

BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

ARLENE SCHERY,

OAH Case No. 2014100674.1

Respondent.

DECISION AFTER REMAND

The Commission on Professional Competence (Commission) heard the above-captioned matter in Los Angeles on November 2, 3, 5, 6, 9, 10, and 12, 2015. The Commission members were John Davis, Andrea Adausto, and Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH). Complainant was represented by Michelle M. Goldsmith, Bergman Dacey Goldsmith, and Susan E. Hyman, Assistant General Counsel, Los Angeles Unified School District (LAUSD or District). Respondent Arlene Schery appeared with her attorney, Ronald C. Lapekis.

At the end of the hearing Complainant moved to amend the First Amended Accusation (FAA), which motion was granted. The amendments, described below, were interlineated into the FAA, exhibit 21, as follows:

At page 2, line 6, paragraph 1, the words “on or about May 14, 2009,” were inserted in place of the words “in or about the 2008-2009 school year.”

At page 2, line 9, paragraph 2, the words “on or about May 14, 2009,” were inserted in place of the words “in or about the 2008-2009 school year.”

At page 2, line 20, paragraph 5, the word “Alexandria” was changed to “Alexandra,” and on that same line the word “Summer” was changed to “Sommer.”

At page 2, line 25, the paragraph was designated as paragraph 6c, and the first words were changed to read “Said, ‘Need an oil change?’.”

At page 2, line 27, the subparagraph designation was changed from “c” to “d.”

The matter was submitted for decision on November 12, 2015. The Commission issued its decision on February 12, 2016. Thereafter the parties instituted proceedings in the Superior Court of California, County of Los Angeles, each seeking a writ of mandate. (*Los Angeles Unified School District v. Commission on Professional Competence, et al.* (Super. Ct. L.A. County, 2016, BS 161753.)

On July 10, 2017, the Honorable Mary H. Strobel, Judge of the Superior Court, issued a Writ of Mandate to the Commission, ordering it to make additional findings concerning the Commission's Legal Conclusion number 10 relating to immoral conduct, in conformity with *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514-515.

On August 7, 2017, the Commission met and deliberated further, in compliance with the writ of mandate. The Commission hereby makes its factual findings, legal conclusions, and order following the remand. This includes a new Factual Finding 20, and new Legal Conclusion 10.

INTRODUCTION AND STATEMENT OF THE CASE

In this proceeding the District took steps to terminate Respondent, and she demanded a hearing on the matter. Four statutory grounds were asserted as justifying termination: unprofessional conduct (Ed. Code, § 44932, subd. (a)(1)); immoral conduct (Ed. Code, §§ 44932, subd. (a)(1) & 44939); evident unfitness for service (Ed. Code § 44932, subd. (a)(5)); and, persistent violation of state laws or regulations, or the district's regulations, for the governance of schools (§44932, subd. (a)(7)).¹

It was alleged that on several occasions Respondent treated students in a demeaning and insulting way. It was also alleged that Respondent violated her school's cell phone policy on more than one occasion, despite written warnings to comply.

Respondent provided evidence regarding the facts and circumstances of the events referenced in the FAA, and otherwise provided evidence in support of her retention by the District. However, the District proved the vast majority of the allegations against Respondent, and the Commission finds and concludes, unanimously, that cause for termination has been established.

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¹ All further statutory references are to the Education Code.

FACTUAL FINDINGS

The Parties and Jurisdiction

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

2. The District commenced this proceeding on April 26, 2013, when Vivian K. Ekchian executed a Statement of Charges against Respondent. That Statement of Charges was filed with the District's governing board, which thereafter voted to terminate Respondent.

3. On May 14, 2013, the District gave Respondent written notice of its intent to terminate her, and served Respondent with a copy of the Statement of Charges. Respondent made a timely request for hearing, which led to the issuance of the Accusation. She then filed a Notice of Defense, and this proceeding ensued. On October 23, 2015, ALJ Michael Scarlett granted the District's motion to file an amended accusation. By operation of law, Respondent is deemed to have denied the allegations of the FAA. All jurisdictional requirements have been met.

