

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

In the Matter of the Dismissal and First
Amended Accusation Against

TIMOTHY O’KAIN,

Respondent,

OAH CASE NO.: 2011051111

DECISION

The Commission on Professional Competence (Commission) heard this matter on March 26-30, 2012, in Redondo Beach, California. The Commission consisted of Commission Members Henry Montelongo, Ali Rabiei, and Administrative Law Judge Chris Ruiz (ALJ), Office of Administrative Hearings (OAH), presiding.

David Larsen and Joseph Larsen, Esqs., represented Nancy Billinger, (Complainant), Assistant Superintendent of the Redondo Beach Unified School District (District). Complainant was present at each day of hearing.

Daniel Kolodziej, Esq. represented Timothy O’Kain (Respondent) who was present at each day of hearing.

Oral and documentary evidence was received, argument heard, and the matter was submitted on March 30, 2012. The Commission began its deliberations on March 30, 2012, and concluded its deliberations in executive session on May 11, 2012. After due consideration, the Commission makes the following factual findings, legal conclusions, and order, by unanimous decision.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Complainant made the First Amended Accusation in her official capacity.
2. On May 10, 2011, the Board of Trustees for the District adopted a Notice of Intention to Dismiss Respondent. On June 3, 2011, Respondent was served with an Accusation and Statement of Charges, a blank Request for Hearing and relevant Education

and Government Code sections.

3. On June 7, 2011, Respondent's Request for Hearing and Notice of Defense were received by the District which led to the instant hearing.

4. The charges filed against Respondent are unprofessional conduct and/or evident unfitness for service. The Accusation, which was later amended on December 15, 2011, and entitled "First Amended Accusation" (FAC) and the Statement of Charges (SOC) are based on the same events and are the operative pleadings (pleadings). During the hearing, Complainant amended the SOC and deleted the allegations regarding improper grading by Respondent.

Background Information

5. Respondent has been employed by the District for approximately 12 years. He is employed as an eighth grade history teacher at Adams Middle School (AMS). Respondent taught history-social science classes, both as a regular model and one that the District identified as the "collaboration" model. In the latter, Respondent taught history-social science to a group of general education students and also to students with Individualized Education Programs (IEP). Respondent holds a teaching certificate which authorizes him to teach Social Studies in grades K-12 and he also holds a Cross-Cultural Language and Academic Development (CLAD) certification.

The Filming Incident

6. In September 2010, Respondent utilized two District campuses to film a video. The video, "Sticks and Stones", a hip-hop song, was filmed by a friend of Respondent. Respondent appeared in the video as a teacher and the video portrayed him in a poor light and his "class" was depicted as out-of-control and disrespectful. The video used "smoke" which caused the fire department to respond. Students appeared in the video and Respondent did not obtain the necessary signed permission slips for all participating students. No parents objected to their children having participated, and some believed the video had a positive effect on their child. The video contained sexual innuendo and inappropriate dance interaction with Respondent who was playing the part of a teacher. Both the AMS and Parras Middle School sites were used. Respondent did not gain any financial advantage from the video, but the video was not solely for "instructional purposes" as Respondent stated in his Facilities Use Permit application (FUP). The video ultimately went "viral." When the District discovered the video, it requested that Respondent remove the video from the internet, which he did.

After the Filming Incident

7. On November 2, 2010, the District issued Respondent a "Notice of Unprofessional Conduct" (Notice) in response to the filming done in September 2010.

8. The Notice stated, in pertinent part, that:

[I]n the future, you are expected to conform to all District policies, to exercise sound judgment in your interactions with your students, to be honest and forthright in your communications with the District, to establish, to establish and maintain acceptable boundaries with students, to follow all school district policies, rules and regulations, including, but not limited to, those dealing with the use of facilities. You are specifically instructed to conduct yourself in a professional manner in all interaction. (Exhibit 23.)

9. The Notice also informed Respondent that he was being given an opportunity to “correct his faults” and that any further unprofessional conduct would result in Respondent being terminated as an employee of the District.

10. In sum, Respondent was given a second chance. Respondent was well liked by his principal and she encouraged the District hierarchy to give Respondent a second chance, which they did. The District issued the Notice and considered the matter resolved. Respondent had always been an excellent teacher and the District assumed the making of the video was an isolated incident. Respondent’s principal and the District considered the matter closed.

