinced of his honesty, his integrity, his reliability." (*Wilson v. State Personnel Board, supra* at 877-878, quoting *Meiner* v. *Ford Motor Co.* (1971) 17 Cal.App.3d 127, 140.)

Conclusions Specific to This Case

10. (A) Jurisdiction was established to proceed in this matter, pursuant to section 44944, and Factual Findings 1 through 9, notwithstanding Respondent's objection to subject matter jurisdiction.

(B) Respondent's objections to subject matter jurisdiction rest on the assertion that the Statement of Charges was not properly executed, and that the Accusation was not properly verified. At most, those are technical objections that did not deprive Respondent of adequate notice and an opportunity to be heard, nor the ALJ and OAH of jurisdiction. Such defects are not cause to dismiss the action. (Ed. Code § 44944, subd. (d)(2) (2014); *DeYoung v. Commission on Professional Competence of the Hueneme Elementary School District* (*DeYoung*) (2014) 228 Cal.App.4th 568.)

(C) In *DeYoung*, students reported that the teacher had acted out, physically and verbally disciplining his students. The governing board of the district voted to dismiss the teacher, and that vote followed an oral presentation of the charges in a closed proceeding. While written charges were later prepared and given to the teacher, the Board acted without either receiving verified written charges prepared by someone on the District staff, or written charges generated by the Board itself. Such are steps that are called for by the Education Code, and such steps were allegedly not performed in this case. Notwithstanding this significant deviation from statutory procedure, the Court of Appeal refused to dismiss the case.

(D) The court noted that section 44934 did not provide a remedy for cases where there is a failure to follow the preliminary steps of providing a verified statement of charges, and that in that case the language had to be treated as directory rather than mandatory. (*DeYoung, supra*, 228 Cal.App.4th at 576.) And, the court relied on former

section 44944, subdivision (c)(2), which provided, in essence, that "nonsubstantive procedural errors" committed by a district or its governing board could not support a decision not to terminate an employee unless those errors were prejudicial.[11]

(E) Plainly, if the failure to submit a written statement of charges to a governing board for consideration is insufficient to nullify subsequent proceedings, then the claim that the head of the District's human resources unit has improperly signed and verified an actual statement of charges must fail.

11. It has been established that Respondent has engaged in unprofessional conduct, providing cause for his termination pursuant to section 44932, subdivision (a)(1). However, it was not established that he was provided with an opportunity to cure his unprofessional conduct after he received his Notice of Unsatisfactory Acts in April 2014, as he was allegedly assigned to the Educational Service Center North after removal from the classroom. (See Accusation, ex. 6, p. 3.) This is fatal to the unprofessional conduct claim. (*Tarquin v. Commission on Professional Competence* (1978) 84 Cal.App.3d 251; *Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1446.)

12. Cause exists to terminate Respondent for immoral conduct pursuant to sections 44932, subdivision (a)(1), and 44939, based on Legal Conclusions 1, 4, 5 and10, and Factual Findings 11-19, 24-44.

13. Cause exists to terminate Respondent for dishonesty pursuant to section 44932, subdivision (a)(3), in connection with his sale of food and beverages in his classroom, under the guise of sponsoring a student organization, where he kept the sales proceeds for himself. This Conclusion is based on Legal Conclusions 1, 7, and 10, and Factual Findings 32 through 35.

14. Cause exists to terminate Respondent for evident unfitness for service, pursuant to section 44932, subdivision (a)(5). This Conclusion is based on Legal Conclusions 1, 3, 5, and 10, and Factual Findings 11-44.

15. Cause was established to terminate Respondent for persistent violation of, or refusal to obey, the school laws of the state or reasonable regulations prescribed for the governance of the schools by the governing board of the District, pursuant to section 44932, subdivision (a)(7). This Conclusion is based on Legal Conclusions 1, 6, 10, and Factual Findings 11-44.

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[11] The language from section 44944, subdivision (c)(2) has been moved to section 44944, subdivision (d)(2) as of January 1, 2015; this was part of a substantial amendment to the statutes pertaining to teacher termination.

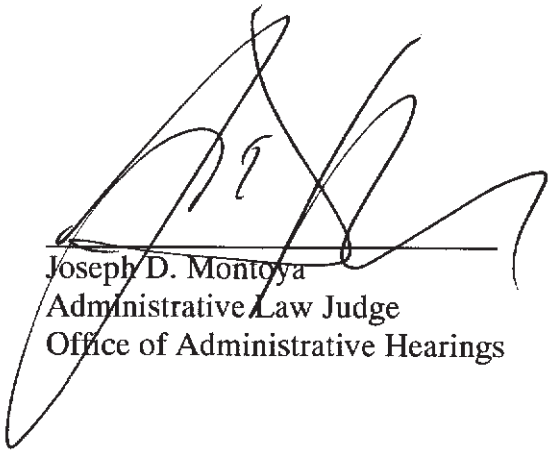
16. Applying the *Morrison* factors, it must be concluded that Respondent's conduct and temperament render him unfit to teach in the District, based on Factual Findings 46 through 48.

17. Based on all the foregoing, Respondent should be terminated as a certificated employee of the District.

ORDER

Respondent Marcos Ortega shall be terminated as a certificated employee of the Los Angeles Unified School District, forthwith.

June ____, 2015



Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings