

BEFORE A
COMMISSION ON PROFESSIONAL COMPETENCE
FOR THE JURUPA UNIFIED SCHOOL DISTRICT

In the Matter of the Dismissal of:

ALLEN UMBARGER,

A Permanent Certificated Employee,

Respondent.

OAH No. 2017061019

DECISION

On November 7, 8, and 9, 2017, a Commission on Professional Competence (Commission) heard this matter in Jurupa Valley, California. The Commission consisted of the following members: Adam L. Berg, Administrative Law Judge, Office of Administrative Hearings (OAH); Scott Richards, Jr.; and Sue Newton.

Kerrie McNally, Attorney at Law with the law firm of Adams, Silva & McNally, LLP, represented complainant, Tamara Elzig, Deputy Superintendent of Personnel Services, Jurupa Unified School District (district).

Carlos Perez, Attorney at Law with the law firm of Reich, Adell & Cvitan, represented respondent, Allen Umbarger, who was present throughout the hearing.

The record was closed and the matter submitted for decision on November 9, 2017.

SUMMARY

Respondent is employed by the district as a high school teacher. A preponderance of evidence established that respondent showed full-length popular movies in class, briefly left his class under the supervision of college tutors while he used the restroom, made two inappropriate racially-related comments to students, nicknamed a student “Dimples,” and posted a comment to a colleague’s Facebook post that arguably contained some negative commentary concerning immigrants and others who supported a national protest event called “A Day Without Immigrants.” However, the district did not establish by a preponderance of the evidence that respondent’s conduct constituted immoral conduct or evident unfitness for service. Accordingly, applicable law does not permit his dismissal on those grounds.

FACTUAL FINDINGS

Procedural Background

1. Respondent is a certificated health teacher who was assigned to Rubidoux High School (RHS) for the 2016-2017 school year.
2. On February 17, 2017, complainant placed respondent on paid administrative leave. On May 1, 2017, complainant provided respondent with a Draft Notice of Intent to Dismiss and Immediately Suspend Without Pay and the corresponding Statement of Charges. The letter attached to the above-referenced documents provided respondent with information concerning his right to a *Skelly* conference.
3. On May 9, 2017, respondent, through counsel, declined to participate in the *Skelly* conference.
4. On May 11, 2017, Dave Doubravsky, the Assistant Superintendent of Educational Services for the district, wrote a letter to respondent representing that the district had considered a letter of support and student petition, but would still be seeking termination of respondent's employment. On that same date, complainant provided respondent with a letter stating she would present the Notice of Intent to Dismiss and Suspend Without Pay and Statement of Charges (Notice of Intent) to the District Governing Board (board) on May 15, 2017.
5. On May 15, 2017, complainant signed the Notice of Intent, alleging that respondent was subject to termination for immoral conduct and evident unfitness for service, in violation of Education Code sections 44932, subdivisions (a)(1) and (a)(6).¹ In support of the two charges, complainant alleged the following:

- From the 2014-2015 through 2016-2017 school years, respondent used class time to show full-length feature films that were not related to the curriculum or approved for use in the classroom.
- In February 2015, respondent left his class unsupervised while he used the restroom.

¹ At the conclusion of the Notice of Intent, complainant alleged that respondent's conduct constituted immoral conduct, dishonesty, and evident unfitness for service. Although, dishonesty can serve as an independent basis for dismissal (Ed. Code, § 44932, subd. (a)(4)), this section was not listed in the statutory causes for termination. Therefore, dishonesty was not considered as an independent basis for dismissal, although the allegation in paragraph 34, wherein complaint alleged respondent was dishonest, was considered in its relationship to the enumerated charges of immoral conduct or evident unfitness for service.

- During the 2015-2016 school year, respondent used derogatory racial slurs to converse with students during class. For example, he used the word “nigger” in class in reference to African-American students.
- During the 2015-2016 school year, respondent made inappropriate comments to students regarding their race. For example, he said words to the effect of “[student J.L.] can run fast or jump high because he is African-American.”
- During the 2016-2017 school year, respondent told several Latino students that they were not required to work hard because if Donald Trump were elected President, they would be deported.
- During the 2016-2017 school year, respondent told AVID tutors that they would be required to change their last names to avoid deportation if Donald Trump were elected.
- During the 2016-2017 school year, respondent told his students that Muslims would be deported before Mexicans.
- During the 2016-2017 school year, respondent referred to one of his ninth grade, female students as “Dimples.”
- During the 2016-2017 school year, a fellow RHS teacher posted a comment on his Facebook page that criticized students for being absent during a National Day Without Immigrants protest. Respondent posted a comment to the message that insinuated that his immigrant students and supporters had poor/failing grades and that RHS was more successful due to their absence from class. Complainant alleged this post violated multiple district policies.
- In an interview with a district administrator on March 21, 2017, respondent was dishonest when he asserted that on February 15, 2017, he told his students to participate in the protest event and attend school. Students who were interviewed by district staff said respondent told them not to attend school.

6. The same day, the board voted to approve the proposed disciplinary action. The Notice of Intent to Dismiss and other jurisdictional documents were served on respondent, who timely filed a demand for hearing on May 18, 2017.

The Day Without Immigrants Protest Event

7. On February 16, 2017, a protest event called “A Day Without Immigrants” was held throughout the country. The protest event was meant for persons who were immigrants, or who supported immigrants, to stay home in order to show what impact immigrants have, economically, on society. It was a nationwide protest event and was not limited to any particular profession.

The Facebook Thread

8. On February 16, 2017, several teachers at RHS – Geoffrey Greer, Robin Riggle, Charles Baugh, Patricia Crawford, Rhonda Fuller, and respondent, posted comments on a Facebook thread initiated by Mr. Greer on his public Facebook page. The original post by Mr. Greer read as follows:

Well. A day without immigrants. Perhaps all the missing workers in all the various industries out there had the intended impact and sent the desired message. I don’t know. As for the public school system, having my class size reduced by 50% all day long only served to SUPPORT Trumps initiatives and prove how much better things might be without all the overcrowding.

That’s what you get when you jump on some sort of bandwagon cause as an excuse to be lazy and/or get drunk. Best school day ever.

Ms. Riggle was the first teacher to post a comment. She wrote, “I had fifty absences today.” Mr. Greer responded, “Yup. And I bet your class went a whole lot more smoothly as well,” to which Ms. Riggle replied, “Yes, it was a very pleasant day.” Respondent was next to post the following, “Unfortunately, statistically my cumulative GPA increased today. Mostly failing students were missing.” That comment was the only comment respondent posted on the Facebook thread.

The Facebook Thread Goes Viral

9. Aside from the numerous comments made on Facebook, an individual by the name of “Marina,” who is a writer and activist with MTV, tweeted the link to the Facebook thread on her Twitter page. It did not take long for the entire Facebook thread to “go viral.” The Facebook thread and comments were shared by individual Facebook users and spread about various social media platforms. Gayle Hammons is a communications support specialist contractor for the district. One of her responsibilities is to monitor social media postings for various groups in Jurupa Valley for content that could be relevant to the district. At 5:23 p.m., which was approximately two hours after Mr. Greer posted his comment, Ms. Hammons notified district administrators of the post. She e-mailed screenshots of the original post and subsequent comments. The screenshots showed that the posts were made

after school had ended. Ms. Hammons noted that Facebook allows users to set security settings to determine who can view content posted on an individual's page. Mr. Greer's Facebook page was public, meaning Ms. Hammons and anyone else could access the content and read his posts.

10. Eventually, Mr. Greer deleted from his Facebook account the original post and the comments by the other teachers, as he explained, to "mitigate any further damage." Mr. Greer posted a public apology in place of the deleted post, apologizing for the "harsh tone" and "hurtful structure" of the original post. Soon after, he deleted or hid his Facebook profile. However, because the original content of the Facebook thread had been captured in screenshots and reproduced so many times, deleting the posts did nothing to stop the continuing viral spread.