4. Respondent is a certificated teacher employed by the District, and at the times relevant to this decision was teaching history and anthropology to high school students. Respondent holds a clear single subject teaching credential, with a social studies authorization. She also holds a Cross-cultural, Language and Academic Development credential (CLAD). During the time relevant to this proceeding—May 14, 2009, to October 25, 2012—Respondent was assigned to teach at Eagle Rock High School.

Findings on the Allegations of the FAA²

5. (A) It was established that during the period between May 14, 2009, and May 28, 2009, Respondent treated her student, C [REDACTED] S., in a derogatory manner and a demeaning manner. Respondent referred to the student as being “dumb.” Respondent would mispronounce the student’s name and when the student would explain how to pronounce her name correctly, Respondent would make no real effort to get the name right. Instead, she would repeat the name, improperly in two or three ways, and then say “whatever.” This showed both disrespect to the student and an unprofessional attitude.

(B) Respondent’s failure to make a real attempt to learn how to say her student’s name properly is juxtaposed to her efforts to teach C [REDACTED] to pronounce certain words properly. C [REDACTED] was an ESL (English as a Second Language) student, one whose primary language was not English, but Spanish. When the student would give presentations, she would mispronounce some words, and Respondent would correct her pronunciation in front of the whole class, who often laughed, to the discomfort of C [REDACTED]. The Commission

² As amended at the end of the hearing

recognizes that Respondent should teach her students in a way that expands their vocabulary, and that correcting pronunciation is not unprofessional in and of itself. However, the evidence indicates that Respondent went about the task in an insensitive way that exposed C [REDACTED] to ridicule, while she herself was not exposed to ridicule for mispronouncing the student's name.

6. During the period after May 14, 2009, and through the end of the 2009 school year, Respondent made disparaging remarks about people who speak Spanish, and about Mexicans. She did this in class, and her classes had many students who were of Mexican or other Hispanic descent. She also referred to a neighborhood where some of the students lived, and which was known to have gang elements, in a way that painted all of her students as involved in gangs.

7. (A) On or about October 12, 2012, Respondent confiscated a cell phone from one of her students, A [REDACTED] O., because he was violating the Eagle Rock High School Cell Phone Policy (Phone Policy). The Phone Policy essentially forbade students from using cell phones during the school day.

(B) Teachers who confiscated cell phones were, required to turn the devices over to the Dean before the end of the day, because the students were authorized to retrieve their confiscated cell phones at the end of the day, if they were accompanied by a parent. If the Dean was unavailable, the phone could be left at the administration office, as it was open until 4:30, and there was a place to secure the phone at that office.

(D) On three occasions between November 20, 2009 and June 6, 2012, Respondent had been reminded, in writing, that confiscated phones or other electronic devices had to be turned in the day they were confiscated.

(D) Respondent did not turn the phone over to the Dean, or the administration office, on October 12, 2012. Instead, she took it home; despite knowledge of her obligations, thereby failing to follow policy and directives previously given to her. Her excuse was that she could not find the Dean in his office, and that her work day was over at 3:07 p.m., and that she was entitled, under the union contract to go straight home, and she was not obligated, after school, to locate the Dean, or otherwise take steps to turn the phone in. This ignores the fact that she could have taken the phone to the administration office on her way out of school, which would have secured the phone but left it accessible to the Dean or another administrator if the student and their parent came to retrieve the phone.

8. (A) In approximately September 2012, Respondent directed a student named E [REDACTED] to tape a picture of a creature that looked like a monkey or an ape onto the chest of another student, M [REDACTED]. Respondent then told M [REDACTED] to come to the front of the room, which he refused to do.

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(B) The picture in question was, according to Respondent, an artist's likeness of "Lucy," considered to be the oldest hominid, and precursor in the evolutionary chain, to humans. However, to a casual observer, it would appear to be a picture of some sort of ape.

