

BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
OCEANSIDE UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the First Amended
Accusation Against:

DALE PALMER,

Respondent.

OAH No. 2013030214

DECISION

This matter came on regularly for hearing before the Commission on Professional Competence (Commission) in Oceanside, California on October 16, 17, 18, and November 8, 2013. The Commission was comprised of the following members: Administrative Law Judge Mary Agnes Matyszewski, Philip Ramos and Stephen McLaughlin.

Daniel Shinoff, Patrice Cody and William Shinoff, of Stutz, Artiano, Shinoff & Holtz, represented the Oceanside Unified School District (the district).

Jon Vanderpool, of Smith, Steiner, Vanderpool & Wax, represented Dale Palmer (respondent) who was present throughout the hearing.

Oral and documentary evidence was received on October 16, 17, 18, and November 8, 2013. On November 19, 2013, the Commission met to deliberate and the matter was submitted.

CASE SUMMARY

The Commission unanimously determined that a preponderance of the evidence failed to establish cause to dismiss respondent from the district. While the Commission did believe that respondent would benefit from additional training and counseling to improve his social skills and his classroom management skills, the Commission concluded that insufficient evidence was presented to affirm respondent's dismissal from the district. The Commission unanimously determined that none of the charges alleged were sustained. The Commission unanimously determined that insufficient

direct or corroborating evidence was offered to demonstrate that respondent engaged in unprofessional conduct, that his actions negatively impacted his ability to function as a teacher in the district or made him unfit for service in the district, or that he persistently violated laws, rules, regulations and/or policies related to education, pursuant to Education Code section 44932, subdivision (a), subsections (1), (5), and (7). The Commission unanimously dismissed the First Amended Accusation.

FACTUAL FINDINGS

Jurisdictional Matters

1. Respondent is a permanent certificated employee of the district. He possesses a clear single subject teaching credential in physical education and a clear adapted physical education specialist credential. At all relevant times respondent was a physical education (PE) teacher who taught in the district at Libby Elementary School (2008-2009 school year), Palmquist Elementary School (2009-2010 school year), and El Camino High School (2010-2011 school year and from the fall of 2011 until February 2012 when he was placed on leave).

2. On January 15, 2013, Shelly Morr, Associate Superintendent of Human Resources, recommended to the Governing Board of the district that respondent should be dismissed as a certificated employee of the district. The Governing Board approved that recommendation.

3. On January 18, 2013, a 30-Day Notice of Intention to Dismiss was served on respondent. Respondent timely appealed the dismissal action and an Accusation and Notice of Charges were served on March 29, 2013.

4. On November 8, 2013, a redacted First Amended Accusation¹ was filed by Shelly Morr, Associate Superintendent of Human Resources, in her official

¹ Consistent with this court's ruling on the motion in limine (Factual Finding No. 5), the district filed a redacted First Amended Accusation (Exhibit R). The First Amended Accusation without redactions and the documents attached thereto were received as Exhibit 2. The Governing Board considered Exhibit 2 when it deliberated. However, many of the documents in Exhibit 2 exceeded the timelines proscribed by Education Code section 44944, subdivision (a)(5), and were improperly considered by the Governing Board. Consistent with this court's ruling (Factual Finding No.5), Exhibits 1, 2, 3, and 4, have been sealed and were not considered by the Commission during its deliberations. The Commission only considered the charges pled in the redacted pleading and the exhibits relevant to those charges. The exhibits the Commission considered were Numbers 12-19, 22, 27-28, 33-36, 113-114, 116, 131, 134, 138, 142, 145, 147, 149, 151, 153-156, 158, and A-S. All other exhibits were not offered, were not considered by the Commission, and are sealed.

capacity. The redacted first amended accusation sought to dismiss respondent on the grounds of immoral conduct, evident unfitness for service, and persistent violation or refusal to obey school and/or district rules. Respondent disputed the allegations and denied that grounds for his dismissal existed.

Respondent's Motions in Limine

5. Respondent's motion in limine to exclude time barred evidence was granted in part and denied in part. Education Code section 44944, subdivision (a)(5), provides that, "No testimony shall be given or evidence introduced relating to matters that occurred more than four years prior to the date of the filing of the notice" to dismiss the employee. A party may introduce "records regularly kept by the governing board concerning the employee." However, "no decision relating to the dismissal or suspension of any employee shall be made based on charges or evidence of any nature relating to matters occurring more than four years prior to the filing of the notice."

The Notice of Intention to Dismiss was served on January 18, 2013, making evidence of incidents occurring before January 18, 2009, inadmissible. However, older evidence may be introduced to impeach a witness's testimony or if equitable principles apply (*Atwater Elementary School District v. California Department of General Services (Truitt real party in interest)* (2007) 41 Cal.4th 227). But, for the district to assert a claim of equitable estoppel, it must demonstrate that it did not have knowledge of facts that would put a reasonable person on notice. The older documents the district sought to introduce were ones either it generated or which were in its possession. Additionally, although the district correctly argued that the totality of the circumstances may be considered when determining whether or not respondent is fit to teach (*Woodland Joint Unified School District v. Commission On Professional Competence* (1992) 2 Cal.App4th 1429, 1457), that court did not address the time limitations issue, or hold that matters beyond the four years can be considered when evaluating the "totality," nor did any of the other cases cited.

6. Respondent's motion in limine to exclude evidence of misconduct not pled in the redacted First Amended Accusation was granted pursuant to Education Code section 44934. However, the district was permitted to introduce non-pled evidence if it would impeach evidence offered by respondent.

7. Respondent's motion in limine to exclude hearsay evidence was denied without prejudice. While Evidence Code section 1200, subdivision (b) prohibits hearsay evidence from being introduced subject to exceptions identified in the Evidence Code, Government Code section 11513, subdivision (d) permits hearsay evidence in an administrative proceeding to supplement or explain direct evidence, but, by itself, it may not be used to support a finding. Consequently, the parties were permitted to make hearsay objections and the administrative law judge ruled on those objections during the hearing.

8. Respondent's motion in limine to exclude cumulative evidence was denied without prejudice. Government Code section 11513, subdivision (f) authorizes the administrative law judge to exclude evidence if its probative value is substantially outweighed by the undue consumption of time spent offering the evidence. The parties were permitted to make objections regarding cumulative evidence and the administrative law judge ruled on those objections at hearing.

Respondent's Background

9. Respondent testified that he first decided to become a teacher during college where he majored in physical therapy and minored in science. Respondent volunteered to coach children in soccer and tennis for the Special Olympics and he found the experience very rewarding. He decided to switch his career path and become an adaptive PE teacher. Respondent served in the US Navy and was honorably discharged before becoming a teacher.

Respondent enjoyed teaching students because he liked seeing the children's eyes light up when they learned new skills. He enjoyed working at the elementary school level. Due to district layoffs in 2010, respondent was reassigned to El Camino High School for the 2010-2011 school year. Respondent found teaching at the high school level very challenging, primarily because he was assigned to teach Team Sports classes which had the largest class size, 50 to 80 students per class. Respondent found it difficult to implement and organize his lesson plans and keep all of his students on task because of the large class sizes.

Respondent acknowledged that he needs to improve his communication and organization skills. Respondent is aware of his colleagues' complaints that he does not communicate well, and he is willing to improve. Respondent explained that he has always been a reserved, introverted person, but he believes he is able to receive constructive criticism. He complied with all directives and letters of reprimand he received and he tried to improve his teaching. When respondent received feedback from administrators, he took those comments to heart and worked hard to improve in those areas.

Respondent testified that he wants to continue teaching in the district. Respondent is willing to work on improving; but he also feels that the district could make some changes by letting him know of problems before issuing him a letter of reprimand. Respondent would like an administrator to sit down with him, put things in writing, and discuss any issues, before initiating disciplinary proceedings. Respondent did not appreciate the fact that the district failed to discuss its expectations in advance of initiating disciplinary action. However, respondent does not harbor any anger or ill will against the district.

*Factual Findings Based on the Testimony and Documents Presented at Hearing*²

10. The district charged respondent with committing workplace violence in April 2009 when he caused two teachers at Libby Elementary School to become frightened of him. The district charged that respondent's conduct violated board policy 4135, but that policy was not introduced at hearing.

Jean Roche, a second grade teacher at Libby Elementary School, testified that respondent had been at that site for approximately two years and she had worked with him every week when she brought her students to him for PE instruction. Ms. Roche never had any issues with respondent during that time. Ms. Roche's incident with respondent occurred when she left a note in his PE box requesting hula hoops. After two or three weeks, she had not received a response, so one morning before school started she went to the PE trailer to follow up on her request. Ms. Roche described the PE trailer as a long narrow room. She knocked on the door and asked respondent if he got her note. Respondent was at the far end when she entered and he came towards her at the door and she backed up. Ms. Roche testified that it "sounds silly," but the way he approached her "was scary." Ms. Roche explained that the way respondent said her name and was "coming at her," did not seem to be a rational way for him to respond to her inquiry. Ms. Roche testified that it "sounds crazy" but her interaction with respondent really upset her. Ms. Roche testified that respondent walked towards her and said her name "in such a hateful way" that it caused her to be afraid. She just wanted to get out of the PE trailer.

Ms. Roche testified that after the encounter she went to tell another teacher. However, on cross-examination, she admitted that the discussion with the other teacher occurred at lunch time, approximately two and one-half hours later. That teacher stated that she had a similar experience with respondent, but Ms. Roche did not know when that other teacher's experience with respondent occurred. The two decided to inform the principal at the end of the day.

At the first meeting the principal listened to the two teachers. Ms. Roche does not know if this meeting was the first time the other teacher reported her incident with respondent because Ms. Roche was "so absorbed with my own experience." The principal had Ms. Roche come back a second time, alone, to provide more information. At the second meeting the principal took lengthy notes and wanted specific information regarding the exact positions of the individuals and the words exchanged. The principal asked many very detailed questions at the second meeting.

² The charges pled in the First Amended Accusation and the Notice of Charges were not identical. Accordingly, in order to convey the Commission's determination that no grounds exist to dismiss respondent from the district, and to demonstrate that the Commission considered all charges alleged against respondent, all Education Code sections referenced in both documents are included at the conclusion of the findings for each charge.

Ms. Roche did not know what the principal did with the information. She is not aware of anything that happened after she filed her complaint but believed there must have been an investigation because there was a substitute teacher who replaced respondent. During her later testimony, Ms. Roche recalled that she signed a document, a complaint form, but she did not recall with any specificity, exactly what she signed, as it was “four years ago.” On cross-examination she admitted that she must have had a third meeting with the principal where she signed the document.