11. In the ensuing days, the story was covered on most local news stations as well as Univision, a Spanish language news station. Local newspapers covered the story; some of the news articles simply reported the facts of what occurred; other articles used less-neutral headlines and editorialized the articles to express the belief that the Facebook posts were racist or anti-immigrant.² Daniel Brooks, the Director of Personnel for the district, said his office – which usually does not receive phone calls from angry parents – received a "couple dozen" phone calls. The callers were upset and wanted the district to take action against the teachers involved.

12. The district and RHS received over 200 e-mails from students, parents, community members, individuals who had no affiliation or personal interest in the district, and others who lived across the country. The American Civil Liberties Union, U.S. Department of Justice, Anti-Defamation League, and various immigrant organizations notified the district of their concerns after learning of the comments on the Facebook thread. Some of the angry communications were directed solely towards Mr. Greer. Others were directed at all the teachers whose comments appeared on the Facebook thread. In many of the e-mail communications, it was unclear whether the writers were reacting to the actual posts, the representation in the news regarding the posts, or what they had read from others regarding their opinions of what the posts contained. Nonetheless, it was not disputed that many people from all walks of life were upset for a variety of reasons about the comments contained on the Facebook thread.

13. In response to these e-mails, the district's superintendent and RHS principal sent e-mail replies for each e-mail received. With a handful of exceptions, the e-mail responses consisted of the same template, noting the writer's concern and promising a full investigation. District personnel and RHS staff were also inundated with phone calls in the following days. Administrators attempted to return calls from angry parents and members of

² For example, one article from the Huffington Post was simply entitled, "Riverside Teachers Put on Paid Leave Over Immigrant Protest Comments." Another article from the Washington Post, however, was entitled, "These California Teachers Mocked Students For Skipping School On Immigrant Boycott Day."

the community. Dr. Jose Araux, RHS's principal, met personally with eight to 10 parents, who were angry about the posts. Dr. Araux sent an e-mail to parents inviting them to meet with himself or Dr. Duchon, the superintendent. In sum, the public reaction to the Facebook posts disrupted the district's and RHS's standard daily operations.

Testimony of Dr. Jose Araux

14. Dr. Araux is in his fifth year as principal of RHS. According to Dr. Araux, RHS has approximately 1,575 students. Approximately 90 to 91 percent of the students are Hispanic, two to three percent are black, two to three percent are white, and the remainder identifies as "other."

15. Dr. Araux said he was aware of the national A Day Without Immigrants protest at the time, but did not think the event would result in any disruption to RHS. National protest events in previous years did not have a big impact. Consequently, he did not advise teachers to expect large absences and the district did not send notification to parents regarding the protest. Dr. Araux said he did not become aware that there were a large number of absences until the day after the event took place. Attendance records for that day showed 357 students were absent, 286 of which were unexcused, which is approximately 18 percent of the student body.

16. Dr. Araux testified that when he saw the Facebook post and comments by his teachers and a counselor, he thought they were "inappropriate, offensive to the immigrant community, and racist." As to respondent's comment specifically, Dr. Araux said he felt bad for the students who were absent from respondent's classes, who would have perceived that it was only the immigrant students who were failing.

17. On February 17, 2017, the district assigned extra personnel to the RHS campus in case any problems arose. Two classrooms, one belonging to Ms. Riggle and the other belonging to Mr. Greer, had been vandalized overnight, with messages stating "fuck you" and "fuck your opinion" spray-painted outside the classrooms.

18. When Dr. Araux went to RHS on February 17, 2017, there were many people on campus from the district to help provide support. Dr. Araux read a message over the school public address system acknowledging the reaction to the Facebook thread and letting students know that the district was committed to investigate and "take appropriate action." He responded to over 200 e-mail complaints from parents and people across the country. Dr. Araux set aside additional time to meet with parents, should they want to do so. RHS received many calls regarding the Facebook thread. Talking points were provided to teachers to help them deal with any situations that might arise in the classroom.

19. A student forum was scheduled for 2:20 p.m. in the gymnasium; however, the forum was not held because there was a student walkout following lunch. Dr. Araux estimated 250 to 280 students left the campus. Teachers and administrators tried to get the students to go back to their classrooms, but the participating students refused to follow

instructions to do so. When the protesting students approached a perimeter fence, one student went over the fence. Other students began to push on it. Dr. Araux said he made the decision to open the gate because he did not want anyone to get hurt. Some students returned to the campus, but many did not. As for the majority of students who remained on campus, Dr. Araux made the decision to keep them in their fifth period class rather than proceed as if it were a normal day; students were eventually dismissed from fifth period.

20. On February 18, 2017, Dr. Araux received an e-mail from a student notifying him about the possibility of a second student walkout planned for February 21, 2017. The student was very “disappointed” with the actions of the students who walked off the campus on February 17, 2017, and was concerned about the safety of students and staff members at RHS should the second walkout take place. Dr. Araux sent an e-mail to all staff that contained a modified schedule for that day to avert a second walkout. Dr. Araux e-mailed parents and the district sent a “robo-call” notification that warned them that students would face consequences if they walked out of school. Ultimately, the second walkout never occurred.

21. Dr. Araux has observed respondent in the classroom, but he had never been responsible for completing a performance evaluation. He believed that respondent’s and the other teachers’ comments were equally as offensive as Mr. Greer’s comment because they were part of a racially loaded conversation. Dr. Araux did not remember if any parent complained about respondent specifically. Dr. Araux was not involved in the investigation or decision to dismiss respondent. He did not think respondent could continue teaching at RHS because he could not be a role model for students. He said students and parents do not trust respondent who has “shown his true colors.” Dr. Araux said he does not trust respondent as a teacher.

Testimony of Tamara Elzig

22. Complainant, Tamara Elzig, has served as the district’s Deputy Superintendent for the past three years. In that position, she oversees all human resource matters. Ms. Elzig thought respondent’s Facebook comment was “appalling” because it implied that as a result of Hispanic students being absent, the grade point average (GPA) in his classes increased. Ms. Elzig said the comment that mostly failing students were missing that day was not accurate; in fact, after reviewing respondent’s grade book, which he certified as being accurate, of 28 students who were missing from respondent’s classes, only 6 were failing. According to the district, the GPAs in each of respondent’s four periods only increased by .27, .28, .18, and .20 respectively.

23. Ms. Elzig said respondent’s statement and his claim in a subsequent interview with her that he had calculated the GPA for that day demonstrated dishonesty. Ms. Elzig believed respondent’s comment was discriminatory and perpetuated stereotypes about immigrants.

24. Ms. Elzig was at RHS and present for the student walkout the next day. The demonstration began at lunch; students began to move toward Mr. Greer's classroom chanting and yelling; some students threw food and objects. It was obvious that the students were upset. The students then congregated at the flagpole and tried to take down the American flag and replace it with a Mexican flag. The students then moved into the parking lot which was blocked by an iron fence. One student went over the fence, others began shaking the gate in an attempt to open it. Ms. Elzig was the first administrator on scene, and fearing students would be injured, she directed a custodian to open the gate. She estimated 300 students left and began marching down a four-lane road. Police were blocking intersections, trying to anticipate where the students were going. Ms. Elzig followed the crowd in a police car. At one point, the crowd attempted to enter a freeway on-ramp, but deputies blocked the intersection. Eventually the crowd disbursed.

Ms. Elzig corroborated Dr. Araux's testimony about the second potential walkout. She said notifications were sent to parents in order to try and avoid a difficult situation.

Ms. Elzig testified that at a February 21, 2017, board meeting, there was a large crowd and 37 public comments were received. There were members of the media present. There were students, parents, and activist groups.