(C) At some point during the interaction, Respondent stated that the picture was a picture of M [REDACTED] M [REDACTED] and other students took this to be Respondent making fun of M [REDACTED] who is somewhat hairy, with heavy eyebrows, and who, as a child, was sensitive to being "hairy."

(D) By telling M [REDACTED] to come to the front of the room, Respondent intended to make him the butt of some joke she had in mind. That he would not go to the front of the room indicates he perceived he was to be made the butt of her joke. Respondent's conduct was demeaning to M [REDACTED] and was perceived that way by other students.³

9. (A) On October 25, 2012, Respondent discussed confidential information pertaining to her student A [REDACTED] with the another student, and the other student's mother. It was improper for her to do so.

(B) The discussion took place during a student-led parent teacher conference that took place in Respondent's classroom on the evening of October 25, 2012. Respondent was meeting with her student, K.S., and the student's mother (Mom). At some point during the conference, Mom told Respondent that her daughter's grades had been declining, and she asked Respondent if she could explain the drop in performance. Respondent replied that the daughter, K.S., was hanging around with the wrong friends, and then named A [REDACTED] as the negative influence on K.S. Respondent told Mom that A [REDACTED] just wanted to fool around, and that she had demonstrated behavioral issues around school.

(C) At some point during this conversation, Respondent discussed A [REDACTED]'s grades with K.S. and Mom. Mom and her daughter both testified in a credible manner, that Respondent told them about A [REDACTED]'s grades in Respondent's history class, and Respondent told them about A [REDACTED]'s Spanish class.

(D) As a result of Respondent's statements about A [REDACTED] Mom told K.S. that she could no longer be friends with A [REDACTED]. K.S. told A [REDACTED] of her mother's edict the next day, and she told A [REDACTED] that Respondent had told her and her mother about A [REDACTED]'s grades.

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³ See exhibit 41, p. 3, where a student named S [REDACTED] described this event to a police investigator.

10. (A) On October 24, 2012, Respondent engaged in assaultive and abusive behavior toward a student, known as Z⁴, when Z⁴ was sent to her classroom by another teacher. The facts and circumstances follow.

(B) On the day in question, Z⁴ and A⁵ (referenced in Factual Finding 9), were brought to Respondent's classroom by Mr. Dominguez, who taught the two students Spanish in a nearby classroom. Dominguez asked Respondent if the two students could be placed in her room for awhile, as they were acting up in the Spanish class. Mr. Dominguez said he had some work that the two students could do. Respondent agreed with Dominguez's request.

(C) While discussing the matter, Dominguez said of Z⁴ that the student was acting up, and that he had the devil in him, or words to that effect. Respondent told Z⁴ and A⁵ where to sit, which was in desks near the back right section of the classroom.

(D) Respondent went to the back of the room near Z⁴ and splashed or poured some water on him, and sprayed him with a spray bottle labeled as whiteboard cleaner. She said words to the effect that the water was to get the devil out of him, implying some sort of exorcism needed to take place.

(E) Z⁴ was surprised and shocked by Respondent's conduct. An exchange followed, and during the course of that exchange Respondent told Z⁴ to get his finger out of his ass.⁵

(F) At another point during the exchange, Respondent held a metal rod, at times during the proceeding described as a dipstick for an automobile engine, and said it was for checking Z⁴'s oil, and moved the stick up and down in a gesture perceived as obscene by Z⁴.

(G) Z⁴, who is openly gay, perceived that Respondent was attacking him on that point. He made a complaint to the school administration before the day was out.

(H) The interchange was witnessed by several students. One of them, S⁶, later described Z⁴ as "that poor guy" who "looked like he was in shock." He went on to say "that poor guy [Z⁴] just looked freaked by the time he left the class." (Ex. 41, pp. 2-3.)

⁴ The student's first and middle name was R⁷ Z⁸, and he went by the name Z⁹. Some of the students knew him as R⁷. (See ex. 41, p. 3.)

⁵ Respondent told a police officer, when interviewed by him the next day, that she told Z⁴ to get his head out of his ass and to get some work done. That version of the event is not credited by the Commission, but is a tacit admission of improper conduct. She also attacked Z⁴'s credibility, claiming he had a chip on his shoulder. (Ex. 41, p. 3.)