On cross-examination Ms. Roche also acknowledged that she was not aware whether anyone offered to meet with respondent. Ms. Roche testified that, “Honestly, I told [the principal] that I do not want to see [respondent] again.” Ms. Roche did not have a meeting with respondent and was not established whether a meeting was ever offered to him. Ms. Roche also admitted that she did not know whether respondent ever got her note about the hula hoops. She was not sure whether she opened the door to enter the trailer or respondent opened the door. She was unsure whether the door opened in or out. She was not certain whether respondent was facing her when she first observed him. She was not sure whether he was at the back of the trailer by the desk. She was not sure what respondent did with his hands, if anything, during the encounter; he did not touch her, but she was “very clear he came towards” her. Although she is certain that she entered the trailer, Ms. Roche admitted that she was not sure where she was standing. However, she knew “for a fact” that respondent was standing at the far end when she asked him about her request and that he walked towards her. However, that testimony contradicted her previous testimony that he may have opened the PE door for her. Ms. Roche admitted that the entire encounter lasted less than 30 seconds. It was “a very fast interaction.”

Ms. Roche agreed that it “seems so ridiculous” but it was a frightening experience, she was scared. Afterwards she looked for respondent’s truck in the parking lot because she did not want to see him. She did not want to come face-to-face with him. Ms. Roche would not get out of her car until she saw that respondent’s vehicle was parked and empty. She told her husband that she was scared and she really wanted a metal detector to be installed at the school.

Respondent testified that one morning before school started he was working in the PE trailer. It was a long narrow, windowless room, a kind of “janitorial closet.” He was taking inventory and had all of the equipment in the middle of the room. Respondent was in the back of the PE trailer when he heard a knock at the door but could not answer it because of all of the equipment in the middle of the room. Ms. Roche opened the door and stuck her head in the PE trailer. She told respondent about her note and he apologized because he had not received it. Respondent asked Ms. Roche when she needed the equipment and she angrily replied, “Right now.” Respondent told her he could not do it “right now” because he was doing inventory but he would bring them to her classroom and leave them by her door before lunchtime. Respondent testified that Ms. Roche was very angry with that answer. Respondent testified that the entire encounter took only a couple of minutes. He

described Ms. Roche as being very flustered; she was in a “real hurry” for respondent to get her the equipment.

Respondent testified that he never got up from the desk area where he was sitting. He never went towards her. The two were approximately 11 to 12 feet apart during their exchange. Ms. Roche might have stepped into the PE trailer, but she stayed in the doorway area. He stayed at the back of the trailer by his desk where he had been when she first knocked on the door. Later that day respondent left the hula hoops at Ms. Roche’s classroom. Respondent had no knowledge that Ms. Roche complained about their interaction until he was called to the principal’s office. The principal told him that “one or two teachers” had filed a complaint against him. The principal did not ask respondent any questions and he did not know what the complaint was about. The principal simply asked him to come back later in the day to review the complaints, but he was never asked to complete any documents, nor was he ever interviewed about what had happened.

Respondent testified that his encounters with these two teachers were intimidating for him, but that he never felt threatened by them to such an extent that he would file a complaint against them. He did not believe he ever did anything during his interaction with either teacher to make them feel threatened or intimidated. Respondent was “extremely surprised” that the two teachers had filed complaints.

Thereafter, respondent met with the Associate Superintendent of Human Resources, Luis Ibarra. During that meeting respondent took notes and recalls Associate Superintendent Ibarra telling him that respondent was “innocent until proven guilty.” As a result of the meeting respondent was placed on paid administrative leave. On May 1, 2009, Associate Superintendent Ibarra issued a letter to respondent summarizing their April 27, 2009, meeting. The letter indicated that while on leave respondent was still subject to reasonable direction from the district. Nothing in the letter referenced anything about the investigation or the teachers’ complaints and Associate Superintendent Ibarra did not testify.

On May 20, 2009, the Libby Elementary School principal issued a letter of reprimand to respondent. Respondent testified that he was surprised to receive a letter of reprimand because the Libby Elementary School principal never met with respondent to discuss the incidents, and he was never given any documents regarding the investigation.

The letter of reprimand indicated that on April 24, 2009, two teachers filed formal complaints against respondent because of three separate incidents. The two teachers claimed they “felt fearful of you after having verbal confrontations with you.” The letter of reprimand indicated that after the two incidents with the first teacher, the principal spoke with respondent reminding him of the expectation of professional conduct when interacting with staff. The letter of reprimand referenced a “Summary of Conversation” but no such document was attached or introduced at

hearing. The letter of reprimand further noted that three days later, the incident with Ms. Roche occurred. An investigation ensued and “the attached report outlines the facts and findings,” but no such report was attached or introduced at hearing. The letter of reprimand advised respondent that his conduct violated Board Policy #4135, Violence and Threats in the Workplace, and that a copy of the Policy was attached, but, as with the report, no such policy was attached to the letter reprimand or introduced at hearing. Respondent was instructed to conduct himself in a professional manner, communicate in a positive, nonthreatening way and told how to behave in the future. Nothing in the letter of reprimand indicated that the Libby Elementary School principal ever met with respondent or obtained his version of events.

Respondent wrote a response to the letter of reprimand, dated May 27 2009. Respondent wrote that the “complaints filed against me are untrue.” Respondent wrote that the two teachers “stated clearly that there were no threats made towards them by me at all, at any time. Therefore, the complaint should not have been written or encouraged to be written.” Respondent noted that the two teachers “demonstrated extreme anger towards me and were in my face. I never exhibited any anger, intimidation, or aggression towards them, which is contrary to their false accusations. I am being reprimanded, while [the two teachers] are not being reprimanded for their actions. [The two teachers] are not being held accountable for their admitted actions.” Respondent further noted that he has not been “proven guilty of any infraction against anyone. I have stated and will continue to state that I have done nothing wrong. I will continue to work to create a positive learning environment for the students.” Respondent testified that he was saddened by the fact that the principal took the two teachers’ sides of the story over his, and that those two teachers were not held accountable for their actions during the exchanges.

Neither the other teacher nor the Libby Elementary School principal testified. The only evidence introduced regarding respondent’s encounter with the other teacher was respondent’s testimony. No evidence refuted respondent’s testimony that he was not interviewed by Ms. Roche. In fact, the letter of reprimand corroborated respondent’s testimony that his side of the story was not considered. Nowhere in that letter of reprimand is there any indication that respondent was ever interviewed. None of the documents referenced in the letter of reprimand were introduced. Additionally, Ms. Roche presented as a histrionic, overly emotional witness. She was unclear of many of the details, making her testimony non-persuasive and non-credible.

Respondent also testified that he collaborated with staff members while at Libby Elementary School. He identified staff members with whom he collaborated. Respondent testified about the various programs he introduced and assistance he gave to Libby Elementary School teachers. No evidence to refute respondent’s testimony was introduced.

The Commission unanimously determined that insufficient evidence was introduced to establish that any workplace violence or threats had occurred. It also appeared as though no “investigation” had been conducted. Rather, it seemed that the Libby Elementary School principal did little more than take the assertions of the two teachers as true and issue a letter of reprimand to respondent. The Commission unanimously determined that the evidence did not establish that respondent engaged in improper and threatening interactions with students and staff, committed immoral conduct, exhibited a pattern of willful failure to complete his professional duties, had a history of misconduct, was unfit for service or persistently violated or refused to obey school and/or district rules. The evidence was insufficient to sustain the charges alleged.³

11. The district asserted that during the beginning of the 2010-2011 school year, El Camino High School Principal Daniel Daris, who was principal at El Camino High School for eight years before becoming the district’s Coordinator of Student Services in 2011, received several complaints about respondent. The complaints alleged that respondent would sit in a corner by himself during department meetings, was very curt and uncommunicative when department members addressed him, did not make eye contact with colleagues, caused colleagues to fear for their safety as they believed respondent’s temper could explode at any time, did not take personal responsibility for his job, missed a lot of Fridays and Mondays, did not attend department Professional Learning Communities (PLCs), was unwilling to collaborate on assessments or lesson plans, became defensive if members of the department asked how he assessed his students and developed his curriculum, did not demand any level of physical activity from his students, would leave before the end of the school day, did not use the rubrics/assessment with his students, would eat his lunch alone in his car, and would not help the other male PE teachers monitor the boys’ locker room. The district asserted that respondent’s behavior caused the PE department to be unable to effectively function.

Maureen Ferrel, the PE Chairperson at the time, testified that PLCs were intended to be collaborative meetings focusing on teaching strategies. It was important that all members participate. Ms. Ferrel detailed the problems that could occur if all members did not. Ms. Ferrel acknowledged that during the first few days of school, respondent had a good idea regarding painting the numbers for roll call on

³ The district also charged that the other teacher felt threatened and filled out a workplace violence/threat report. However, that report was not introduced and that teacher did not testify. Only respondent testified about their encounters and his testimony did not establish grounds to support the district’s charges. The district also alleged that staff members were fearful of respondent and that during his meeting with Dr. Ibarra, respondent showed no affect and portrayed himself as a victim, but no evidence to support those charges was introduced. Consequently, those charges are dismissed.

the black top and helped with painting. Ms. Ferrel described respondent as not very talkative, he was quiet and reserved. Ms. Ferrel recalled respondent not having lunch with the staff and not interacting socially with them. He would sit off to the side. At meetings the staff would put the desks in a circle and she recalled respondent sitting outside of the circle, even though they would ask him to sit in the circle. However, Principal Daris testified that at the one PLC he attended, respondent was sitting fairly close to everyone else.

Ms. Ferrel explained that the PE staff thought that respondent would be a good resource because he had taught at other schools and they asked him questions about how his other school did various things, but he was non-responsive. Respondent's behavior at PLCs caused difficulties for the PE department because they are a very collaborative group and had never encountered someone who did not collaborate with them. Respondent was curt and would not make eye contact. Ms. Ferrel recalled that respondent would write very intensely on his clipboard during meetings. Ms. Ferrel could not recall a time when respondent offered ideas that were dismissed by other staff members. Respondent never shared any difficulties he was having with students. Ms. Ferrel had concerns about respondent's teaching abilities, based upon his behavior at staff meetings. She worried how respondent would communicate with students since he did not communicate with staff.

Ms. Ferrel felt threatened by respondent's behavior because he did not respond to greetings. She did not know how to approach respondent. He placed himself on the outside of the group. She had never encountered someone who resisted collaborating with his colleagues as much as respondent did. Ms. Ferrel shared her concerns with the principal and vice principal. Eventually it became extremely uncomfortable to be in the same room with respondent. Other male PE teachers told her that respondent did not talk to them and did not eat lunch with them. Students complained to her about respondent but she told them they needed to talk to him about their issues. No evidence of these "issues" was introduced at hearing.

Ms. Ferrel did not see respondent leave school early but she did see him leave PLCs early. Although Teresa Kilpatrick, a PE teacher, testified that respondent missed many PLCs, Ms. Ferrel only thought respondent missed one or two. No documents verifying the number of PLCs respondent missed were introduced. Ms. Ferrel also testified that respondent missed a lot of Mondays and Fridays and Principal Daris agreed that Ms. Ferrel made those complaints to him. However, no documents to support that claim were introduced even though Ms. Ferrel admitted that those records are maintained by the district. Principal Daris testified that Ms. Ferrel also complained that respondent was leaving campus during his prep period, but Principal Daris did not know if respondent had a sixth period prep period and no documentation regarding respondent's schedule was introduced.