25. Ms. Elzig interviewed respondent in March 2017. She said respondent was adamant that his Facebook comment was not problematic and he did not apologize for it. He admitted to calling one of his female students "Dimples" and did not see a problem with it. She asked him whether he ever referred to an African-American student as "nigger." Respondent laughed and said he had used the word "nigga" with a student. Finally, he said he told students that education was important and that he had encouraged them to come to school on A Day Without Immigrants. Ms. Elzig did not remember the exact question she asked respondent, but he said he made a point of telling students how important education was and they should stay in school.

26. Ms. Elzig did not believe that respondent should continue teaching for the district. She believed his post was clearly discriminatory and that he demonstrated a pattern of poor judgment that impacted the students and the community. She believed students have lost trust and confidence in him as a teacher; there is not a school in the district that doesn't know of him. During his interview, Ms. Elzig felt respondent revealed a complete lack of remorse and no apparent understanding of what he had done and the impact on parents and district. She felt respondent was nonchalant, annoyed, and cocky about the whole situation. He never apologized for his conduct.

Testimony of Josh Lewis

27. Josh Lewis is the Director of Information Technology for the district. His primary duty is to oversee the networks and technology education. Mr. Lewis testified about two voluntary events the district hosts, Techfest and SummerJam, held at the beginning and end of the school year, respectively. These events relate to the use of information technology

in the classroom. No testimony provided showed that the events provide direction, policy, or other information concerning how teachers should interact on social media on their own time after school hours. Mr. Lewis also testified that all teachers are required to teach digital citizenship to their students. Several exhibits showed the content of the curriculum, which generally instructs students about proper conduct online in a variety of situations. Respondent was on the committee that helped develop the curriculum. Some of the lessons involved cyber-bullying and the idea that anything posted online can become public. The lessons were intended to help students make appropriate choices online. The district's records indicated that respondent provided the digital citizenship curriculum to his students during the 2016-2017 school year. The curriculum documents did not include any guidance to teachers regarding their personal use of social media. Mr. Lewis admitted that the district does not have a social media policy for teachers.

Testimony of J. [REDACTED] L. [REDACTED]

28. J. [REDACTED] L. [REDACTED] is a 16-year-old student at RHS. Respondent was his ninth grade AVID³ teacher. Mr. L. [REDACTED] testified that respondent showed the movie "The Blind Side"⁴ in class. Respondent did not discuss the movie; there was no apparent reason that he showed it. He said respondent showed several sports-related movies, but "The Blind Side" was the only one he could recall.

29. Mr. L. [REDACTED] said respondent frequently joked around with the class and was laid-back. One time, in front of the entire class, respondent said something to the effect of, "because [Mr. L. [REDACTED]] was black, he could run fast and jump high." Mr. L. [REDACTED] said he did not respond because he was surprised that a teacher would say such a thing. Mr. L. [REDACTED] said respondent made several other similar comments or jokes during the school year. At some point, Mr. L. [REDACTED] complained to respondent and told him he did not like it. Respondent stopped making the jokes.

Testimony of E. [REDACTED] C. [REDACTED]

30. E. [REDACTED] C. [REDACTED] is a 16-year-old student at RHS, currently in the eleventh grade. He is Hispanic and his parents are immigrants. Respondent was his teacher in both the ninth and tenth grades. For the 2016-2017 school year, respondent was his third period teacher. Mr. C. [REDACTED] testified that last year, after Donald Trump won the election, students were discussing the election and expressing their disappointment at the results. Respondent joked to Mr. C. [REDACTED], "Oh it doesn't matter because you are going to be gone next week anyways."

³ AVID stands for Advancement Via Individual Determination. It is a program designed to help students develop the skills needed for college.

⁴ The district alleged respondent showed several different movies, but it did not allege any of these movies had content that was inappropriate for high school students, such as having unsuitable sexual or violent themes. Rather, it alleged it was inappropriate for respondent to have shown movies with no educational value during class time.

Mr. C [REDACTED] said he was shocked, and he did not think it was okay for respondent to make that type of joke since they were not close. He did not say anything to respondent because respondent was a teacher and Mr. C [REDACTED] did not want to be disrespectful, but Mr. C [REDACTED] felt the statement was disrespectful.

Mr. C [REDACTED] said respondent frequently joked around with the class. The comment concerning deportation was the only instance when Mr. C [REDACTED] was offended by something respondent said. Otherwise, he said respondent was a “funny guy” and a good teacher. Mr. C [REDACTED] enjoyed his class.

31. Mr. C [REDACTED], who was not absent from school during the protest, said he saw the Facebook posts by the RHS teachers on February 16, 2017. He felt students trusted the teachers, and respondent specifically because he “seemed like a cool guy and was very funny,” but the posts made Mr. C [REDACTED] see “what kind of person respondent was” and what respondent thought of “us” even though he was not specifically offended by respondent’s post. He said if what respondent posted was true, then the statement was factual; if it was false, then it is biased because it appears he does not like immigrants.

Testimony of A [REDACTED] G [REDACTED]

32. A [REDACTED] G [REDACTED] is a 15-year-old student at RHS. She had respondent in ninth and tenth grades. Last year, she, like Mr. C [REDACTED], had respondent for third period. She said respondent showed movies twice a week. She said he showed a lot of sports movies. She could only recall the movie “Juno” by name. She said respondent never discussed the movies after showing them.

33. Ms. G [REDACTED] was in class the day after the election. Students were discussing the results and Mr. C [REDACTED] made a comment about the election. Respondent responded, “Don’t worry because next week you’ll be gone.” This comment made Ms. G [REDACTED] angry because she is Hispanic and thought respondent was being rude. The same day, Ms. G [REDACTED] overheard respondent talking to three of the AVID tutors⁵ concerning Donald Trump and deportations. Respondent was trying to change the tutors’ names, which were Hispanic, to sound more American.

After both incidents, Ms. G [REDACTED] told respondent that she did not feel it was right for respondent to say that type of thing, and it was offensive. Respondent said it was a joke and his comments were not meant to be taken to heart. He never made such comments again.

34. Ms. G [REDACTED] went to school the day of the protest. She saw the teachers’ Facebook posts the same day. She said the posts upset her and made her angry. Specifically, respondent’s post upset her because she was an “A” and “B” student, and she felt respondent was referring to her. However, she did not interpret the comment to be racist. After seeing

⁵ AVID tutors are area college students who come to RHS to assist students during the class period.

the post, her opinion of respondent changed; she no longer looked up to him. In the aftermath of the incident, she feels that RHS has become a much closer community and more understanding of one another.

Testimony of James Wandrie

35. James Wandrie is currently a principal at another high school in the district, but for the last three school years, he was an assistant principal at RHS. One of his responsibilities involved observing teachers in the classroom by performing “walk-throughs.” On February 4, 2015, Mr. Wandrie visited respondent’s third period class. Respondent was not in the classroom and there were no other RHS staff members present, except for the AVID college tutors. They told Mr. Wandrie that respondent had gone to the restroom. Mr. Wandrie spoke to respondent about the incident two days later. Respondent agreed not to leave his classroom unsupervised, and Mr. Wandrie instructed him to contact the office in order to find someone to cover for him if he needed to use the restroom. Mr. Wandrie did not find formal discipline was required. As was his practice, he documented the counseling session in an e-mail to himself. He never again observed respondent away from his classroom.

Testimony of L ■ R ■

36. L ■ R ■ is an RHS sophomore who had respondent as a teacher last year for sixth period. She said respondent sometimes left the classroom to make coffee in an anteroom connected to the classroom. She said he left the door open and he was able to observe the class while he was in that room. She said he would also leave the classroom go to the restroom, and on such occasions, either a campus officer or AVID tutor(s) watched the class.