11. The District established that Respondent had, during the relevant time period, received direction and counseling regarding her behaviors. The District has had policies in place that governed the actions of permanent teachers such as Respondent, and Respondent had notice of those policies. Those policies proscribed Respondent's misconduct.

12. (A) On May 29, 2009, following the events involving C [REDACTED] Respondent had a conference with an assistant principal that dealt, in part, with the events regarding that student. Respondent received a memo regarding the conference. That memo cited provisions of the California Standards for the Teaching Profession (Cal. Standards), the LAUSD Code of Conduct (Conduct Code), LAUSD Code of Ethics (Ethics Code), and the LAUSD Respectful Treatment of All Others Policy (Respect Policy).

(B) According to the memo, Cal. Standards sections 2.2, 2.3, and 2.4 were discussed with Respondent. Also discussed was the Conduct Code, numbers 3 and 5, the Ethics Code, wherein it is stated teachers must treat students with respect, as well as similar provisions of the Respect Policy.

(C) Copies of the Conduct Code, Cal. Standards, Ethics Code, and Respect Policy were transmitted to Respondent along with a copy of the memo issued after the May 28, 2009 meeting.

13. (A) At the beginning of every school year, all the teachers at Eagle Rock High School received a number of documents that set out District policies and procedures. In the school years 2010-2011, 2011-2012, and 2012-2013, Respondent received copies of such documents at the beginning of each school year.

(B) The documents received by Respondent at the beginning of each school year included the District's Code of Conduct with Students, Conduct Code, Ethics Code, Cal. Standards, and the School Board's Resolution pertaining to the respectful treatment of all persons.

(C) The aforementioned documents put Respondent on notice of what she should know in any event: that conduct tending to insult or demean students was improper.

14. During the hearing Respondent stated she had never read the Ethics Code. It is inferred she had not read the other policy materials that had been transmitted to her on a yearly basis.

Other Matters

15. (A) Z [REDACTED] did not testify at the hearing because he now resides in Arizona, beyond the reach of a subpoena. He was deposed by both parties in June 2015. Respondent argued that the credibility of his testimony should be scrutinized in light of the many times he claimed, while being examined by Respondent's counsel, not to recall something.

(B) As noted in the Legal Conclusions below, discerning a witness's credibility from a cold transcript is problematic. Z█'s nearly complete refusal to answer questions put to him by Respondent's counsel, following a barrage of objections by District's counsel has harmed, but not destroyed, Z█'s credibility regarding the incident in October 2012. However, the bulk of his claims were corroborated by other witnesses and contemporaneous statements. In this regard, the statements by S█ to the police the next day, memorialized in exhibit 41, supported the findings made on the incident with Z█.

16. Respondent's credibility suffered during her testimony, in that she herself had memory lapses, and sometimes had a truculent demeanor during cross examination. Further, testimony she gave in a deposition taken in connection with this proceeding, a deposition taken in connection with her workers' compensation claim against the District, and testimony during a workers' compensation hearing, provided inconsistent positions on some of the key events. And, Respondent had made some damning admissions. As noted above, when questioned by police the day after the incident with Z█ she denied telling him to get a digit out of his ass, instead saying she told Z█ to get his head out of his ass. During the conference in May 2009, where her attitude toward Hispanic students was questioned, she said "you get called a racist all the time. Doesn't everyone?" (Ex. 32, p. 105.)

17. Respondent attempted to make these issues of her conduct into a case against the way the District is administered, and not about her behavior. At times she claimed that she was being let go because the District wants to fire its higher-paid teachers. There was no evidence she is among the highest paid teachers, nor was there a hint of such a motive on the District's part. When she received the Notice of Unsatisfactory Acts and Notice of Suspension in January 2013, she stated that the principal and other administrators in the District were acting like Nazis, "just following orders" like the senior Nazis claimed they had been doing when they were brought to justice at Nuremberg after the Second World War. Such pernicious insults had no justification. She has made claims of sexual harassment and retaliation that went unsupported.