Principal Daris admitted that he did not issue any sort of formal warning for respondent's alleged failure to engage in PLCs, comply with the code of conduct, or

collaborate with fellow teachers. Additionally, he had no documentation regarding any of the alleged staff complaints he received about respondent. Many of the complaints were in email form, but he does not know what happened to them after he left El Camino High School in 2011. He was never asked provide any of his emails to the district or its attorneys.

Principal Daris testified that it was his custom to meet with all new employees and go over his expectations with them. Principal Daris had such a meeting with respondent. Principal Daris admitted that he did not give respondent any written expectations but did give him a copy of the California teaching standards. Principal Daris did not give respondent any documentation regarding PLCs. Principal Daris testified that at staff meetings all employees got a copy of a document describing how the PLCs should run. However, Principal Daris admitted he does not have a copy of those PLC documents and does not know what happened to them. Principal Daris admitted that he has nothing in writing directing respondent to sit in the PLC circle or make eye contact. Respondent denied having a meeting with Principal Daris and no documentation to verify that a meeting took place was offered. In fact, respondent testified that he did not receive support from the administration when he arrived at El Camino High School. Respondent thought it was strange that he did not get any kind of welcome or information regarding what he would be teaching or where his classroom was located. He had to navigate on his own. Respondent was not offended by that, he just thought it was strange.

Respondent also had difficulty accessing his email when he first arrived. He brought it to the administration's attention but no one offered to help him. A fellow PE colleague came over once to help him but respondent could tell he was bothered by trying to help respondent. Principal Daris testified that when he learned of respondent's computer issues, he did request the tech department to address the problem. No one ever offered to help respondent, he had to ask for help. He had to ask for access to the computer system. Respondent testified that he had to ask for the keys to the facility. Respondent's October 8, 2010, response to his letter reprimand (Factual Finding No 12), corroborated respondent's testimony that he was not getting any help from the administration or his colleagues.

Ms. Ferrel was critical of respondent's teaching, as he was testing students in a manner that was not allowed by the testing protocol, because he was letting other students assist in the testing. Ms. Ferrel said nothing to respondent about her concerns because he was with students. The Commission concluded that the evidence introduced regarding how respondent tested his students did not establish that he violated testing protocols. In fact, two of the Commission members noted that, as described at hearing, respondent was using permissible methods.

Ms. Kilpatrick testified that she taught PE 9A, a classroom-based course and body dynamics, a cross fit, aerobics, yoga course. Ms. Kilpatrick discussed the collaboration involved in sharing the PE facilities. In addition to the matrix, the staff

also used emails and professional courtesy to share the facilities. The staff tried to coordinate facility usage. When respondent first arrived at the school, she recalls that he did not participate, although he was sitting in the circle. They were discussing staff birthdays and when they asked him about his, respondent withdrew in his chair, shook his head and looked down. Ms. Kilpatrick recalls specifically thinking that it was a strange interaction because respondent was new to the department. On cross-examination Ms. Kilpatrick admitted that she was unaware that respondent's mother had died on his birthday and she agreed that this could affect how he felt about his birthday and made her rethink the incident.

Ms. Kilpatrick testified that at a PLC in February or March of 2011, staff was discussing common assessments for students. Ms. Kilpatrick asked respondent how he assessed students and respondent replied that she was "picking on" him. Respondent was very abrasive towards her and she was shocked because she had simply been asking him a question. Respondent stormed out of the room, leaving Ms. Kilpatrick shocked. She testified that the rest the staff all just sat there, bewildered by respondent's behavior. Ms. Ferrel also testified about the incident. She recalled that respondent "said something about being bullied," but she did not feel he was being bullied, although he was upset and left the room, she did not see any bullying. Respondent's actions surprised Ms. Ferrel. However, Sean Helgesen, a PE teacher, who has also been the Athletic Director since the 2009-2010 school year, testified that the incident was "not a big blow up." The incident had not fazed Mr. Helgesen. Douglas Musgrove, the PE teacher that respondent originally replaced, testified that Ms. Ferrel was asking respondent a question and respondent replied, "Why are you asking me?" Respondent thought he was being picked on, but respondent did not storm out of the meeting. Mr. Musgrove testified that Respondent felt that he was being singled out but it did not go any further than that.

Mr. Helgesen agreed that he stood in the doorway during PE class while students were getting dressed, but he did not do it to intimidate respondent, he did it to pass out loaner PE clothes and to monitor students. Mr. Helgesen never had any issues with respondent and was not aware of any problems between them or between respondent and other staff until the district's attorney told him of respondent's allegations that he was being bullied and intimidated. Mr. Helgesen denied doing any of those things and never observed any staff members bully respondent.

Mr. Musgrove testified that because of the 2010 teacher layoffs, he was reassigned to a geometry class as a long-term sub. He taught there approximately five or six weeks before he was reassigned to the PE department. Mr. Musgrove testified that there was never a PLC where someone left early. He recalled that respondent did not bring "a whole lot to the table." Respondent did not seem happy being there. Respondent was very antisocial, but Mr. Musgrove never saw respondent act threatening at any PLC or department meetings. Respondent never raised his voice at a PLC. When questioned about other employees' testimony to the contrary, Mr. Musgrove testified that, "I think it's how it's viewed, we all view things differently."

Mr. Musgrove testified that the staff grabbed chairs and pulled them into a circle, but respondent did not join the circle. He never told respondent to join the circle. Mr. Musgrove never conveyed any concerns about respondent to Principal Daris.

Respondent testified that he was assigned to teach five classes of Team Sports. His classes had at least 10-15 more students in them than in the other PE classes. The administrators and teachers who were questioned about respondent's class size at hearing, all discussed the many challenges and difficulties encountered with large class sizes. All the witnesses agreed that Team Sports classes had a lot of students to monitor and teach. Respondent testified that on his first day of classes when he noticed how much larger his classes were than his colleagues' classes, he asked Ms. Ferrel about the discrepancy, but she dismissed him. In January, with the start of the new semester, respondent's schedule changed so that he was scheduled to teach four Weight Training classes and only one Team Sports class. Respondent discussed his relief at having this schedule with another PE teacher. That teacher became very upset, called Ms. Ferrel and she advised that she was unaware of the change. Ms. Ferrel looked at the schedule, got upset, called the counseling office, and the next thing respondent knew, he was reassigned to teach five Team Sports classes again for the second semester.

Ms. Ferrel testified that she could not recall respondent's schedule. She did not recall that respondent's schedule was changed after another PE staff member complained. She testified that schedules are set by the counselors and she had no ability to change them. Principal Daris testified that he had the final say on teaching assignments. Principal Daris did not recall respondent complaining about his class schedule but typically those matters are handled by the department chairperson. Principal Daris did not know what respondent's schedule was in the fall of 2010, but remembered that one of the other PE teachers complained about teaching the five Team Sports classes, which led to that teacher's schedule being swapped with respondent's schedule. Principal Daris claimed that all of that "took place at the department level." No evidence to refute respondent's testimony about the change to his second semester schedule was introduced.

Respondent testified that the purpose of PLCs was for staff to collaborate on ideas. He acknowledged missing a few PLCs, but he never stormed out of a PLC. Respondent was never given any feedback about his failure to participate at PLCs or staff meetings. He denied ever missing a department meeting and no evidence to refute that testimony was introduced. If respondent left early it was only because of a personal appointment. Any time respondent missed school he arranged for a substitute teacher to cover his class. All of his absences were accounted for in the district records. However, no documents demonstrating respondent's absences were introduced. Respondent testified that when he requested a substitute teacher, he had all of his teaching materials organized in a folder for the substitute teacher. He collaborated with the substitutes who covered his classes when he was out on medical leave.

Respondent denied that he sat alone at PLC meetings. A lot of the times he was on his computer or writing his class attendance report for the 70+ students he had in each of his classes. Because he had so many students, it took him longer to complete his paperwork. Often he was doing it when the PLCs started. Respondent testified that if he entered the room when the PLC was starting, he would try not to disturb the meeting and would sit on the outside of the circle so as not to be disruptive. Respondent's explanation was credible.

Respondent testified that he initially offered ideas at the PLCs, but his suggestions were either dismissed or ignored. Respondent suggested a better way to perform student flexibility tests, but Ms. Ferrel told him that they were going to continue doing those tests the way they had always been done. Respondent was also concerned because students were running on the concrete steps, something which can cause long-term injuries, and he suggested that students run only on the track. Respondent brought research to a PLC to support his position. Ms. Kilpatrick laughingly dismissed his suggestions, claiming this was the way they had always done it and no student had ever been injured. Respondent also inquired as to why the gym was not part of the facilities' rotation, but that question went unanswered. Respondent also suggested a different way to keep track of students because they switched classes so often, but that suggestion was also dismissed. Respondent suggested a different way to perform weight testing to prevent student injury and that idea was dismissed.

Respondent's testimony about being ignored was credible, given his presentation at this hearing. Respondent presented as an extremely quiet, reserved witness. He primarily looked down, making very little eye contact, even when testifying. Respondent presented as a very introverted individual and it was conceivable that he would withdraw even further if his suggestions were dismissed.

Ms. Ferrel testified about her concerns if respondent was allowed to return to the site. His erratic behavior, the way he acted around staff, the feeling that he did not want to be a teacher, or be part of the team and his unwillingness to communicate were troublesome. It got to the point that she was scared of respondent and did not know what he would do. Ms. Kilpatrick was concerned that if respondent returned to school there would be more issues regarding his inability to collaborate with colleagues and she did not believe respondent is able to give students what they need to succeed. However, Mr. Helgesen testified that nothing in particular about his interactions with respondent stood out other than that he was fairly quiet. He never observed anything out of the ordinary in respondent's classes; respondent was not doing anything differently from the other PE teachers. Mr. Helgesen testified that respondent had very limited communication with others, but answered direct questions asked of him.

Ms. Ferrel's testimony appeared coached. Ms. Kilpatrick appeared to be very much part of the "in crowd" and had very small class sizes. It was easy to understand

how she would fail to appreciate respondent's shy, introverted demeanor or his struggles with his large class sizes. Mr. Helgesen had a very large, athletic stature. It was conceivable that respondent could have mistakenly perceived Mr. Helgesen's actions as being intimidating even though Mr. Helgesen was not acting that way. Principal Daris' testimony and impressions were based primarily on second hand information and not direct knowledge, making them non-persuasive.

The Commission unanimously determined that although it was unprofessional for respondent not to immediately seek assistance with his email access issues, the evidence did not establish that respondent engaged in improper and threatening interactions with students and staff, that any workplace violence or threats had occurred, committed immoral conduct, exhibited a pattern of willful failure to complete his professional duties, had a history of misconduct, was unfit for service or persistently violated or refused to obey school and/or district rules. The evidence was insufficient to sustain the charges alleged.