37. Ms. R ■ testified that respondent showed movies when there were substitute teachers or on Fridays. She said she saw “16 Candles” and two football movies. Respondent never stopped the movies to discuss them or explain how they were educationally relevant.

38. The day before the scheduled A Day Without Immigrants protest, respondent was talking to a group of students in his sixth period class about the protest. Respondent said, “I support you guys, go support your people.” Ms. R ■ took this to mean that he supported students who chose not to attend school the next day.

39. Ms. R ■ said respondent’s Facebook post affected her more than the posts of the other teachers because respondent was her teacher and he always gave her good advice. She said the AVID students were supposed to have good grades and it bothered her that respondent referenced the class GPA. Ms. R ■ said she had a 3.6 GPA and did not attend school the day of the protest. She did not believe respondent’s statement about a decrease in GPA was true because she had friends who were good students who were also absent. She was not offended by the comment personally because she had good grades. She described respondent as a role-model. She said he made the class laugh and was always available to

help; she loved his class. She said respondent was a good teacher and she learned a lot in class. Respondent never made any racist comments, and she did not believe he was racist. She would not respect respondent as much if he returned to teaching at RHS.

Testimony of L P

40. L P is a 15-year-old sophomore at RHS. Last year she had respondent for sixth period AVID. Respondent's nickname for her was "Dimples." She said respondent sometimes showed sports movies during class. The only title she remembered was "16 Candles." She said some movies were shown when there were substitute teachers.

41. Ms. P was in class on A Day Without Immigrants. She said respondent never mentioned anything about the class size or grades increasing that day. When she saw the Facebook posts the next day, she was a little offended because she is of Mexican descent. She said she was primarily offended by Mr. Greer's post. She said her opinion of respondent changed a little, but she still sees him as a role-model. She thought respondent could return to teaching at RHS. She said he was a good teacher and she enjoyed his class. She signed a petition that requested the district to allow respondent to return to RHS. She did not start the petition, but she knew what she was signing.

Testimony of Mariana Lopez

42. Mariana Lopez graduated from RHS in 2012. She has several siblings who attended or attend RHS. Her father is an immigrant. Ms. Lopez never had respondent as a teacher, although her brother did. Ms. Lopez saw the Facebook comments. She thought respondent's post undermined his students' contributions because it generalized that Hispanic students were failing. She said the comment could not be taken out of context because it was made on A Day Without Immigrants and part of a larger conversation that identified Latinos as drunks or lazy.

43. She said respondent had a reputation as a funny person who was liked by students. She said her brother was upset by respondent's comment because he trusted respondent. She feels that respondent cannot be a good role model and was fearful that respondent would retaliate against her brother.

School District Policies

44. The statement of charges alleged respondent violated two board policies and cited three additional board policies, although it did not allege respondent violated those policies.

Complainant first contended respondent's Facebook post violated Board Policy 4000, which describes personnel "concepts and roles." However, this policy outlines the governing board and superintendent's responsibilities, not those of a teacher. Accordingly, the policy is not one that respondent could have violated.

Complainant contended that respondent's Facebook post violated the Code of Ethics, contained in Board Policy 4119.21. The broad language complainant referred to as being a basis for a violation came from the preamble of the document, which cannot be violated. Complainant did not cite any specific violations related to the three other board policies that were enumerated. The Code of Ethics contains a clause at the end providing that the code governs the profession and any violations will be considered "unprofessional." The clause goes on to say that in order to constitute grounds for discipline, the violation must "endanger students, evidence malice, indicate serious incompetency, bad judgement, or a pattern of bad judgement." Although not dispositive of whether respondent violated the policy, complainant did not allege unprofessional conduct as a basis for dismissal. For purposes of violating the board policy so as to constitute a grounds of discipline, complainant needed to specifically allege how the Facebook comment constituted a danger to students, involved provable malice, bad judgement, or a pattern of bad judgement. The statement of charges contained no expressed allegations.

Complainant mentioned Board Policy 4119.32, having to do with the duties and responsibilities of teachers, but did not allege a violation of that policy. Complainant contended that because of the Facebook post, respondent is "not a proper role model for students." The policy contained three categories: instruction, pupil supervision, and communication. Policy 4119.32 makes no reference to a teacher being a "proper role-model."

Complainant mentioned Board Policy 5000, having to do with concepts and roles of teachers. This policy sets forth responsibilities of the governing board and explains the commitment of the governing board to students. The policy cannot be violated by teachers.

Complainant mentioned Board Policy 5145.3, concerning harassment and discrimination. This policy specifically applies to activities on and off campus that create a hostile environment at the school. Complainant alleged respondent's Facebook comment and other "racist comments" throughout the years "represent feelings that minorities are inferior and demonstrate that Mr. Umbarger does not provide equal opportunities to all students." Although respondent may have uttered certain remarks perceived to be racially insensitive, and some may have construed respondent's Facebook comment as being racially insensitive, there was absolutely no evidence presented at the hearing that established that respondent ever suggested that minorities were or are inferior or that he did not provide equal opportunities to all students. It is unclear how the Facebook comment could be construed as being racially motivated - the students who participated in the protest event were Hispanic, as were most of those who attended class on the day of the protest. The Facebook post and some of respondent's comments may have been unprofessional and inappropriate, but to label respondent as a racist is devoid of a factual basis and unnecessarily incendiary.

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Written Statement by a V [REDACTED] B [REDACTED]

45. The district submitted a written statement from V [REDACTED] B [REDACTED], although the statement was not signed, nor did it contain her name.⁶ The statement was received as administrative hearsay. (Gov. Code, § 11514, subd. (d)). The statement described incidents purportedly taking place in respondent's class that were not alleged in the statement of charges. The statement did not supplement or explain other evidence; consequently, it was given no weight.

Respondent's Testimony

46. Respondent's testimony is summarized as follows: Respondent began his teaching career in 1998 as a substitute teacher and started teaching for the district in 2004. At RHS, he was the AVID coordinator and developed a program to tie health curriculum with AVID. He was involved in a number of extracurricular activities such as the senior class advisor, was a coach for several different sports, and participated in a number of camps.

47. Respondent first heard about A Day Without Immigrants on Tuesday, February 14, 2017. A couple of his students were talking about a rumor that students would not be going to school that day and should plan a party. On Thursday, February 16, 2017, respondent noticed a few students were missing during his second period and realized that many students were out. Approximately 30 percent were absent that day. The only class he really remembered was his sixth period, and because of the number of absences, he turned it into a study hall. A student in his class, Ms. Plascencia, said it was a nice day because all of the troublemakers were gone. He told Ms. Plascencia that the cumulative GPA of the students who were in class was a 3.7; the average GPA for the class was a 2.8 or 3.0. He calculated the GPA for his sixth period class and skimmed through the other classes. He testified that he determined the GPA that day had increased because students who were present were turning in assignments, and consequently, their GPAs went up, whereas the students who were absent did not. Respondent believed there were students who needed to be in the class that day because of their substandard grades.

Respondent left the school and was going home when he stopped for gas. He opened his phone and saw Mr. Greer's post on Facebook. He could tell Mr. Greer was disappointed that students did not go to school. Respondent posted his comment to Mr. Greer's post at the gas station on his phone. After respondent typed his post, he added the word "unfortunately" to the beginning in order to express his own feelings that the students who should have been in school were not there. Respondent did not consider that the post might become public; he felt he was engaged in a conversation amongst educators. He did not know what Mr. Greer's privacy settings were, did not think about who might see the comment, and did not think that anyone would be upset by it. He had been on Facebook for approximately five or six years. Respondent said he did not deliver the digital curriculum instruction to his students, despite a record indicating he had.

⁶ Her name was obtained from complainant's exhibit list.