18. The record establishes that Respondent was counseled, informally and formally, that she had to watch her behavior and guard against making hurtful statements. The former principal at Eagle Rock High School testified that Respondent made hurtful comments about his accent, and he tried to get her to understand that she was being inappropriate. Other supervisors testified to hearing occasional complaints from students that Respondent was saying inappropriate things in class, often with racial overtones or making statements that were demeaning of some of the students. Those supervisors counseled Respondent to take care not to act in an offensive manner. Respondent failed to heed those warnings.

19. While trying to shift the focus in this case to the conduct of the students and District administrators, Respondent has failed to take any responsibility for her failure to abide by State and District standards of conduct, and her failure to abide by what most would consider good manners. She has been unapologetic.

20. (A) As indicated by Factual Findings 5, 6, 8, 9, and 10, Respondent's conduct was willful, and in the incidents described in those findings, she showed indifference to the feelings of her students. She also showed that indifference during the May 2009 conference (Factual Finding 16, citing ex. 32, p. 105). She exhibited that indifference by her response to counseling provided by supervisors over a period of time, as indicated in Factual Finding 18.

(B) Respondent showed a studied indifference to, and disregard of, the Ethics Code, and other standards of conduct promulgated by the District and by the State, as indicated by Factual Findings 11, 12, 13, and 14.

(C) Respondent's disregard of the standards of conduct and Ethics Code was willful and shameless, as indicated by her admission that she had not read the Ethics Code. (Factual Finding 14.) As noted in Factual Finding 19, she has been unapologetic.

The Morrison Factors

21. (A) Where there is conduct that might justify termination of a teacher, an examination must still be made of whether or not that conduct indicates that the Respondent in question is unfit to teach. The misconduct must be shown to have some rational connection, some nexus, to the teacher's ability to teach in the District.

(B) This requirement was first set forth in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229 (*Morrison*). In that case a teacher had been discovered to be homosexual, though there had been no inkling of that fact within the school. The California Supreme Court held that such alone was not enough to discipline his teaching credential, requiring that some connection of his private conduct be made to his job duties and performance had to be shown. The court listed a number of factors that might be considered in determining whether or not unfitness to teach had been established.

22. (A) The first factor to consider is the likelihood that the conduct may have adversely affected students or fellow teachers. In this case, the record establishes an adverse effect upon students, especially C [REDACTED], Z [REDACTED], S [REDACTED] K.S., and her former friend A [REDACTED]

(B) Another factor is the proximity or remoteness in time of the conduct. In this case the misconduct occurred over a four year period between 2009 and 2012. The conduct is relatively recent.

(C) Another factor is the type of certificate held by the teacher, which in this case is a single subject credential allowing Respondent to teach high school students.

(D) Extenuating or aggravating circumstances is another factor under the *Morrison* case. In this case there are no extenuating circumstances. In aggravation, Respondent had notice of District policies. However, she kept herself in ignorance of the District's Ethics Code and, inferentially, other policies. (Factual Findings 11-14.) She had

been counseled on a formal and informal basis to watch her behavior and language. She did not.

(E) The praiseworthiness or blameworthiness of the motives resulting in the conduct should be considered. There is no praiseworthiness to the Respondent's conduct. It was blameworthy to act in a manner that would tend to cause hurt. Further, to disclose A [REDACTED] s grades to another student and parent was wholly inappropriate, and cannot be justified on the grounds that the parent of K.S. wanted to know why her daughter's performance was slipping.

(F) Another factor is the likelihood that the conduct in question will recur. The Commission believes, based on all the evidence that there is a very high likelihood that Respondent's misconduct will recur. This is evidenced, in part, by her attitude toward the District and its administrators. It is also shown by her attitude generally, as illustrated in her statements to the police about Z [REDACTED] and as described in Factual Findings 14 and 16 through 19.

LEGAL CONCLUSIONS

Legal Conclusions of General Application:

1. The Commission has jurisdiction to proceed in this matter, pursuant to section 44944, and Factual Findings 1 through 4.