12. The district asserted that in September 2010, respondent failed to respond to a parent's complaint, was rude and disrespectful when he spoke with the parent, and acted inappropriately during a meeting with the principal and the parent. Although the district also asserted it received other complaints from parents, students and counselors, no evidence to support those allegations was introduced and those charges are dismissed.

Principal Daris testified that in October 2010, a parent contacted him complaining that her son reported that respondent told him that he was going to get an F in the class. The mother did not understand how her son could get an F when only one-third of the school year had taken place. The mother claimed she had tried numerous times to contact respondent and he had not responded. Principal Daris directed respondent to call the mom. Principal Daris testified that there is a school policy that all parent messages should be returned within 24 hours. However, Principal Daris admitted he did not know when the mother contacted him to complain that respondent was not returning her calls. Thereafter, the mother complained that respondent had been very rude, disrespectful and hung up on her during their call. The mother was very upset.

Principal Daris spoke to respondent who denied the mother's assertions. Respondent told Principal Daris that the mother accused respondent of numerous things and he told her that he was not going to listen. Principal Daris scheduled a parent conference with himself, respondent and the mother. Respondent brought his union representative to the meeting, which Principal Daris found unusual because union representatives are typically not at parent conferences.

Respondent testified about the phone call with the mother and also introduced the note he drafted on September 25, 2010, about the incident. On September 9, 2010, Principal Daris asked him to call a student's mother and respondent did so

during his lunch hour. When respondent asked the mother what he could do to help her, the mother stated that she was not comfortable talking with respondent over the phone. The mother wanted to meet with respondent and the principal. Respondent told her that was fine and then there was a long silence. Respondent then told the mother that he would like to eat his lunch and he was going to hang up. After more silence, the mother hung up the phone and then respondent hung up the phone. The Commission concluded that based upon respondent's presentation at this hearing, respondent's version of what transpired during the call was credible. Moreover, the evidence established that respondent immediately complied with Principal Daris's directive to contact the mother. The evidence did not establish that respondent was ever aware there was an issue until Principal Daris informed him of the mother's email attempts.

Principal Daris testified that the mother was very assertive, but he felt she was very respectful. When the union representative began to respond to the mother's statements, Principal Daris "cut him off" and told him he was merely there to observe. Principal Daris recalled that respondent just sat there during the meeting. Principal Daris told respondent to engage since the meeting involved one of his students and the student's mother. Principal Daris tried to prompt respondent to participate, but respondent did not engage during the meeting. Respondent testified that during the meeting the mother was very rude and disrespectful to him. She told him that he should go to greener pastures and quit teaching if he did not like it. Respondent testified that he said nothing during the meeting, but his union representative told the mother that he did not think she should speak to respondent liked that. Respondent felt that the mother was rude to him and that he was being disrespected. Respondent testified that he was not offended that Principal Daris did not step in; he was just surprised he did not do so. The union representative asked Principal Daris why he did not step in and Principal Daris stated that he needed to remain impartial at the meeting.

Principal Daris testified that finally, at the very end of the meeting, respondent said that he did not tell the student that he was going to flunk the class and that he did not hang up on the mother. Respondent's demeanor at the meeting was not engaging. Respondent did not look at the mother. He was primarily looking at the ground. Principal Daris refuted respondent's assertion that the mother told respondent that he should quit the teaching profession and move on to greener pastures. Principal Daris also refuted respondent's assertion that the union representative told the mother that she should not speak to respondent in that way and that she was acting disrespectful.

After the parent meeting, Principal Daris issued a letter of reprimand on October 8, 2010, to respondent. Respondent was shocked to receive the letter of reprimand. In it, Principal Daris stated that on September 2, 2010, and again on September 6, 2010, a parent e-mailed respondent a request to communicate regarding her son, but received no response. On September 9, 2010, Principal Daris directed respondent to contact the parent and respondent did so on that date. However, during

the call, respondent was rude and disrespectful. Principal Daris stated that respondent's conduct violated teaching standards and the school's commitment to communicate with parents as partners in education. Respondent's conduct negatively impacted both the parent and student and cast the school in a negative light. Principal Daris directed respondent to be respectful to all parents and to respond to them within 24 hours. The letter of reprimand contradicted Principal Daris's testimony that the emails from the parent were in October and also refuted his testimony that he issued the letter of reprimand based on respondent's actions at the parent meeting. Nothing in the letter of reprimand referenced that meeting.

Respondent wrote a response to the letter of reprimand. In the response, respondent stated that the reason he did not reply to the mother's two emails were because he was "getting my bearings at the school and learning where everything was around me." Respondent claimed that no one offered to help him and still had not offered to help him. Respondent wrote that the letter of reprimand was based solely on the parent's report of what occurred, a version of the events which respondent disputed. Respondent claimed it was the mother who was disrespectful and that since there were no witnesses to the conversation, Principal Daris was simply taking the mother's word against his. Respondent also stated that Principal Daris witnessed the mother being disrespectful towards respondent during the September 30, 2010, meeting and chose to ignore it. Respondent claimed there was absolutely no evidence that respondent was ever disrespectful in the meeting or during the phone conversation. However, respondent concluded by saying he would follow the directions in the letter of reprimand and would work to "create a positive learning environment for the students." Principal Daris testified that he did not recall ever seeing this response, but acknowledged he does not always see teachers' responses to letters of reprimand. Principal Daris believed the mother showed him her emails, but since they are not attached to the letter of reprimand, "We don't have them."

In October of 2010 respondent requested a transfer. He was unhappy at El Camino High School because of the way he was being treated by administration and coworkers. He did not feel matters were fully investigated. He was given a letter of reprimand but did not feel that his side of the story had been accepted. Respondent felt it was unfair because he did not believe that an investigation had ever taken place and he felt that the letter of reprimand was inaccurate regarding what had transpired.

The Commission unanimously determined that the evidence did not establish that respondent engaged in improper and threatening interactions with students and staff, committed immoral conduct, was unfit for service, persistently violated or refused to obey school and/or district rules, exhibited a pattern of willful failure to complete his professional duties, had a history of misconduct, or that that any workplace violence or threats had occurred. The evidence was insufficient to sustain the charges alleged. The evidence did not establish that respondent was rude during the phone call and Principal Daris's letter of reprimand did not mention that respondent had been rude during the parent meeting. Neither the parent who made

the complaint nor the student testified. Insufficient evidence to establish this charge was introduced.

13. The district alleged that on November 4, 2010, respondent repeatedly asked A■■■■ C■■■■, a female student, to lift her sweatshirt to prove she was wearing PE clothing, even though the student advised that she had nothing underneath her sweatshirt. The district alleged that when the student refused to lift her sweatshirt, respondent grabbed the sweatshirt and tried to lift it. The district alleged that another female student observed the incident and that the two students left PE class and reported the incident to the principal. The district asserted that respondent denied responsibility and claimed the student was trying to get him fired. No other witnesses reported the student making that statement.

Ms. C■■■■ testified about her educational background. During the fall of her sophomore year, she was a student in respondent's PE class. She was unable to participate in PE because she was on medical leave. On the day of the alleged incident, Ms. C■■■■ was on the football field, standing alone with respondent. There were 50 to 80 other students in the PE class who were in the middle of the track, participating in PE. It was up to the PE teacher whether medical leave students should "dress out" for PE and respondent required his students to do so. Ms. C■■■■ was wearing a black hooded sweatshirt and her PE shorts. She was not wearing anything under her sweatshirt.

Ms. C■■■■ testified that respondent told her that she was not wearing appropriate PE clothes and she told him her clothing was dress code appropriate. Respondent told her that if she was wearing her school clothing underneath her sweatshirt then he wanted her to take the sweatshirt off. Ms. C■■■■ told respondent that she had nothing on underneath. Ms. C■■■■ testified that respondent said he did not believe her and he grabbed the bottom of her sweatshirt by the pockets and lifted it up, exposing her midriff near her belly button area. Ms. C■■■■ testified that another female student intervened, grabbed Ms. C■■■■ by the arm, and said that they were going to the office to report the incident. Ms. C■■■■ testified that respondent told them they were not allowed to leave, his tone was loud and angry, it frightened Ms. C■■■■, but the two girls left the field and headed to the office.

Respondent testified that Ms. C■■■■ insisted she was dressed out for PE. Respondent told her that he did not believe her because she was wearing the same sweatshirt and jeans she had worn to school. Ms. C■■■■ was not wearing any type of athletic shoes. Respondent testified he had a problem with Ms. C■■■■ all year not dressing out for PE. Respondent asked her to show him the tag of her shirt or to pull down the tail of her shirt to show that she was dressed out for PE. Respondent did not ask her to lift her sweatshirt. Ms. C■■■■ told respondent she was not wearing a shirt and that was the end of it. Respondent agreed that it would be "horrific and totally inappropriate" for a male teacher to ask a female student to lift her sweatshirt. It would be "unprofessional and unacceptable at a minimum." Ms. C■■■■ told

respondent she was going to get him fired and that she was going to say that he told her to lift her shirt. Ms. C■■■ and the other student had stated in the past that they were going to get him fired. Respondent believed that Ms. C■■■ and the other student were trying to get him in trouble. Respondent denied ever touching Ms. C■■■'s sweatshirt or Ms. C■■■.

Ms. C■■■ testified that she did not know the other student before this incident. Ms. C■■■ never observed that student interact with respondent and was unaware of that student ever claiming that she would try to get respondent fired. Ms. C■■■ denied ever making statements that she was going to get respondent fired and never heard any students make that claim.

Ms. C■■■ testified that when the two girls arrived at the office they requested to see the principal and were told they had to wait until the next day to see him. Ms. C■■■ was "pretty positive" that she spoke with Vice Principal Barry Tyler, but cannot recall anything the vice principal told her or any direction she was given. Ms. C■■■ spoke with Vice Principal Tyler by herself. Ms. C■■■ was told to stay in the office until the bell rang before going to her next class. This testimony seemed to support respondent's testimony that Ms. C■■■ was not dressed for PE, since it did not seem plausible that she would go to her next class wearing her PE clothes.

Ms. C■■■ testified she met with principal Daniel Daris the next morning. She relayed to him the events that took place. Principal Daris informed her that he would take care of it and that she should see the counselor to change her PE class. Principal Daris testified that when the two students came up from respondent's class, he met with Ms. C■■■. His testimony contradicted Ms. C■■■'s testimony that she did not meet with Principal Daris on the day of the incident; she claimed met with him the following day. Principal Daris testified that Ms. C■■■ advised him that she felt very uncomfortable with respondent's actions. Principal Daris testified that Ms. C■■■ was very upset and seemed extremely uncomfortable with the situation. He assured Ms. C■■■ that he would investigate the incident.