Later that night respondent started getting text messages calling him derogatory names and a racist. Respondent did not know what was happening and began “freaking out.” He called RHS assistant principal Mr. Olson to report his receipt of these text messages. Mr. Olson said he would attempt to get some guidance. Respondent did not go to school the next day, but Ms. Elzig called him and told him the district was placing him on leave. Respondent said he apologized to one student on his Facebook page, but he was very upset and shut down his Facebook account that weekend.

48. Respondent admitted he had shown movies in class. He said Mondays and Wednesdays were the AVID tutorials, Tuesdays and Thursdays were health; Fridays were “fun days” where he would have peer-building activities or show movies. He said the movies had educational value that he could tie to the curriculum or themes appropriate for his class. For example, he showed documentaries by Morgan Spurlock, such as “Supersize Me,” which was related to health, and movies such as “16 Candles,” which dealt with issues of adolescence. When he started teaching health he had many students who were failing. It was suggested to him that he not take it so seriously, and that he should treat the class more as an elective that should be fun for students. RHS administrators never informed him it was inappropriate for him to show movies, and an assistant principal was even aware that he showed movies. He never received any complaints from administrators, parents, or students.

49. In addition to Ms. P [REDACTED], respondent had another student named “L [REDACTED]” in his class. Respondent said Ms. P [REDACTED] had dimples, as does respondent; he began calling her “Dimples.” Ms. P [REDACTED] never complained. Had she or an administrator asked him to stop, he would have done so. He had no ill-intent with the nickname and does not see it as a problem.

50. Respondent testified about his interactions with Mr. L [REDACTED]. Mr. L [REDACTED] was in his ninth grade AVID class. They were in class discussing the musculoskeletal system. Mr. L [REDACTED] told respondent that he had heard that because he was black he could run faster and jump higher. Mr. L [REDACTED] brought the topic up. Respondent told him there were such studies, but there was no evidence establishing this as a fact. Respondent said he did not recall making a joke about it.

51. Respondent said he did not recall making a comment to Mr. C [REDACTED] about being deported. He and Mr. C [REDACTED] joked around a lot, and he had a different relationship with Mr. C [REDACTED] than he had with other students. If he did in fact say something to that effect, he in no way intended to offend Mr. C [REDACTED].

52. Respondent had a conversation with some of AVID tutors around the election. Respondent had his prep period after lunch and the tutors were in the classroom joking around. They brought up the topic of changing their last names to sound more American. Respondent joked about his own name, and the tutors were Anglicizing their own names. Only the college tutors were present. He did not intend to belittle the tutors or be offensive. He said the tutors called him Mr. Hamburguesa, the Spanish word for hamburger.

53. Respondent admitted he left his classroom with the AVID tutors in charge when he had to go to the restroom. He said the AVID tutors were college students from local universities who were paid by the district. He considered it appropriate to allow them to supervise the students for the brief period of time he was gone. When Mr. Wandrie spoke to him about the issue, he told Mr. Wandrie that he would not do it again.

54. Respondent never used the word “nigger” during the 2015-2016 school year as alleged. He admitted that on one occasion, he believed during the 2010 school year, an African-American student was on the golf team he coached. He took the student to a fast food restaurant. There, the students said something to the effect of, “Coach, you my nigga.” Respondent responded, “Greg, you’re my nigga, but let’s not use that word again.” From the context, the word was being used as a form of endearment. Respondent said he considers the allegation that he used the word “nigger” as the most serious charge. He absolutely understands why the district would be concerned.

55. Respondent does not believe he has ever used racial slurs. He never told students that Muslims would be the first to be deported if Donald Trump were elected. He did not intend to make any statements that demeaned students for participating in a Day Without Immigrants.

56. Respondent did not remember telling students they should skip school to participate in A Day Without Immigrants. He remembered supporting students involved in the event, but he felt leaving school was not an effective form of protest because education was something that was important to have and nobody could ever take away. He denied that he is racist or in any way discriminates against his Hispanic students. He loves their food, music, and sings songs with his students in class. He noted that most of the students who remained in class during the protest were Hispanic.

57. Respondent said the impact of the Facebook posts has been devastating. He felt scared and helpless, concerned for his and his family’s safety. Moving forward, he would absolutely comply with the district’s instructions. He never meant to cause harm or for people to be upset. In hindsight, he understands why so many were upset. He never meant to hurt any of his students. The hardest part of the process was watching his former students testify against him. He cares about them and the school. He believes he could be an effective teacher and is now better able to help himself and his students learn from the incident.

Respondent said he is a kind person and loves being a teacher. He gave up a lot of his time to RHS outside of class. When a student died while playing soccer, he helped plan the funeral. He had a refrigerator that was full of food that was always open for students. He said his car was the first there in the mornings and he had a reputation of being there for students. He loved his students and took pride in what he did. It hurt him that he gave so much time to the school and district and his dismissal was their reaction.

Character Witnesses and Letters

TESTIMONY OF JANIECE BAILEY

58. Janiece Bailey has been an English teacher at RHS since 2010. She first met respondent when she was a substitute teacher. If she did not have a class, she would sometimes sit in his classroom to observe. She believed he was a highly effective teacher because of his rapport with students. He has a “goofy” personality that students respond to, but they also listen to him. She had many of the same students as he did and never had any complaints or observed anything inappropriate. Respondent was involved in many extracurricular activities. She said respondent was well-regarded and students with whom she has spoken want him to return. Ms. Bailey socialized with respondent outside of school. She never observed any behavior that would be considered racist. Ms. Bailey admitted she is friends with respondent and does not want to see him lose his job. She said even if the allegations against respondent were true, her opinion of respondent would remain the same.

TESTIMONY OF GEORGE MONGE

59. George Monge, who has been with the district since 1992, has been a social studies teacher and department head at RHS since 2009. He first met respondent in 2009. Mr. Monge was the union leader at RHS. He was provided a petition that was signed, by a rough estimate, by 350 students that stating the AVID program has not been the same since respondent was placed on leave and respondent should be given a second chance. Mr. Monge said he did not solicit the petition nor did he know who organized it. Following an RHS staff meeting in April, Mr. Monge met with other teachers to discuss union issues. The issue of the suspensions came up and the teachers voted to submit a letter of support to the board, although this vote was not formal or counted. Mr. Monge wrote a letter, on behalf of the teachers and staff of RHS, dated May 4, 2017, to the district’s board. Mr. Monge believes that RHS students and staff would welcome respondent back. On cross-examination, Mr. Monge admitted he was previously an administrator, but denied he was demoted. He felt that even if the allegations against respondent were true, his opinion about respondent would be the same.

TESTIMONY OF MARY TUCKER

60. Mary Tucker, who is African-American, met respondent in 2003 and knows him and his family well. Her impression is that respondent is a loving son, father, and good friend. Ms. Tucker is raising her grandchild, who is half Hispanic, and respondent has been instrumental in helping her. She believes respondent is a great person and it hurts her to think that he is being considered a racist.

TESTIMONY OF FERNANDA DE LA O

61. Fernanda De La O is a second year professor at Azusa Pacific University who runs the speech and debate program. Respondent was her coach and class advisor, although

she did not have any classes with him. She has had intermittent contact with respondent since graduating in 2012. She described him as a role-model and “fantastic all-around guy.” She never saw him do anything offensive or inappropriate. She felt he was racially blind and encouraged students of all backgrounds.

TESTIMONY OF J [REDACTED] H [REDACTED]

62. J [REDACTED] H [REDACTED] is an RHS senior. He described respondent as “the life of the school.” Respondent was very involved and was the senior class advisor. He believes that students would accept respondent if he were to return to RHS. He felt students have learned how to forgive from the incident. He did not believe respondent treated any student differently because of race.

LETTER BY FRANKLIN MARMOLEJO, JR.