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

3. "Evident unfitness for service" as used in section 44932, subdivision (a)(5), properly means "clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies." Unlike "unprofessional conduct," "evident unfitness for service" connotes a fixed character trait, presumably not remediable merely on receipt of notice that one's conduct fails to meet the expectations of the employing school district. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, at 1444.)

4. "Immoral conduct," of which Respondent has been accused, is not confined to sexual matters. It has been defined to mean that which is hostile to the welfare of the general public and contrary to good morals. It includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, and dissoluteness. Or, it can be conduct that is willful, flagrant, or shameless, conduct showing moral indifference to the opinions of

respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare. (*Board of Education of the San Francisco Unified School District v. Weiland* (1960) 179 Cal. App.2d 808, 811 (*Weiland*); *San Diego Unified School Dist. v. Commission on Professional Competence* (2011) 194 Cal.App.4th 1454, 1466.)

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

6. Even where unprofessional conduct, immoral conduct, evident unfitness for service, or refusal to follow rules and regulations is or are established, it must also be established that such conduct renders the Respondent unfit to teach. (*Morrison, supra*; *Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208; *Woodland Joint Unified School District v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444-1445; See *Bourland v. Commission on Professional Competence* (1985) 174 Cal.App.3d 317, 321.)

7. (A) It is settled that the trier of fact may “accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted.” (*Stevens v. Parke Davis & Co.* (1973) 9 Cal.3d 51, 67.) The trier of fact may also “reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material.” (*Id.*, at 67-68, quoting from *Neverov v. Caldwell* (1958) 161 Cal.App.2d 762, 767.) Further, the fact finder may reject the testimony of a witness, even an expert, although not contradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.) And, the testimony of “one credible witness may constitute substantial evidence,” including a single expert witness. (*Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, 1052.)

(B) The rejection of testimony does not create evidence contrary to that which is deemed untrustworthy. That is, disbelief does not create affirmative evidence to the contrary of that which is discarded. That the trier of fact may disbelieve the testimony of a witness who testifies to the negative of an issue does not of itself furnish any evidence in support of the affirmative of that issue, and does not warrant a finding in the affirmative thereof unless there is other evidence in the case to support such affirmative. (*Hutchinson v. Contractors' State License Bd.* (1956) 143 Cal.App.2d 628, 632-633, quoting *Marovich v. Central California Traction Co.* (1923) 191 Cal.295, 304.)

(C) “On the cold record a witness may be clear, concise, direct, unimpeached, uncontradicted—but on a face to face evaluation, so exude insincerity as to render his credibility factor nil. Another witness may fumble, bumble, be unsure, uncertain, contradict himself, and on the basis of a written transcript be hardly worthy of belief. But one who sees,

hears and observes him may be convinced of his honesty, his integrity, his reliability.” (*Wilson v. State Personnel Board* (1976) 58 Cal.App.3d 865, at 877-878, quoting *Meiner v. Ford Motor Co.* (1971) 17 Cal.App.3d 127, 140.)

Legal Conclusions Pertaining to the Specific Allegations of the FAA:

8. Respondent’s conduct can be deemed unprofessional conduct. However, Respondent may not be terminated for unprofessional conduct. This is because complainant has not established that Respondent was served with a Notice of Unprofessional Conduct and then provided with an opportunity to cure her unprofessional conduct after receiving such a notice. The record indicates that Respondent was served with a Notice of Unprofessional Conduct on January 23, 2013. (FAA, ex. 21, p. 3, l. 13; ex. 46..) The record indicates that Respondent had been removed from the classroom thereafter, and not returned to the classroom. This is fatal to the unprofessional conduct claim because she was not given the opportunity to cure her unprofessional conduct; a jurisdictional defect. (*Tarquin v. Commission on Professional Competence* (1978) 84 Cal.App.3d 251; *Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1446.) Further, there is no evidence of unprofessional conduct occurring after January 23, 2013.