Principal Daris testified that he was uncomfortable with a male teacher asking a female student to remove her sweatshirt after she told the teacher that she was wearing nothing underneath. Principal Daris initially could only recall meeting with Ms. C■■■, he did not recall meeting with the other female student. However, Principal Daris later recalled speaking with the other female student that same day, but could not recall her name. That female student verified that respondent had asked Ms. C■■■ a number of times to remove her sweatshirt and that Ms. C■■■ told respondent she was not wearing anything underneath the sweatshirt. Although respondent testified that the students swore at him, Principal Daris testified that respondent never told him that Ms. C■■■ or the other female student had done so.

When Principal Daris discussed the incident with respondent, respondent told him that because of the PE uniform guidelines, he was checking to make sure the

student was complying with the PE dress code and that he only asked her to lift her sweatshirt one time to verify she was wearing a PE shirt underneath. When she said that she had nothing underneath, he stopped. Respondent stated that Ms. C■■■■ was rude and disrespectful, left class without permission, and he wrote her a referral. Principal Daris does not know what happened to respondent's referral. Principal Daris testified that respondent told him that the students' statements were not true, and that respondent appeared very upset and angry when Principal Daris questioned him about the incident. Respondent told Principal Daris that he had had other interactions with Ms. C■■■■ where she threatened to get him fired, but respondent never told anyone about those threats. Principal Daris admitted that he did not interview anyone else about the incident. Principal Daris never spoke to any other students in respondent's PE class to verify what had transpired.

Respondent testified that Principal Daris never interviewed him regarding his version of events. Principal Daris never spoke with respondent about the incident and never told him about any investigation. This claim was contradicted by Principal Daris's testimony that he discussed the matter with respondent, although, the length of time he spoke with respondent was never established. Respondent testified that the incident with Ms. C■■■■ occurred right after the district found out about respondent's 2007 conviction (Factual Finding No. 14) and respondent believed it was connected in some way. At this point in time, respondent felt that there was a concerted effort to pile paperwork against him in his personnel file.

Principal Daris issued a letter of reprimand after the incident because he felt Ms. C■■■■ and the other female student were credible witnesses and that respondent's actions were inappropriate, especially at the high school level and especially between a male teacher and a female student. Another reason Principal Daris issued the letter of reprimand was because of his observations that Ms. C■■■■ was visibly shaken and displayed a "level of uncomfortableness" with what had occurred. Additionally, Principal Daris testified that the PE guidelines were very liberal and when checking uniforms, if a student stated that they are not wearing clothing underneath, the male teacher should stop and not pursue the issue, nor ask a female student to lift her shirt. Principal Daris testified that as long as a student has on "PE type of workout clothes" in the proper school colors, that satisfies the PE dress code. Ms. C■■■■'s black sweatshirt was acceptable PE clothing.

Respondent wrote two responses to his letter of reprimand, each one dated November 15, 2010. Both responses were similar, except that one contained additional assertions. Respondent wrote that he asked Ms. C■■■■ to prove she was wearing her required PE uniform by showing her the bottom of her shirt. He referenced the PE uniform guidelines. Respondent denied ever asking the student to lift her sweatshirt. Respondent wrote that Principal Daris indicated that he completed an investigation and talked to witnesses. However, the only other witness with whom Principal Daris spoke was the other student and she was not credible because she told respondent on several previous occasions that she was going to get him fired. During

the October 21, 2010, disaster drill, that student stood up and swore at respondent and she, Ms. C■■■■ and a third student told respondent on several occasions that they were going to get him fired. Respondent wrote that he did not believe that Principal Daris “cares about the truth. He is holding a grudge for the district and wants to pile paperwork in my personnel file.” Respondent concluded by stating that he would “follow the directives of the letter of reprimand. I am working to create a positive learning environment for the students.” In one of the two responses, respondent also added that he “never asked a student to do what [Principal] Daris has accused me of. I have been teaching in the district honorably for years, mentoring thousands and thousands of students. He has no credible proof of anything and cannot produce reliable proof of anything. I expect this reply to be attached to the letter of reprimand, and will be checking my personnel file to see if it is there.”

The Commission unanimously determined that the evidence did not establish that respondent engaged in improper and threatening interactions with students and staff, committed immoral conduct, was unfit for service, persistently violated or refused to obey school and/or district rules, exhibited a pattern of willful failure to complete his professional duties, had a history of misconduct, or that that any workplace violence or threats had occurred. There was a lack of urgency displayed by Principal Daris in how he conducted his investigation. He did not immediately interview the student or suspend respondent, suggesting that Ms. C■■■■’s assertions were doubtful. No other witnesses were interviewed. No other witnesses testified at hearing. The evidence was insufficient to establish that Ms. C■■■■’s allegations were true. Moreover, given respondent’s presentation at hearing, her allegations seemed inconceivable. The Commission also did not find Ms. C■■■■ to be a credible witness given her presentation at hearing. She appeared to enjoy being in the spotlight and her school background suggested that there were many issues transpiring in her life raising doubts as to her credibility. The evidence was insufficient to sustain the charges alleged.

14. In February 2010 Associate Superintendent Shelly Morr received a letter from the Commission on Teacher Credentialing (CTC) advising her that CTC was considering discipline against respondent for his 2007 misdemeanor battery conviction. The CTC letter was the first notice the district had of that conviction.

On February 26, 2010, CTC issued a letter to respondent, which it copied to the district, advising respondent that at its April 2010 meeting it would be considering the enclosed investigation report which may result in discipline being issued against respondent’s certificate. The report noted that on April 5, 2007, respondent was convicted, based upon his guilty plea, of violating Penal Code section 242, battery, a misdemeanor. In exchange for his plea, two additional charges for vandalism were dismissed. The report noted that on July 24, 2007, respondent and his neighbor became involved in an altercation after having several verbal conflicts in the past. The report noted that on the night of the incident, when the neighbor parked his truck in the alley, respondent began punching him and swearing at him. Respondent left

and returned with a 2x4 which he used to strike the neighbor's truck. The report indicated that respondent claimed he would "never be done with" the neighbor and that the neighbor's wife and daughter witnessed part of the incident. The CTC report noted that when interviewed by the sheriff's deputy, respondent denied assaulting the neighbor and claimed the neighbor was injured when the neighbor attacked respondent. The sheriff's report was not introduced and it was unclear from the CTC investigation report where the information contained in that CTC report was obtained.

On December 19, 2009, in response to their request for information about the conviction, respondent wrote a letter to CTC stating that after years of harassment by his neighbor, respondent committed misdemeanor battery on the neighbor. Respondent noted that he pled guilty to the misdemeanor battery charges, took responsibility for his actions and has obeyed the court's order. Respondent wrote:

That day in July 2007 I made a big mistake by doing what I did. I was and am now sorry for my actions. I can't go back and take away that day from my life, but I wish I could. If I could go back, I would have just walked away from him.

I put my family through a tremendous amount of pain and sorrow through my actions that day in 2007. I also put my neighbor and his family through a lot of agony that they don't deserve. I made a terrible mistake, accept the responsibility for [it], and have taken my punishment. I have tried to put the whole thing in the past, learn from it, and move on with my life. My family has given me a second chance and has moved on. My family and I wish to ask that I am not punished for this again.

Teaching kids is my passion. I have tried to make a positive difference in the student's life that I see every day [sic]. I will continue to work hard towards creating a positive learning environment for the students.

Respondent testified that the problems with his neighbor began in 2003-2004. Respondent had a shed on his property which formed part of the property line in his yard. Respondent took down the shed and his neighbor came to respondent's home with a brick in his hand and started screaming and swearing at him for tearing down the shed without telling the neighbor. Respondent called 911 about the neighbor's behavior and a sheriff's deputy took a report from respondent and spoke to the neighbor. Thereafter, for the next several years there were between 50 and 100 times when the neighbor would swear at, or make obscene gestures at, respondent. Once in 2007, when respondent was driving down the street, the neighbor jumped in front of respondent's vehicle and started swearing at him to slow down.

On the night of the incident that led to respondent's conviction, respondent was taking his trash to the alley and the neighbor began swearing at him. At that point respondent had enough and struck him with his fist. Respondent testified that he had been building a fence and part of the trash in his hands was a 2x4 which he used to strike the neighbor's truck. Respondent denied ever leaving the scene and coming back with the 2x4; he was holding it the entire time. Respondent denied swearing at the neighbor or telling the neighbor that he would never be done with him. He never saw the neighbor's family present to witness the altercation. The two fought and respondent called the police and he was arrested. Respondent did not contest the criminal charges. He took responsibility for his actions and pled guilty to battery. Respondent has complied with all criminal probation terms.

Associate Superintendent Morr testified that when she received the CTC's letter, she schedule a meeting with respondent. Associate Superintendent Morr had never met respondent before that meeting. Associate Superintendent Morr stated that her concerns stemmed from the fact that respondent not only left the scene and returned, but also that the neighbor's wife and daughter witnessed the incident. Associate Superintendent Morr asked respondent if he had pled guilty to battery of a neighbor and he looked at the floor and said, "Yes." She informed him that they would need to discuss what would happen if CTC revoked or suspended his credential because, he could not be able to teach in the classroom, he would not be on paid status, and he would not be allowed to work in the district. Associate Superintendent Morr recalled stopping while talking and getting no response and no eye contact from respondent. She asked respondent if he had any questions and he did not. He asked no questions during their meeting, just listened and then left when the meeting was over. Associate Superintendent Morr found it quite odd. Thereafter, CTC suspended respondent's credential from September 11-17, 2010, and he was on unpaid status with the district from September 13-17, 2010.

On cross-examination Associate Superintendent Morr acknowledged that when she received the CTC letter, respondent was teaching at Palmquist Elementary School. Respondent's performance evaluation for the 2009-2010 school year from that site, which was the only performance evaluation introduced at this hearing, noted that respondent met all six California Standards for the Teaching Profession. The Evaluator's Comments section, completed by the principal at Palmquist Elementary School, noted that respondent "was successful in defining students' fine motor skills as outlined by the California standards for P.E. His attention to detail has been evident in expectations he has set forth for his students." The Palmquist Elementary School principal further noted in her evaluation that respondent "was new to our school but has worked with administration to further build our school's Peaceful Playground program.⁴ Thank you for your continued hard work!" Respondent

⁴ Respondent testified that he implemented the Peaceful Playground program at Palmquist Elementary School to help students attain a peaceful playground. Respondent was in charge of implementing the plan for the entire school.

received an overall performance evaluation of satisfactory, the highest rating available on the evaluation.

Associate Superintendent Morr admitted on cross-examination that she could not recall if she introduced the Palmquist Elementary School evaluation to the Governing Board during closed session, but she believed the Governing Board members would have asked questions about respondent's overall performance in the district. However, upon further questioning, Associate Superintendent Morr admitted that she could not recall whether the facts referenced in the Palmquist Elementary School evaluation were discussed in closed session. She further acknowledged that she did not hand the evaluation to the Governing Board and did not recall being asked about respondent's performance at Palmquist Elementary School. A review of the documents presented to the Governing Board indicated that respondent's Palmquist Elementary School performance evaluation was not provided. During a break in the testimony, the district was given an opportunity to determine whether or not the evaluation had been given to the Governing Board, and Associate Superintendent Morr testified that it had not been provided. Associate Superintendent Morr also confirmed that respondent's letters in response to his letters of reprimand were also not provided to the Governing Board.