63. Frank Marmolejo, Jr. is a counselor at RHS who has known respondent for 10 years. He echoed most of the other witness’ testimony, and stated that respondent was highly visible on campus and involved in student activities. He described respondent’s passion for teaching and described him as someone who would do anything for his students.

Respondent’s Performance Evaluation

64. Respondent submitted his two most recent performance evaluations from 2015 and 2013. The evaluations stated respondent met expectations in all categories, except for “developing as a professional educator,” in which he exceeded expectations. The written comments were uniformly positive; there were no criticisms or suggested areas of improvement. The evaluations noted respondent enjoyed a strong rapport with his students and stated, “There is a climate of fairness and respect between students and teacher.”

Evaluation of the Factual Allegations

MOVIES DURING CLASS

65. Respondent showed full length movies during class that were not contained in his syllabus. Several students testified there were sports movies. Complainant did not allege that any of the movies contained inappropriate content for high school students, such as containing inappropriate themes or graphic material. Instead, complainant alleged the films were not related to the curriculum and had not been approved for classroom use.

It was undisputed that the district or RHS administrators never specifically told respondent that it was inappropriate conduct for a teacher, thus respondent was never placed on notice that this was an issue.

The district and RHS maintain no written policies regarding the screening of movies in class.

LEAVING CLASS UNSUPERVISED

66. Respondent left his class under the supervision of AVID tutors in February 2015 in order to use the restroom. Respondent's belief that it was appropriate for him to do so because the AVID tutors were adults paid by the district was reasonable. However, Assistant Principal Wandrie disagreed, and admonished respondent not to do it again in the future. Respondent testified that he heeded this warning.

Complainant did not allege that respondent continued to leave his class unattended, although there was testimony that he went into a backroom to make coffee and went to the restroom in 2016. Even if true, the evidence showed that he could still monitor what was going on in the classroom from the backroom. The student's testimony that he went to the restroom was insufficient to impeach respondent's testimony that he stopped leaving his class after being warned by Mr. Wandrie.

USE OF A RACIAL SLUR

67. Complaint alleged respondent used "derogatory racial slurs to communicate with his students during class. For example, respondent used the word 'nigger' in class in reference to African-American students." Complainant presented no testimony to substantiate this allegation.⁷

INAPPROPRIATE COMMENTS TO STUDENTS

68. Complainant alleged respondent told Mr. L [REDACTED] that he could run fast and jump high because he was African-American. Mr. L [REDACTED]'s and respondent's testimony regarding this incident conflicted. Mr. L [REDACTED] testified that respondent made repeated jokes about this; respondent testified that Mr. L [REDACTED] asked him this question in relation to anatomy. On one hand, despite the fact that many other students would have been present in class, the district presented no corroborating evidence of the alleged comment. Notwithstanding the lack of corroboration, Mr. L [REDACTED]'s testimony was more credible than respondent's testimony on this issue. One clear pattern of conduct that was consistent throughout the testimony was respondent's jocular relationship with his students. It is more believable that respondent's

⁷ Respondent, on direct examination, admitted to addressing a student as his "nigga" in 2010. The district, having been aware of this admission since March 2017, did not allege this in the statement of charges. Education Code section 44934, subdivision (c), requires the statement of charges to "specify instances of behavior and the acts or omissions constituting the charge so that the teacher will be able to prepare his or her defense." Moreover, Education Code section 44944, subdivision (b)(2)(A), provides that, "Testimony shall not be given or evidence shall not be introduced relating to matters that occurred more than four years before the date of the filing of the notice." Here, the circumstances as described by respondent are vastly different in time and place than what is alleged in the statement of charges. Accordingly, respondent's testimony on this issue cannot serve as a basis for dismissal as it was not pled in the statement of charges.

modus operandi of telling jokes and kidding around with his students resulted in him making this comment to Mr. L [REDACTED]. Considering the portrait drawn of respondent's occasionally flippant interactions with his students, Mr. L [REDACTED]' testimony was more persuasive. Although definitely reflective of poor judgement, there was no evidence that the statement was made out of malice or with invidious intent.

69. Similarly, Mr. C [REDACTED]'s testimony, as corroborated by Ms. G [REDACTED], that respondent made a joke about him being deported after Donald Trump won the election, was credible. Respondent did not specifically deny saying this, only that he did not recall doing so. Again, considering respondent's classroom personality, his making such a comment is entirely believable. Like his comment to Mr. L [REDACTED], there was no evidence that respondent intended to demean or offend Mr. C [REDACTED].

70. The conversation with the AVID tutors about changing their last names was less clear. The only evidence was from a student, who was not involved in the conversation, and who reportedly overheard respondent telling the tutors that they needed to change their name. However, none of the AVID tutors testified respondent did so. Respondent's testimony about the conversation was credible, and while it was established that respondent joined in the conversation, complainant did not establish that he actually told the tutors they would have to change their last names or that he said anything to them that was derogatory or patently inappropriate.

71. Although complainant alleged that respondent told his students that Muslims would be deported before Mexicans, no evidence was presented to support this allegation.

72. Finally, it was undisputed that respondent called Ms. P [REDACTED] "Dimples." His testimony that he did this because there were two people in his class with the same name and he had dimples was credible.

THE FACEBOOK POST

73. The underlying facts regarding respondent's Facebook post were mostly undisputed. There is no question that the posts, cumulatively, had a negative impact on the district's operations and resulted in a large public outcry locally and across the country. District personnel received over 200 e-mails, numerous phone calls, media requests, and were forced to devote educational time to the issue. Additionally, the posts, cumulatively, impacted students at RHS and were the primary impetus for a large student walkout the next day, which further disrupted the educational environment.

Complainant placed much emphasis on the fact that respondent's Facebook post – that statistically his cumulative GPA increased and mostly failing students were missing – was not true, and this deception was the result of a malicious intent on respondent's part to degrade the students who were absent. However, the first statement, that the cumulative GPA increased, was factually accurate. Complainant contends that in his deposition testimony, respondent claimed to have calculated the GPA for each class and determined the

GPA *significantly* increased. Complainant did not offer this deposition testimony as evidence, so it was unclear exactly what respondent said. Respondent testified that the GPA increased because individuals who were present on the day of the protest turned in assignments and individuals who were absent did not. This explanation was not particularly compelling or credible. It is much more likely that respondent made the statement about the GPA increasing based on an anecdotal belief that poorer performing students were absent that day. Regardless, the Facebook post on this point *was* factually accurate, even if the increase was very small.

The second point of the post stated that mostly failing students were missing. Again, complainant emphasized that this was in fact false. Complainant is correct that out of 28 of respondent's students who were absent, six had an "F" and four had a "D." However, the comment does not necessarily show malicious intent on respondent's part. He could have come to an anecdotal conclusion that the students who were absent, generally, were his underperforming students. Using the district's calculations, the average GPA of his students who were absent was a 2.1. Put another way, the "A" and "B" students who were absent were not in the majority. So while the statement itself was not technically true, it was not established that it was made with a discriminatory purpose.

This goes to the next point: complainant alleges respondent "discriminated against students and stereotyped students as failing." Complainant failed to establish that the post was "discriminatory" in any sense of the word. Nor was it clear how he "stereotyped" the missing students. Complainant repeatedly alleged the post was racist. However, the demographics of RHS belie this assertion. Of its 1,575 students, RHS is approximately 90 percent Hispanic, which is approximately 1,418 students. There were 286 unexcused absences on February 16, 2017. Assuming that the only students who had unexcused absences were Hispanic (because they were at the protest), this leaves 1,132 Hispanic students at school or with excused absences, which is approximately 71 percent of the student body. Although the students who were absent were mostly Hispanic, so were the students who were in school that day. This is not an insignificant point because complainant alleges that respondent belittled and demeaned his Hispanic students who were absent, but it ignored the fact that the vast majority of his students who were in class were also Hispanic.