9. It was established that Respondent is evidently unfit for service within the meaning of section 44932, subdivision (a)(5), as further defined in Legal Conclusion 3. It was established that she has fixed character traits that make her unsuitable for teaching in the District. While there is evidence of positive attributes—her development of an anthropology course is to be credited—her temperament is such that she will invariably say hurtful and negative things to her students, and then attempt to fob off her maladroit statements as a joke gone awry. Despite counseling and advice, she did not change her ways. In the course of this process, which began with the service of the Notice of Unsatisfactory Performance, Respondent has been defiant and unapologetic.

10. (A) In considering the totality of Respondent’s conduct, the Commission concludes that Respondent did engage in immoral conduct within the meaning of sections 44932, subdivision (a)(1), and 44939, and the cases cited in Legal Conclusion 4. This Conclusion is based on Factual Findings 5, 6, 8, 9, 10, 11, 12, 13, 14, 16, 18, 19, and 20.

(B) The District’s Code of Conduct with Students, Conduct Code, Ethics Code, California Standards, and the School Board’s Resolution pertaining to respectful treatment of others (Factual Finding 13(B)) set forth what are fairly seen as a distillation of standards for “good order and the public welfare” within the public schools. At the same

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time, the opinions of school administrators as to how Respondent should behave towards students may be deemed the opinions of respectable members of the community.⁶

(C) Respondent's conduct toward her students, and at times toward her supervisors (Factual Finding 18) showed substantial indifference toward the opinions of others. Her conduct toward her students, coupled with her failure to read the Ethics Code and other standards of conduct, shows to a substantial degree an inconsiderate attitude toward good order and the public welfare. Her failure to accept any responsibility for her actions indicates that her inconsiderate and indifferent behavior has been willful and shameless.

11. It was established that Respondent has engaged in persistent disobedience of applicable rules and regulations, because it was established that Respondent's behavior was motivated by an attitude of disregard for applicable rules and policies. That she kept herself ignorant of those rules speaks volumes. There has been a consistent refusal to follow rules and regulations. Her attitude toward her supervisors during office conferences, and during the hearing, indicates that Respondent has an insubordinate attitude.

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⁶ As pointed out in *San Diego Unified*, "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.'" (*San Diego Unified School Dist.*, *supra*, 194 Cal.App.4th at p. 1466, quoting *Board of Trustees v. Stubblefield* (1971) 16 Cal.App.3d 820, 824)

12. The Commission agrees unanimously that grounds for termination have been established; this includes consideration of the *Morrison* factors as set forth in Factual Findings 21 and 22.

ORDER

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

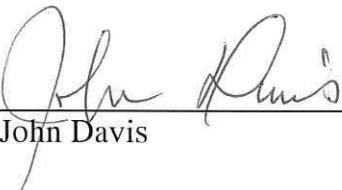
August 7, 2017


Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings

August 7, 2017


Andrea Adauto

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John Davis

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DECISION

The Commission on Professional Competence (Commission) heard the above-captioned matter in Los Angeles on November 2, 3, 5, 6, 9, 10, and 12, 2015. The Commission members were John Davis, Andrea Adauto, and Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH). Complainant was represented by Michelle M. Goldsmith, Bergman Dacey Goldsmith, and Susan E. Hyman, Assistant General Counsel, Los Angeles Unified School District (LAUSD or District). Respondent Arlene Schery appeared with her attorney, Ronald C. Lapekis.

At the end of the hearing Complainant moved to amend the First Amended Accusation (FAA), which motion was granted. The amendments, described below, were interlineated into the FAA, exhibit 21, as follows:

At page 2, line 6, paragraph 1, the words “on or about May 14, 2009,” were inserted in place of the words “in or about the 2008-2009 school year.”

At page 2, line 9, paragraph 2, the words “on or about May 14, 2009,” were inserted in place of the words “in or about the 2008-2009 school year.”

At page 2, line 20, paragraph 5, the word “Alexandria” was changed to “Alexandra,” and on that same line the word “Summer” was changed to “Sommer.”