When questioned why she did not provide the performance evaluation or contact the Palmquist Elementary School principal to determine whether the behavior that led to respondent's conviction was being exhibited at school, Associate Superintendent Morr testified that "cumulatively we had enough" with the El Camino High School incidents. She explained that she felt that the El Camino High School incidents were consistent with the CTC report, although she acknowledged that the Palmquist Elementary School evaluation was inconsistent with that conclusion. Associate Superintendent Morr also admitted that she never received any complaints about respondent from any staff members at Palmquist Elementary School.

Respondent testified that when he met with Associate Superintendent Morr she informed him that he was going to be suspended if CTC suspended his credential and when she issued her suspension directive, he complied with it. Respondent explained that there was no reason to debate the situation with her, as he knew he was guilty of the crime and he accepted his punishment. During cross-examination, attempts were made to impeach respondent with his deposition testimony and the CTC letter. However, the questions posed to respondent at his deposition were not identical to those posed at trial and respondent's responses at trial did not contradict his answers given at his deposition. It was not established that respondent provided inconsistent or untruthful testimony at either his deposition or this hearing. Moreover, the neighbor, his family, the sheriff's deputy, and the CTC investigator did not testify. The sheriff's report and the criminal court documents were not introduced. Respondent's testimony was the only testimony about the incident that was offered and there was no direct evidence introduced to refute it. Moreover, given respondent's presentation at this hearing - quiet, passive, and reserved - his version of

the events that transpired that evening was credible. Moreover, even during the very vigorous cross-examination that respondent endured for several hours, his demeanor did not change, which further supported the Commission's determination that he was not an aggressive individual.

Respondent testified that while teaching at Palmquist Elementary School, he implemented the Peaceful Playground program. He applied his adaptive PE credential and helped students with challenges and in special education classes. There were 25 teachers at the school and weekly staff meetings. There were never any complaints from Palmquist Elementary School employees or students about respondent. The principal liked respondent's work and gave him a good performance evaluation. Respondent testified that he collaborated with staff members while at Palmquist Elementary School. He identified staff members with whom he collaborated. Respondent testified about the various programs he introduced and assistance he gave to Palmquist Elementary School teachers. No evidence refuting respondent's testimony was introduced.

To his credit, respondent disclosed his conviction on his CTC renewal application. No evidence was introduced to suggest that respondent was required to disclose his conviction any time before respondent renewed his credential with CTC. While the district's position that it would have liked to have known about the conviction in 2007 was understandable, no evidence was introduced to suggest that respondent was required to notify the district of his conviction. It simply cannot be concluded that respondent ever hid that conviction from the district. The evidence established that respondent honestly disclosed the conviction when he was requested to do so, namely, on his CTC renewal application. Additionally, respondent's letter to CTC and his demeanor during his meeting with Associate Superintendent Morr corroborated respondent's testimony that he never denied his conviction nor made excuses for it. In fact, his demeanor while meeting with Associate Superintendent Morr demonstrated that he understood that he would receive a consequence for his conviction and he never made any attempts to minimize it, deflect blame, or make excuses for it. He simply quietly accepted his consequences when meeting with Associate Superintendent Morr.

The Commission unanimously determined that the evidence did not establish that respondent engaged in improper and threatening interactions with students and staff, committed immoral conduct, was unfit for service, persistently violated or refused to obey school and/or district rules, exhibited a pattern of willful failure to complete his professional duties, had a history of misconduct, or that that any workplace violence or threats had occurred. The remoteness in time of the conviction was such that the evidence did not establish that respondent is an aggressive individual or someone to be feared. In light of respondent's testimony about the incident, the evidence did not demonstrate that respondent's conduct was immoral. No witnesses to the incident testified other than respondent. His explanation of the events was credible. While it may be beneficial to respondent to receive some anger

management counseling because of the altercation, the passage of time, without any further incident, demonstrated that respondent was unlikely to engage in this type of behavior again. Additionally, no evidence was introduced that suggested that the circumstances between respondent and his neighbor are in any way similar to the circumstances that exist at respondent's school sites, making it a tenuous stretch to conclude that respondent will be violent in the workplace, especially in light of the Palmquist Elementary School performance evaluation praising respondent for his Peaceful Playground program. The evidence was insufficient to sustain the charges alleged.

15. On February 1, 2012, El Camino High School Vice Principal Barry Tyler met with respondent to go over his mid-year reflections. During that meeting, respondent advised Vice Principal Tyler that he was worried about his personal safety. Vice Principal Tyler reported this to Principal Rowe. The two administrators went to talk to respondent who was unable to provide specific details of why he felt unsafe.

Vice Principal Tyler testified that one of his duties was to oversee and support the PE department. He testified that he had a meeting with respondent at the beginning of the school year to review expectations and goals with respondent. However, when he was shown the Professional Growth Plan that was signed on November 16, 2011, Vice Principal Tyler admitted that he did not meet with respondent at that time, because respondent was out on medical leave⁵ when school first began. Vice Principal Tyler could not recall the specifics of that November meeting with respondent and nothing in the Professional Growth Plan references anything about respondent's failure to attend PLCs or collaborate with colleagues. In fact, the only goal listed was, "To make certain that students...are exposed to and learning the California Standards for PE. To assist students in achievement of maximum development and growth of gross motor skills for their grade level development."

On February 1, 2012, Vice Principal Tyler met with respondent in the vice principal's office to conduct the mid-year evaluation. Vice Principal Tyler recalls going through the Evaluator's Request for Additional Information with respondent. Respondent was taking notes; the two had minimal discussions. Nothing specifically about the meeting stood out to Vice Principal Tyler until he got to Step Two, the area containing the evaluator's specific concerns. Vice Principal Tyler went over section 6.5,⁶ which indicated that respondent "has failed to participate in regularly scheduled department and PLC meetings - unless absent, [respondent] must attend and actively participate in regularly scheduled PLC and department meetings." Respondent

⁵ Respondent suffered extensive injuries in a bicycle accident and was out on medical leave for several months.

⁶ Only section 6.5 was relevant to the charges pled against respondent.

testified that before this meeting, respondent was never told of any alleged failures to participate in or, attend PLCs. Respondent was surprised by the criticism because he had attended all PLCs. Vice Principal Tyler testified that when he went over this section with respondent, respondent advised that he had not been going to staff or department meetings because no one listened to him or took him seriously. Vice Principal Tyler informed respondent that he would attend the PLC meetings with him so that there would be clear expectations of how everyone was to conduct themselves at the meetings. Respondent told Vice Principal Tyler that he was not going to attend the meetings even if Vice Principal Tyler attended.

Vice Principal Tyler testified that he believed he attended several PLCs and specifically discussed respondent's concerns with the PE staff. Respondent was not present at the PLCs that Vice Principal Tyler attended. Even though respondent said he would not go to the February 1, 2012, PLC, Vice Principal Tyler attended it and discussed with PE staff the appropriate interaction that should take place at the meeting. Vice Principal Tyler also told the PE staff about respondent's safety concerns to which the PE staff replied that they had just as many safety concerns regarding respondent and theirs were to a much greater degree. The PE staff discussed their concerns regarding the failure to have a relationship, interaction, or communication with respondent.⁷

After respondent advised Vice Principal Tyler of his safety concerns, Vice Principal Tyler notified Principal Rowe. The two administrators decided to go down to the track to talk to respondent. When Principal Rowe asked respondent to explain his safety concerns, respondent replied with words to the effect, "Kind of like right now how you are making me feel unsafe. You are stepping in my personal space." Principal Rowe responded with words to the effect, "What do you mean? What are you talking about?" Vice Principal Tyler recalled that respondent was agitated, he was not hostile, but he had an agitated type of response. Neither respondent nor Principal Rowe raised their voices during the discussion. Vice Principal Tyler testified that Principal Rowe was approximately three feet away from respondent during the encounter. Vice Principal Tyler recalled that respondent stepped back while they were talking. Neither Principal Rowe nor Vice Principal Tyler stepped towards respondent during the discussion. Vice Principal Tyler did not recall that respondent gave any specific reasons as to why he felt fearful. Vice Principal Tyler was at a follow-up meeting with respondent on February 2, 2012. The district's attorney, Dan Shinoff, attended the meeting, during which, they attempted to gain some "clarity of understanding" from respondent regarding his safety concerns.

⁷ However, based upon Vice Principal Tyler's testimony it was clear that many of the PE staff's concerns were based upon their knowledge of incidents that were beyond the relevant Education Code time limitations and were excluded by this court's order.

On cross-examination Vice Principal Tyler testified that he did not know when he inserted the sentence in the Evaluator's Request for Additional Information regarding respondent's being fearful for his safety with PE staff. The document was signed by both respondent and Vice Principal Tyler on February 1, 2012, so he may have been typing during his meeting with respondent as they were reviewing the document. During that meeting respondent and Vice Principal Tyler also signed the Mid-Year Goal(s) Reflection in which respondent noted that he had "attended collaborative meetings."

Vice Principal Tyler testified that Ms. Farrell would specifically email him notes regarding those in attendance at meetings. No formal attendance was taken or records maintained. Vice Principal Tyler testified that if he could look at those emails he could determine whether respondent missed "a lot of meetings," but the emails were not produced at the hearing. Vice Principal Tyler admitted on cross-examination that none of the goals in respondent's professional growth plan required him to attend PLCs or collaborate with colleagues. Vice Principal Tyler also admitted that the midyear review is more of an opportunity for reflection. Vice Principal Tyler agreed that he never did any formal observations of respondent's classroom; it was more an informal type of observation and reflection of things that he saw and practices that need to be improved.

The evidence established that the Evaluator's Request for Additional Information that Vice Principal Tyler was reviewing with respondent when respondent made his safety concern allegations, was only used as the beginning step in the evaluation process. It merely requested additional information; it was not a final evaluation of respondent. In fact, at no point was an evaluation of respondent ever performed at El Camino High School. Moreover, in the Mid-Year Goal(s) Reflection signed by respondent and Vice Principal Tyler on February 1, 2012, respondent noted that he has attended collaborative meetings and he noted ways that his teaching had positively impacted his students.

Principal Rowe testified that when he was hired to replace Principal Daris, he and Principal Daris met to discuss various school issues. Principal Daris identified respondent as an employee who needed to be monitored. Principal Rowe admitted that respondent was never provided any documentation advising him that they would be focusing on him during the school year. Principal Daris never showed Principal Rowe the personnel file maintained at the site regarding respondent and Principal Rowe never reviewed such a file. On cross-examination Principal Rowe agreed that there was no documentation of any meetings held with respondent to express the goals or expectations that respondent was to meet during the 2011-2012 school year. He agreed that he never sat down with respondent to discuss goals or expectations and no documentation of any such writings, purportedly given to respondent, were introduced.