Finally, complainant alleged respondent lied to Ms. Elzig during the March 2017 interview when he said he told students that they should attend school on A Day Without Immigrants. Respondent testified that he did in fact encourage students to come to school because education was important. Complaint's allegation that this was a lie is based on the testimony of Ms. Ruiz, who said she heard respondent tells students the day before, "go support your people" in reference to a student saying that he was not going to class. There was no other corroborating evidence regarding this statement, and given the seriousness of the accusation that respondent lied, it would be expected that complainant would have sought and produced some corroboration. Moreover, Ms. Elzig could not recall the exact question that she asked of respondent during the interview, nor was it entirely clear whether what Ms. Ruiz testified to was respondent's exact words, or her impression of what she thought

respondent meant. On this record, a preponderance of evidence did not establish respondent lied to Ms. Elzig.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. The standard of proof in a teacher disciplinary proceeding is a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1039-1040.) Preponderance of the evidence means evidence that has more convincing force than that opposed to it.’ [Citations.]” (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325) The sole focus of the legal definition of ‘preponderance’ in the phrase ‘preponderance of the evidence’ is on the *quality* of the evidence. The *quantity* of the evidence presented by each side is irrelevant.” (*Ibid.*, italics emphasis in original.)

Applicable Law

2. A permanent employee may be dismissed for cause only after a dismissal hearing. (Ed. Code, §§ 44932, 44934, and 44944.)

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

4. A permanent certificated teacher may not be dismissed except for, among other things, immoral conduct or evident unfitness for service. (Ed. Code, § 44932, subs. (a)(1) and (a)(6).)

Applicable Case Law

5. In *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 235, the Supreme Court held that “an individual can be removed from the teaching profession only upon a showing that his retention in the profession poses a significant danger of harm to either students, school employees, or others who might be affected by his actions as a teacher.” The court delineated the following criteria to determine whether a teacher’s conduct indicates that he or she is not fit to teach: (1) the likelihood that the conduct may have adversely affected students or fellow teachers; (2) the degree of such adversity anticipated; (3) the proximity or remoteness in time of the conduct; (4) the type of teaching certificate held by the teacher; (5) the extenuating or aggravating circumstances, if any, surrounding the conduct in question; (6) the praiseworthiness or blameworthiness of the motives resulting in the conduct; (7) the likelihood of the recurrence of the conduct in question; and (8) the extent to which disciplinary action may

inflict an adverse impact or have a chilling effect upon the constitutional rights of the teacher involved or other teachers. (*Id.*, at pp. 229-230.)

6. In *Board of Education v. Jack M.* (1970) 19 Cal.3d 691, the Supreme Court detailed the process to be considered in determining fitness to teach. In addition to the *Morrison* factors, the court provided additional factors that may be considered to determine whether there is a nexus between the conduct and a teacher's fitness to teach: (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. (*Id.*, at fn. 5.)

IMMORAL CONDUCT

7. There is broad discretion in determining what constitutes immoral conduct in the context of teacher disciplinary matters. (*California Teachers Association v. State of California* (1999) 20 Cal.4th 327.) Immoral conduct has been defined by the courts as follows:

[T]hat which is hostile to the welfare of the general public and contrary to good morals. Immorality has not been confined to sexual matters, but includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, dissoluteness; or as wilful, flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare. (*Palo Verde etc. School Dist. v. Hensey* (1970) 9 Cal.App.3d 967, 972, citing *Bd. of Education of San Francisco Unified School Dist. v. Weiland*, 179 Cal. App 2d 808, 811.)

Immoral conduct alone cannot serve as a basis to terminate a teacher unless the conduct indicates the teacher is also unfit to teach. (*Palo Verde, supra*, at p. 972.) The definition of immoral or unprofessional conduct must be considered in conjunction with the unique position of public school teachers, upon whom are imposed "responsibilities and limitations on freedom of action which do not exist in regard to other callings." (*Board of Trustees v. Stubblefield*, 16 Cal.App.3d 820, 824.)

EVIDENT UNFITNESS FOR SERVICE

8. Unfitness for service means "not fit; not adapted to a purpose, unsuitable; incapable; incompetent; and physically or mentally unsound." (*Palo Verde, supra*, at p. 972.) As a threshold matter, the *Morrison* criteria are examined to ascertain whether the conduct in question is related to the teacher's fitness to teach. In reaching a conclusion that grounds exist to dismiss a certificated employee on the basis of evident unfitness for service, not all

Morrison factors need be examined, only the pertinent ones. (*Governing Board v. Haar* (1994) 28 Cal.App.4th 369, 384.) In this sense, the purpose of examining the *Morrison* criteria is to establish a nexus between the proven conduct and fitness to teach.

However, even if the *Morrison* analysis shows a nexus between the conduct and fitness to teach, it must also be determined that the alleged conduct shows *evident* unfitness for service. (*Morrison, supra*, at p. 1445 [emphasis added].) “Evident unfitness for service” means clearly not fit for teaching, ordinarily by reason of *temperamental defects or inadequacies*; it connotes *fixed character trait*, presumably not remediable merely on receipt of notice that one’s conduct fails to meet expectations of the school district. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444 [emphasis added].)

Evaluation and Conclusion

9. There is no question that the Facebook post by Mr. Greer, and the subsequent comments by the four other teachers and counselor, elicited heated reaction from students, parents, community members, and many who have no association with the district. Indeed, much of the statement of charges is devoted to capturing the responses by individuals who found the posts offensive. It was undisputed that the viral nature of the posts and the ensuing disruption on campus the day after the posts went viral had a significant impact on RHS and district operations. Although reasonable minds may differ as to the nature of respondent’s post, reaching a decision in this matter does not mean looking at how many people felt his comment was inappropriate versus how many people did not. Rather, the question in this case is whether respondent’s Facebook comment on Mr. Greer’s Facebook thread on February 16, 2017, showing movies in class, leaving the class unattended on one occasion while he used the restroom, calling a student “Dimples,” and making two inappropriate race-related “jokes” to student constituted immoral conduct or evident unfitness for service, warranting his dismissal. For the reasons discussed below, a preponderance of the evidence did not establish that respondent’s conduct, in isolation or in aggregation, constituted immoral conduct or evident unfitness for service.

EVIDENT UNFITNESS FOR SERVICE

10. Once the Facebook thread was discovered, it went viral. Parents, students, teachers, immigrant groups, civil rights organizations, and community members became upset about the overall content of the Facebook thread. The incident gained widespread media attention. Shortly after the Facebook thread went viral, the district began receiving numerous e-mails and phone calls from a variety of individuals expressing their anger about the Facebook thread. Two classrooms were vandalized.

On February 17, 2017, the day after the Facebook thread went viral, the district ensured there was a large presence of administrators and teachers on the RHS campus to alleviate any potential problems. Counselors were made available to students and staff. Talking points were distributed to staff in order to allay any potential problems.

Nonetheless, school district operations were interrupted by a student walkout from regularly scheduled classes after lunch. During the walkout, several hundred RHS students left the campus without permission. They blocked streets and tried to take the protest on to a freeway. A majority of the students who comprised the approximately 1,575 total student body at RHS, however, remained on campus and did not partake in the disruption. Most certainly, the reaction to the Facebook thread affected both the school and the district's ability to provide educational services on February 17, 2017.

However, the impact of the conduct alone does not determine whether a teacher is unfit to teach. Rather, what matters is whether the conduct meets the legal criteria for evident unfitness for service. As a threshold matter, the factors mentioned in *Morrison* and *Jack M.* must be considered to determine whether there is a nexus between the conduct and fitness to teach.