Events following the Notice of Unprofessional Conduct

11. After the Notice was issued, Respondent’s conduct deteriorated. During the 2010-2011 school year he used inappropriate language in the classroom, occasionally left his classroom unattended, and generally did not professionally control his classroom. Respondent’s poor judgment in the classroom following receipt of the Notice affected the students in his classroom. Many of his students found the classroom to be out-of-control and not a positive learning environment.

12. Respondent’s class size during the 2010-2011 was large in size (approximately 35 students) and included many students who had disciplinary issues. The District removed some students from one of his classes that included special education students. Respondent failed to ask for any other additional assistance from either school site or District personnel. It is unclear exactly what Respondent’s state of mind was during this time period, but it appeared that Respondent had difficulty dealing with and accepting the previously issued Notice. That is, prior to the Notice, Respondent performed as an exemplary teacher. The District found his work very good, students and students’ parents both liked him, he was an effective teacher, and he was involved in a multitude of extracurricular activities.

13. By his own admission, Respondent attempted to personally handle some issues, such as discipline and classroom control, of which he should have sought District assistance. After the Notice, Respondent discontinued some of his extracurricular activities, but by his own admission, he was still busy. At this point in time, Nicole Wesley, the

principal at AMS, had informed him that his classroom should be his highest priority. As such, it was Respondent's responsibility to adjust his schedule so as to ensure that his classroom performance was professional.

14. Respondent's testimony was not convincing. He appeared to hesitate before answering, as if he were attempting to think of the "correct" answer rather than the simple facts. Respondent acknowledged that the District's concerns were legitimate with respect to the video. However, he failed to simply state that he had done something inappropriate. Respondent's overall testimony was filled with "I am sorry" and "I would change." For example he acknowledged his classroom language was inappropriate, his handling of classroom discipline was inappropriate, his leaving his classroom unattended was inappropriate, the making of the video was inappropriate, and that his lack of control in the classroom was inappropriate. However, he seemed to not grasp the seriousness of his multiple examples of lack of judgment. Respondent also appeared to believe that an apology should be sufficient.

15. Respondent was placed on administrative leave on April 11, 2011.

LEGAL CONCLUSIONS

1. The standard of proof in this proceeding is preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1038-1039.)

2. The grounds for the dismissal of a teacher in this state are enumerated in Education Code section 44932, subdivision (a). In this case, the District relies only on the following grounds and sections of subdivision (a): (1) unprofessional conduct and/or (5) evident unfitness for service.

3. It is the unanimous conclusion of the Commission that Respondent has engaged in unprofessional conduct, within the meaning of Education Code section 44932, subdivision (a)(1).¹ Section 44932, subdivision (a)(1), permits dismissal of a permanent employee for "immoral or unprofessional conduct." Unprofessional conduct has been defined as conduct, measured by the *Morrison*² factors, which indicates unfitness to teach. (*Board of Education v. Jack M.* (1970) 19 C.3d 691, 696-697; *Perez v. Commission on Professional Competence* (1983) 149 Cal.App.3d 1167, 1173-74.) Immoral conduct was not charged in this case.

4. During the hearing, Respondent moved to dismiss the unprofessional conduct basis for discipline as to Complainant's allegations regarding Respondent's grading. Section

¹ All further statutory references are to the Education Code unless otherwise indicated.

² *Morrison v. State Board of Education* (1969) 1 Cal.3d 214.

44938 requires written notice of unprofessional conduct before an employee can be terminated for unprofessional conduct. Respondent's motion was granted as to the grading allegations because no written notice was provided regarding the grading allegations. In any event, Complainant withdrew the grading allegations during hearing. As such, those allegations were not considered. The Commission therefore only considered the unprofessional conduct charge with respect to the video and classroom conduct. The conduct related to the video is not a basis standing alone. That is, Respondent was issued the Notice and absent any further unprofessional conduct he could not have been further disciplined for his actions, or inaction, related to the video. However, his unprofessional conduct to the video can be, and was, considered in conjunction with his unprofessional conduct related to his classroom performance.

5. It is the unanimous conclusion of the Commission that Respondent is evidently unfit for service as a teacher, within the meaning of Section 44932, subdivision (a)(5), with respect to the underlying events related to the video and in conjunction with his classroom performance.