Principal Rowe testified that one concern was the number of referrals respondent was issuing. Another concern was respondent's failure to collaborate with colleagues, although there were no specifics, just "a general feeling" of respondent not getting along with his colleagues. Vice Principal Tyler advised Principal Rowe about concerns regarding respondent's classroom management and a sense that students were not being appropriately monitored. Vice Principal Tyler's job was to evaluate respondent during the 2011- 2012 school year and they were coming to the point where they would be doing formal observations. During the mid-year review in February respondent told Vice Principal Tyler that he did not feel safe. This was an immediate concern to Principal Rowe because he is responsible for the safety of everyone on campus. As soon as Vice Principal Tyler told him about respondent's comments, Principal Rowe went right down to talk to him to learn firsthand what his fears were and to determine why he was concerned about his safety. Principal Rowe thought it was odd that respondent had never expressed those concerns before the time that Vice Principal Tyler conducted the mid-year review as part of respondent's performance evaluation. Because the evaluation process became sidetracked with the safety issue, a written evaluation was never performed and respondent was no longer teaching on-site before a written evaluation could be completed. As such, the only performance evaluation this Commission had before it was the Palmquist Elementary School one.

Principal Rowe testified that he stood about five to 10 feet away from respondent and asked him what his safety concerns were. That testimony contradicted Vice Principal Tyler's testimony that Principal Rowe stood three feet from respondent. Respondent was unable to provide any details, which Principal Rowe thought was odd. Principal Rowe wanted to know what he could do to make respondent comfortable and respondent's inability to verbalize his concerns baffled him. During their meeting Principal Rowe was very aware of the personal space between them. Principal Rowe took a step back while talking because respondent appeared so uncomfortable. Principal Rowe was at least three to five feet away from respondent. He could not touch him with his hands. Principal Rowe testified that there was a PLC meeting that day and he told respondent that he needed to attend it as there were going to be important discussions taking place. Respondent reiterated that he was fearful for his safety and advised that he would not attend the PLC.

Principal Rowe testified that at this point he was primarily just trying to discern what the issue was for respondent. He asked respondent to put his concerns in writing by the following morning. Principal Rowe returned to his office to strategize about how to proceed. He and Vice Principal Tyler discussed what to do. Principal Rowe drafted a letter to respondent on February 1, 2012, summarizing what had taken place and noting that Principal Rowe found the conversation with respondent and Vice Principal Tyler "to be very unusual" because respondent "proceeded to accuse me of making you feel unsafe and when I asked you why, you informed me that I was in your personal space while standing five feet away on the open track area." In the letter Principal Rowe confirmed that he needed respondent "to provide a written

statement by 7:30 a.m. tomorrow morning explaining exactly how your personal safety is being threaten [sic]." The letter also noted that during their "brief meeting" Principal Rowe offered to have Vice Principal Tyler accompany respondent to the PLC that day, but that respondent advised that he was taking time off for personal business. Because of respondent's concerns, Principal Rowe arranged for security to accompany respondent on campus. Principal Rowe recalled that at some point there was a shift from respondent expressing concern that he was fearful of the students to his also being fearful of the staff and administration.

The following morning, respondent provided a note which simply stated, "To Whom It May Concern, I have fears for my safety with my physical education department members and with students at ECHS." Principal Rowe informed respondent that this note was insufficient. It would not help Principal Rowe investigate respondent's complaints. Principal Rowe drafted a letter dated February 2, 2012, advising respondent that his written statement was "very inadequate and provides no details on which I can address and/or take action." The letter also summarized his meeting with respondent on February 2, 2012, where Principal Rowe tried to get more details. Respondent told him that the staff makes him "uncomfortable," that they are "condescending, confrontational and aggressive," and that respondent claimed it was "hard to explain." When pressed for specific dates, respondent told Principal Rowe that it was hard to describe and then claimed Principal Rowe was making respondent feel unsafe. Principal Rowe's letter further noted that respondent indicated that he was not attending the PLC because his colleagues made him feel unsafe, but in his letter and during the discussions with Principal Rowe, respondent only referred to how the students made him feel unsafe. Principal Rowe advised that based upon the lack of details and evidence, he was denying respondent's request for a substitute teacher but had assigned campus security to be with or near respondent for the day.

Principal Rowe testified that while he was investigating this issue, Ms. Ferrell told Principal Rowe that she felt uncomfortable and was afraid to be around respondent. Ms. Ferrell expressed concern that respondent was inconsistent, that he had a lack of eye contact, a lack of participation with colleagues and he was unstable. Ms. Kilpatrick also complained to Principal Rowe about the testing on the track incident. Ms. Kilpatrick was frustrated with respondent's lack of cooperation regarding her attempts to schedule her student testing. Principal Rowe admitted that he has nothing in writing from these teachers regarding their concerns. He also admitted that he never advised respondent that PE staff members had concerns regarding him. Principal Rowe admitted that two weeks before the meeting with Vice Principal Tyler, respondent requested a transfer. Principal Rowe also admitted that he never interviewed respondent regarding his job performance, as he was relying on input from the vice principal.

Principal Rowe admitted on cross-examination that on February 2, 2012, he met with respondent, the district's attorney Dan Shinoff, respondent's union

representative, and Associate Superintendent Moor. They were trying to get more information from respondent regarding his safety concerns. However, respondent did not provide much information. He gave short concise responses. They had to draw answers out of him. Principal Rowe acknowledged that respondent appeared nervous and apprehensive during the meeting. Principal Rowe believed that respondent's concerns were real. Respondent was fearful for his safety and fearful of returning to the site. Within three days of expressing his safety concerns, respondent went on leave.

Respondent explained that some of his concerns for his safety were that students had thrown rocks, Gatorade bottles, shoes, and locks at him. One time a student threw a rock and hit respondent but Vice Principal Tyler would not transfer the student out of respondent's class. PE staff did nothing to help respondent with these issues. Respondent testified that he is somewhat passive, and the male PE teachers would stand in the doorway and not move out of the way, they would sort of square up on him, stare him down, and this intimidated him. Respondent explained that in the summer of 2011 he was in a bicycle accident and broke his hip. He was on medical leave until November. Respondent felt that the atmosphere had gotten stronger against him when he returned from his hip injury rehabilitation in the fall of 2011 but he did not know why. Respondent testified that when they met, Vice Principal Tyler asked respondent if he wanted to add anything to the mid-year review and respondent told him about his safety concerns.

Respondent testified that when Vice Principal Tyler and Principal Rowe came to his PE class, Principal Rowe stood approximately 18 inches away from respondent and told respondent that he had heard that respondent was not attending PLCs and was "skipping out." Respondent backed up and Principal Rowe stepped towards him so that he was approximately three inches away from respondent. Respondent felt uncomfortable and Principal Rowe told him that he wanted see him in his office during respondent's prep period. Respondent advised that he would be there. Respondent felt intimidated by Principal Rowe. Respondent did not feel that Principal Rowe was in his corner.

Principal Rowe assigned a security person to follow respondent around campus and respondent believes that the individual attended a PLC with respondent. Respondent thinks Vice Principal Tyler told him not to go to the PLC on February 1, 2012. In any event, a few days later, respondent was placed on leave and February 12 or 13, 2012, was his last day as a teacher on that campus. Respondent testified that the February 2, 2012, follow-up letter from Principal Rowe contained some inaccuracies. Respondent felt that Principal Rowe was a little aggressive and confrontational during their meeting, but respondent did not feel unsafe. The reason respondent's letter was so brief was because he only just arrived at work and Principal Rowe demanded specific dates and times of incidents even though respondent told him he did not have those specifics. During the 2010-2011 school year respondent never felt fear. It was after he returned from his hip injury that he had concerns for

his safety. He felt that his colleague's behavior was getting "stronger" against him, making him feel more intimidated. He admitted he never talked to them about their behavior.

The Commission unanimously determined that the evidence did not establish that respondent engaged in improper and threatening interactions with students and staff, committed immoral conduct, was unfit for service, persistently violated or refused to obey school and/or district rules, exhibited a pattern of willful failure to complete his professional duties, had a history of misconduct, or that that any workplace violence or threats had occurred. Insufficient evidence was introduced to establish that any of the events that transpired regarding the mid-year review process rose to the level of constituting grounds for dismissal. The evidence was insufficient to sustain the charges alleged.

16. The district alleged that respondent had a threatening and improper interaction with Ms. Kilpatrick. Kilpatrick was doing a final mile test with her students and had emailed the PE department that she needed to use the track to time the mile. Respondent did not reply to that email. When Ms. Kilpatrick arrived at the track, respondent's students were using it. Ms. Kilpatrick asked respondent if she could use the track, but he did not respond and walked away from her. When she approached him a second time and asked again about using the track, respondent inquired, "Are you asking me or are you telling me?" When Ms. Kilpatrick stated that she was merely asking him, respondent replied, "No," and walked away. Ms. Kilpatrick felt threatened and intimidated by respondent's behavior.

Ms. Kilpatrick testified that she had sent an e-mail to staff advising that she wanted to assess her students on the track. She did not hear back from respondent but when she arrived with her class, respondent's class was using the track. Because so many students were on the track, it was difficult for her to assess her students. After class, she went to speak with respondent, and called his name several times but he did not respond. She finally caught up with him and when she asked him if she could assess her students on the track, respondent asked if she was asking him or telling him. Ms. Kilpatrick replied that she was asking him and he responded, "No." For the rest of the day, her students had to dodge respondent's students in order for her to assess them. On cross-examination Ms. Kilpatrick admitted that she did not know if respondent received her email asking to use the track. Ms. Ferrel and Principal Daris admitted that respondent did not have, or could not access, his emails.

Respondent testified that Ms. Kilpatrick asked him if his students could run on the concrete instead of the track and because of his concerns of students running on concrete, he did not want to do that but he told Ms. Kilpatrick that he would try to keep his students out of her way so that she could do her testing. Respondent testified that he thought Ms. Kilpatrick's request that he keep his students out of her way so that she could test her students was a fair request and he did try to accommodate her.

The Commission unanimously determined that the evidence did not establish that respondent engaged in improper and threatening interactions with students and staff, committed immoral conduct, was unfit for service, persistently violated or refused to obey school and/or district rules, exhibited a pattern of willful failure to complete his professional duties, had a history of misconduct, or that that any workplace violence or threats had occurred. The evidence did not establish that respondent ever received Ms. Kilpatrick's email. The evidence was insufficient to conclude that the exchange between the two was improper or threatening. The evidence was insufficient to sustain the charges alleged.

17. The district alleged that respondent's improper and threatening interactions with staff and students resulted in an inordinate number of transfers, causing disruptions for both students and staff at multiple school sites. However, no evidence to support this allegation was introduced. This charge was not established.

18. The district alleged that respondent's behavior violated District Board Policy 1313 Civility, 4119.21 Professional Standards, and 5145.3 Students.⁸ Associate Superintendent Morr testified that respondent violated these policies due to his behavior with students, parents and staff as outlined above.