There was a lot of notoriety surrounding this incident and there was an impact on the students because of the *overall* Facebook thread in which respondent participated. Respondent's comment could be construed as adversely affecting students and teachers to the extent that his comment was contained in a Facebook thread that contained other questionable comments directed against immigrants. Teachers and district personnel were also affected because they had to modify their schedules to tend to the problems that arose following the reaction to the Facebook posts. Given the demographics of the district, respondent should have anticipated some backlash about commenting on a Facebook thread that contained arguably insensitive remarks about immigrants, or at least against persons participating in the A Day Without Immigrants event. There were no aggravating circumstances or bad motives; to the contrary, respondent's credible testimony established he did not intend to say anything other than to express his disappointment that those students who most needed to be in class were not there. In fact, he prefaced his statement with the word "unfortunately," which contrasts with tone of Mr. Greer's post. His testimony that he did not think about whether Mr. Greer's Facebook page was public or consider that his comments might be seen by the world was credible.

The district emphasized the fact that respondent helped review the digital citizenship curriculum provided to students. However, respondent posted the Facebook comment while getting gas and did not give it much thought. He clearly did not appreciate the consequences at the time. While he did not demonstrate a great deal of remorse, he learned from this incident, and had he known of the repercussions that would follow, he would not have posted his comment on the Facebook thread.

Practically all of the witnesses who testified and were familiar with respondent's teaching style described him similarly – he interacted with students in a light-hearted manner, made numerous jokes, and had a gregarious personality. Although his performance evaluations and students recognized that he maintained a good rapport with his students, an overly familiar and jocular relationship can be problematic, as it was when he made two racially-related references to students that were flatly inappropriate and ill-advised. In total, enough of the criteria in *Morrison* and *Jack M.* are satisfied to establish a nexus between respondent's fitness

to teach and his conduct (the posting of a Facebook comment and the comments he made to Mr. L [REDACTED] and Mr. C [REDACTED]).

However, the analysis does not stop after finding a relationship exists between the conduct and fitness to teach. *Evident* unfitness for service must be demonstrated – and here, it was not. Respondent has been in the educational field for almost 20 years. He was extensively involved in RHS and its extracurricular activities. He has experienced no formal discipline his entire career. His latest performance evaluations noted he promoted a “climate of fairness and respect,” contained comments that were uniformly positive, and characterized him as an asset to the RHS community. All of the students who testified praised him as a teacher and commended his teaching style. Up until the time when the district’s counsel began interviewing his students in the aftermath of the Facebook posts, there was no evidence that any student had complained to RHS administrators or the district about any inappropriate comments or racist and discriminatory behavior. There was no evidence that respondent treated any group of students differently than other students at any time in his career, or otherwise engaged in discrimination or maltreatment of students in his classroom.

The Facebook comment was made on his personal time, on his personal phone, on his private Facebook account, after school hours. His comment did not disparage any student. It did not comment on any student activities. It did not comment on race. It did not express agreement with any inappropriate comments. His comment did not contain strong language or other questionable material that showed an inappropriate temperament, an undesirable character trait, corruption, depravity, moral indignation for any class of persons, or contain any material that suggests respondent is unfit to teach.

While the comments respondent made to Mr. L [REDACTED] and Mr. C [REDACTED] were inappropriate and unprofessional, they were not malicious or made for an invidious purpose. Similarly, while calling a student “Dimples” did not reflect best judgment, there was no sexual connotation or any improper motive other than some degree of cheekiness. Showing full-length movies and leaving his class under the supervision of college tutors to use the restroom was conduct the district disapproved of, nothing more. There was no evidence that respondent failed to follow the district’s policies or instructions he knew about or should reasonably have known about. Respondent is now aware that what he perceives as being light-hearted or funny can be offensive. There is no reason to believe that he is not capable of changing his interactions to comport with appropriate standards or that he is unable to maintain clear professional boundaries. In other words, the district failed to establish that his behavior is not remediable once he has been placed on notice that his conduct fails to meet expectations of the district. (*Woodland Joint Unified School Dist., supra*, at p.1444.)

In summary, while several of the factors set forth in *Morrison* and *Jack M.* arguably may have been satisfied, thus establishing a nexus between respondent’s comments and his fitness to teach, ultimately, a preponderance of the evidence did not establish that respondent’s actions were attributable to a temperamental defect, inadequacy, or a fixed character trait that was not remediable merely on his receipt of notice that his conduct failed to meet the district’s expectations. He was not shown to be unfit, not adapted to a purpose, unsuitable,

incapable, incompetent, or physically or mentally unsound to continue teaching. Thus, his conduct did not constitute evident unfitness for service.

IMMORAL CONDUCT

11. A preponderance of the evidence did not establish that respondent's conduct constituted immoral conduct. Again, while respondent may have used poor judgement in participating in a Facebook thread that contained other questionable comments, for the reasons discussed above, his decision to post his single comment about his belief that the students who were absent should have been in class because they were poorer performing, was not flagrant, shameless, inconsistent with public decency, or reflective of a moral indifference to the opinions of others.

12. Similarly, a preponderance of the evidence did not establish that respondent's comments to Mr. Lewis and Mr. Castillo, and employing a nickname for a student constituted immoral conduct.⁸ Again, the two race-related comments in particular constituted a lack of sound judgment and were unprofessional. However, as previously noted, in consideration of an absence of malice or invidious intent, the comments were not flagrant, shameless, inconsistent with public decency, or reflective of a moral indifference to the opinions of others, and that is what must be proven to sustain a charge of immoral conduct.

Conclusion

13. Given the diverse and multicultural population of any school district, and the unique position a teacher holds, it is important for teachers to be cognizant of the impact their personal speech outside the classroom may have on the population they serve. With respect to social media, teachers need to use discretion and good judgment should they decide to engage in social media interactions. The same principle applies to interactions with students. While respondent has been praised for his teaching style and ability to develop a rapport with his students, such interaction is not without boundaries, and it requires measured judgment to ensure all students are afforded respect and dignity. The Commission does not condone respondent's conduct and trusts that respondent will consider the effect his conduct and statements had on his students.

The choice the district gave the Commission was to dismiss respondent from his employment or dismiss the charges entirely. There was no room to choose a suspension or other remedial measure. Given the turmoil in the immediate aftermath of the Facebook posts, the district's position of electing to terminate all certificated staff involved is understandable. However, like most firestorms, this one came in with fury and passed quietly. The district concluded that students and administrators have lost confidence in respondent's ability to teach at RHS. However, RHS students may be more resilient and

⁸ Clearly, showing full-length films in class and leaving the class unattended for a brief period while he used the restroom are not immoral conduct.


capable of reconciliation than the district gives them credit for. The academic environment brings students and teachers together from a variety of personal, professional, and political backgrounds. Inevitably, students will have classes with teachers who may disagree with them personally, politically, and professionally. The classroom environment can be a microcosm of society as a whole, and part of the educational experience is to learn how to deal with those who express views that may be contrary to one's own. Reconciliation can have positive educational benefits and lead to greater empathy among all involved.

Ultimately, a preponderance of the evidence did not establish that respondent's conduct was either immoral or rendered him evidently unfit to serve, such that cause does not exist to dismiss respondent from his employment with the district pursuant to Education Code sections 44932, subdivisions (a)(1) or (a)(6).

ORDER

Allen Umbarger's appeal is granted. Jurupa Unified School District's request to dismiss Allen Umbarger is denied. The Statement of Charges against Allen Umbarger is dismissed.

DATED: December 27, 2017

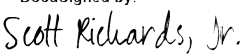
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ADAM L. BERG
Administrative Law Judge
Office of Administrative Hearings

DATED: December 22, 2017

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SUSAN V. NEWTON
Commission Member

DATED: December 27, 2017

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SCOTT RICHARDS, JR.
Commission Member