6. "Evident unfitness for service" means clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies. (*Woodland Joint Unified School District v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444.) "Unlike 'unprofessional conduct,' 'evident unfitness for service' connotes a fixed character trait, presumably not remediable merely on receipt of notice that one's conduct fails to meet the expectations of the employing school district." (*Id.*)

7. Respondent's unprofessional conduct was not remediated merely on receipt of notice that his conduct failed to meet the expectations of the employing school district. On November 12, 2010, Respondent was given written notice that his conduct related to the video was unprofessional, and that any further unprofessional conduct would result in his termination. Thereafter, despite this warning, he did not concentrate his efforts on acting professionally as a teacher. This was not a case where Respondent was not given a second chance. After the incident involving the video, Respondent's principal encouraged the District hierarchy to give Respondent a second chance. Thereafter, the District issued the Notice and considered the matter resolved. Respondent had always been an excellent teacher and the District assumed the video was an isolated incident and considered the matter closed.

8. It is the unanimous conclusion of the Commission that Respondent's conduct as set forth in Factual Findings 1-15 was such as to render him unfit to teach, within the meaning of *Morrison v. State Board of Education* (1969) 1 Cal.3d 214. The Commission specifically considered all criteria described by *Morrison* and compared them to the facts established above. However, it is settled that not all "Morrison factors" need be present to trigger application. (*Governing Board of ABC School District v. Haar* (1994) 28 Cal.App.4th 369.) Moreover, the *Morrison* analysis need not be conducted on each individual fact established, but rather can be applied to the accumulated facts established collectively. (*Woodland Joint Unified School District, supra*, 2 Cal.App.4th at 1457.) The Commission is of the view that some of *Morrison* factors apply to Respondents conduct as follows:

The likelihood the conduct may adversely affect students or fellow teachers.

Respondent's poor judgment in the class room follow receipt of the Notice affected the students in his classroom. The students found the classroom to be out-of-control and not a good learning environment.

The degree of such adversity.

A number of Respondent's students testified that their experience in Respondent's classroom was not positive. While there was no serious injury or expected long term impact on the student's lives, their overall experience in Respondent's classroom was negative.

The proximity or remoteness in time of the conduct.

The charges that serve as cause for discipline occurred in 2010 and 2011. The conduct is proximate in time as compared to the date of this Decision.

The type of teaching certificate held by the party involved.

Respondent's teaching certificate authorizes him to teach Social Studies, grades K through 12. His teaching certificate is neither a positive nor negative factor.

The existence of extenuating or aggravating circumstances, if any, surrounding the conduct.

Respondent offered explanations or denials for his misconduct. For example Respondent contended that the type of students he was teaching made it difficult to maintain control in the classroom. However, Respondent had previously been given the Notice that no further unprofessional conduct would be tolerated. Nevertheless, he chose to attempt to handle issues in his classroom without involving his supervisors. While Respondent may have been trying to do what he believed was best, he was on notice that his performance in the classroom was of the utmost concern and he should have sought assistance from his supervisors.

Extenuating circumstances are that Respondent was an outstanding before he received the notice. He performed as an excellent teacher, was well-liked by students and District personnel, and was involved in many extracurricular activities at which he excelled. However, Respondent's prior outstanding performance also indicates dismissal is proper. Respondent knew how to be an excellent teacher. After he received the Notice, he failed to perform as he knew he should and with the abilities that he possesses.

The praiseworthiness or blameworthiness of the motives resulting in the conduct.

Respondent was given the Notice which warned him that no further unprofessional conduct would be tolerated. His conduct thereafter established that he used poor judgment in the classroom.

The likelihood of recurrence of the questioned conduct.

Respondent contended that he can change all of his unprofessional conduct. However, Respondent was previously warned when he received the Notice. His conduct thereafter established that the likelihood of recurrence is increased because of his prior failure to act professionally when he knew that future misconduct would result in the instant administrative action. At hearing, Respondent stated, “[I] won’t do it again” at least five times. This many errors in judgment after receiving the Notice indicate a substantial likelihood of recurrence.

The extent discipline may cause adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers.

The parties presented no direct constitutional arguments

9. This Commission has the discretion to determine that dismissal is not appropriate even though cause for discipline exists. (*Fontana Unified School District v. Burman* (1988) 45 Cal.3d 208.) Having considered all of the evidence and the *Morrison* factors, it is the unanimous decision of the Commission that dismissal of Respondent is appropriate.

ORDER

The First Amended Accusation and Statement of Charges against Respondent TIMOTHY O’KAIN are sustained. Respondent shall be terminated and dismissed as a certificated employee of the Redondo Beach Unified School District.

DATED: _____

Henry Montelongo, Commission Member

DATED: _____

Ali Rabiei, Commission Member

DATED: _____

Chris Ruiz, Commission Member,
Administrative Law Judge