District Board Policy 1313 Civility provides that the district "wishes to provide an orderly and safe learning environment in which students and adults feel comfortable." The policy identifies 11 activities which constitute uncivil conduct. The evidence did not establish that respondent engaged in any of these 11 activities. Moreover, Ms. Ferrel had never heard of any civility policies in the district. She had never before seen any of the district policies that were introduced at this hearing. Ms. Ferrel never prepared any documents claiming that respondent violated any of these policies. Principal Daris testified that he did not give respondent the district policy regarding civility. The Commission unanimously determined that the evidence did not establish that respondent violated this policy.

District Board Policy 4119.21 Professional Standards provides that district employees are "to maintain the highest ethical standards, exhibit professional behavior, follow district policies and regulations, and abide by state and federal laws." The Commission unanimously determined that the evidence did not establish that respondent violated this policy.

District Board Policy 5145.3 Students provides him that the district desires to ensure equal opportunities for all students and prohibits discrimination, intimidation, or harassment of any student by any employee. The Commission unanimously determined that the evidence did not establish that respondent violated this policy.

⁸ The district also alleged that respondent's conduct violated District Administrative Regulation 4112 (marked as Exhibit 24) but that regulation was not introduced into evidence and no findings were made thereon.

The Commission unanimously determined that the evidence did not establish that respondent persistently violated or refused to obey district policies.

19. The district alleged that in May 2012, when respondent was on a leave of absence, he was unavailable on multiple occasions to the district and its agent, Keenan and Associates, an investigation firm hired by the district. The district asserted that this constituted a willful failure by respondent to complete his professional duties.

Respondent testified that he was contacted by telephone by an individual who claimed to be an investigator. Respondent rightfully did not want to disclose personal information over the telephone. The Commission unanimously determined that respondent's actions did not constitute a willful failure by respondent to complete his professional duties.

Leave Issue

20. Associate Superintendent Morr testified that respondent's safety concerns were taken very seriously. During this same time-frame respondent also had filed a worker's compensation claim for stress. Associate Superintendent Morr explained that the district's worker's compensation broker automatically puts stress claims on hold and requires employees to use their sick pay until the claim is accepted or denied. Respondent's worker's compensation claim was denied but Associate Superintendent Morr changed his time to administrative leave with pay instead of sick leave because the district was investigating his safety concerns. After February 2012, respondent continued to be out on sick leave with notes from his physician. Respondent remained out on leave through the Fall of 2012. Associate Superintendent Morr recalled that January 2013 was the last time respondent was eligible for his 50 percent pay and if his physician did not return him to work, he was not eligible to return to work. However, it appeared from the evidence that respondent's physician did provide the necessary documentation that would enable him to remain on sick leave and/or return to work, and, absent this dismissal action, it is unclear why respondent was not returned to work when cleared by his physician.

On cross-examination Associate Superintendent Morr acknowledged that respondent was on sick leave during the 2011-2012 school year because he had broken his hip in a bicycle accident. She never checked to see if his medical appointments or physical therapy appointments occurred on Mondays or Fridays. On February 13, 2012, she signed the document placing respondent on administrative leave for the following reason, "Pending interactive meeting." Associate Superintendent Morr testified the pending interactive meeting reason was used because when an employee claims a disability and needs modifications to perform the job, there must be an opportunity to have a discussion with the individual regarding reasonable accommodations. The district wanted to meet with respondent to see if he was seeking accommodations. Associate Superintendent Morr was unaware of

whether there were any documents indicating when respondent's leave status was changed.

In May 2012, the district sent notices to employees requesting them to indicate if they intended to remain in the district employment. Respondent signed the document on June 21, 2012, indicating his intent to remain a district employee.

Respondent filed a request for leave of absence to begin on August 20, 2012, due to medical reasons. He requested paid sick leave which was approved by district administrators on August 20, 2012, and August 30, 2012. On November 16, 2012, Associate Superintendent Morr sent a letter to respondent advising him that the Governing Board approved his unpaid leave of absence effective August 20, 2012, through a date to be determined. However, at hearing, Associate Superintendent Morr testified that the word unpaid was written in error, the Governing Board approved respondent being on paid leave of absence. For the remainder of the 2012-2013 school year respondent was on administrative leave.

Associate Superintendent Morr testified that the leave request did not factor into the district's decision to dismiss respondent. Associate Superintendent Morr testified that she recommended respondent's dismissal because she is responsible for staff and school safety and after the many incidents involving respondent, she had concerns. However, many of the incidents are beyond four year time limitation proscribed by the Education Code and cannot be considered by the Commission.

LEGAL CONCLUSIONS

Due Process under the Education Code

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

Education Code section 44944, subdivision (b) requires that the dismissal hearing be conducted by a three-member Commission on Professional Competence. Two members of the Commission must be non-district teachers, one chosen by the employee and one by the district, and the third member of the Commission must be an administrative law judge from the Office of Administrative Hearings.

When a school board recommends dismissal for cause, the Commission may only vote for or against it. The Commission may not dispose of a charge seeking dismissal by imposing probation or an alternative sanction. (Ed. Code, § 44944, subd. (c)(1)-(3).)

Burden and Standard of Proof

2. The standard of proof in a teacher dismissal proceeding is a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1039-1040.) This standard requires a party to convince the trier of fact that the existence of a fact is more probable than its nonexistence. (*Redevelopment Agency v. Norm's Slauson* (1985) 173 Cal.App.3d 1121, 1128.)

Relevant Statutory Authority

3. Education Code section 44932 provides the grounds for dismissing a permanent employee. Subdivision (1) authorizes dismissal for immoral or unprofessional conduct. Subdivision (5) authorizes dismissal for evident unfitness for service. Subdivision (7) authorizes dismissal for the persistent violation of or refusal to obey the school laws or reasonable regulations.

Relevant Judicial Authority

Unprofessional Conduct

4. The seminal case for teacher dismissals is *Morrison v. State Board of Education* (1969) 1 Cal.3d 214. There the Supreme Court held that where charges of unprofessional conduct are raised in teacher dismissal cases, the applicable standard is whether the person is fit to teach. The *Morrison* criteria also apply where “evident unfitness for service” is at issue. The criteria must be analyzed to determine, as a threshold matter, whether the cited conduct indicates an unfitness for service. (*Id.*, at 229.)

5. Unprofessional conduct has been defined as conduct, measured by the *Morrison* factors, which indicates unfitness to teach. (*Board of Education v. Jack M.* (1970) 19 Cal.3d 691, 696-697; *Perez v. Commission on Professional Competence* (1983) 149 Cal.App.3d 1167, 1173-1174.)

Evident Unfitness to Teach

6. The applicable standard or determinative test in teacher discharge cases is whether the person is fit to teach. “Fitness to teach” is probably a question of ultimate fact. (*Board of Education v. Commission on Professional Competence* (1980) 102 Cal.App.3d 555, 560-561.)

7. Evident unfitness for service under Education Code section 44932, subdivision (a)(5), is established by conduct demonstrating that the teacher is “clearly not fit, not adapted or suitable for teaching, ordinarily by reason of temperamental defects or inadequacies.” (*Woodland Joint Unified School District v. Commission on*

Professional Competence (1992) 2 Cal.App.4th 1429, 1444.) As a threshold matter, the *Morrison* criteria must be examined to ascertain whether the conduct in question indicates unfitness for service. “If the *Morrison* criteria are satisfied, the next step is to determine whether the ‘unfitness’ is ‘evident,’ i.e., whether the offensive conduct is caused by a defect in temperament.” (*Id.*, at 1445.)

8. In *Board of Education v. Jack M.*, *supra*, the court delineated the process to be considered in determining fitness to teach. This opinion upheld the standard established in *Morrison* that a discharged teacher is entitled to a fitness hearing in which not only his conduct but also these factors are analyzed: (1) likelihood of recurrence of the questioned conduct; (2) the extenuating or aggravating circumstances, if any; (3) the effect of notoriety and publicity; (4) impairment of teachers’ and students’ relationships; (5) disruption of educational process; (6) motive; (7) proximity or remoteness in time of conduct.

Persistent Violation of or Refusal to Obey Laws

9. The word “persistent” is defined by lexicographers as “refusing to relent; continuing, especially in the face of opposition . . . stubborn; persevering . . . constantly repeated.” (*Governing Board of the Oakdale Union School District v. Seaman* (1972) 28 Cal.App.3d 77, 82.) Subdivision (7) pertains to unintentional as well as intentional transgressions, and hence the Legislature has decreed that a single violation is not sufficient to warrant dismissal, apparently to allow for correction; “it is the persistent disregard” of school rules that the subdivision is designed to regulate. (*Id.* at.84.)

10. A violation of Education Code section 44932, subdivision (a)(7) must also be established by reference to the *Morrison* factors. If unfitness to teach is shown, then the District must further establish that employee’s refusal to follow the laws or regulations was “persistent,” i.e., “stubborn and continuing.” (*San Dieguito Union High School District v. Commission on Professional Competence* (1985) 174 Cal.App.3d 1176, 1183.) Isolated incidents or incidents involving an issue unresolved over a period of time are not generally considered “persistent.” (*Bourland v. Commission on Professional Competence* (1985) 174 Cal.App.3d 317.)

Cause Does Not Exist to Dismiss Respondent

11. Cause does not exist to dismiss respondent pursuant to Education Code section 44932, subdivision (a), subsection (1), because respondent’s conduct did not constitute unprofessional conduct.

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12. Cause does not exist for dismissal pursuant to Education Code section 44932, subdivision (a), subsection (5), because respondent's conduct, has not negatively impacted his ability to function as teacher in the district; thus, making him unfit for service in the district, as defined by the California Supreme Court in *Morrison, supra*.

13. Cause does not exist for dismissal pursuant to Education Code section 44932, subdivision (a), subsection (7), because respondent's conduct did not demonstrate a persistent violations of laws, rules, regulations and/or policies related to education.

ORDER

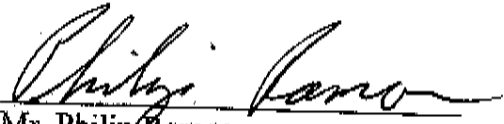
Respondent's appeal of his dismissal from employment with the Oceanside Unified School District is granted. The district's request to dismiss respondent is denied. Respondent shall not be dismissed from the district.

Dated: December 17, 2013.



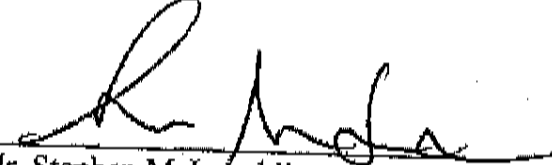
Mary Agnes Matyszewski
Administrative Law Judge
Office of Administrative Hearings

Dated: December 30, 2013



Mr. Philip Ramos
Commission Member

Dated: December 18, 2013



Mr. Stephen McLaughlin
Commission Member