At page 2, line 25, the paragraph was designated as paragraph 6c, and the first words were changed to read “Said, ‘Need an oil change?’.”

At page 2, line 27, the subparagraph designation was changed from “c” to “d.”

The matter was submitted for decision on November 12, 2015. The Commission hereby makes its factual findings, legal conclusions, and order.

INTRODUCTION AND STATEMENT OF THE CASE

In this proceeding the District took steps to terminate Respondent, and she demanded a hearing on the matter. Four statutory grounds were asserted as justifying termination: unprofessional conduct (Ed. Code, § 44932, subd. (a)(1)); immoral conduct (Ed. Code, §§ 44932, subd. (a)(1) & 44939); evident unfitness for service (Ed. Code § 44932, subd. (a)(5)); and, persistent violation of state laws or regulations, or the district's regulations, for the governance of schools (§44932, subd. (a)(7)).¹

It was alleged that on several occasions Respondent treated students in a demeaning and insulting way. It was also alleged that Respondent violated her school's cell phone policy on more than one occasion, despite written warnings to comply.

Respondent provided evidence regarding the facts and circumstances of the events referenced in the FAA, and otherwise provided evidence in support of her retention by the District. However, the District proved the vast majority of the allegations against Respondent, and the Commission finds and concludes, unanimously, that cause for termination has been established.

FACTUAL FINDINGS

The Parties and Jurisdiction

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

2. The District commenced this proceeding on April 26, 2013, when Vivian K. Ekchian executed a Statement of Charges against Respondent. That Statement of Charges was filed with the District's governing board, which thereafter voted to terminate Respondent.

3. On May 14, 2013, the District gave Respondent written notice of its intent to terminate her, and served Respondent with a copy of the Statement of Charges. Respondent made a timely request for hearing, which led to the issuance of the Accusation. She then filed a Notice of Defense, and this proceeding ensued. On October 23, 2015, ALJ Michael Scarlett granted the District's motion to file an amended accusation. By operation of law, Respondent is deemed to have denied the allegations of the FAA. All jurisdictional requirements have been met.

4. Respondent is a certificated teacher employed by the District, and at the times relevant to this decision was teaching history and anthropology to high school students. Respondent holds a clear single subject teaching credential, with a social studies

¹ All further statutory references are to the Education Code.

authorization. She also holds a Cross-cultural, Language and Academic Development credential (CLAD). During the time relevant to this proceeding—May 14, 2009, to October 25, 2012—Respondent was assigned to teach at Eagle Rock High School.

*Findings on the Allegations of the FAA*²

5. (A) It was established that during the period between May 14, 2009, and May 28, 2009, Respondent treated her student, C [REDACTED] S., in a derogatory manner and a demeaning manner. Respondent referred to the student as being “dumb.” Respondent would mispronounce the student’s name and when the student would explain how to pronounce her name correctly, Respondent would make no real effort to get the name right. Instead, she would repeat the name, improperly in two or three ways, and then say “whatever.” This showed both disrespect to the student and an unprofessional attitude.

(B) Respondent’s failure to make a real attempt to learn how to say her student’s name properly is juxtaposed to her efforts to teach C [REDACTED] to pronounce certain words properly. C [REDACTED] was an ESL (English as a Second Language) student, one whose primary language was not English, but Spanish. When the student would give presentations, she would mispronounce some words, and Respondent would correct her pronunciation in front of the whole class, who often laughed, to the discomfort of C [REDACTED]. The Commission recognizes that Respondent should teach her students in a way that expands their vocabulary, and that correcting pronunciation is not unprofessional in and of itself. However, the evidence indicates that Respondent went about the task in an insensitive way that exposed C [REDACTED] to ridicule, while she herself was not exposed to ridicule for mispronouncing the student’s name.

6. During the period after May 14, 2009, and through the end of the 2009 school year, Respondent made disparaging remarks about people who speak Spanish, and about Mexicans. She did this in class, and her classes had many students who were of Mexican or other Hispanic descent. She also referred to a neighborhood where some of the students lived, and which was known to have gang elements, in a way that painted all of her students as involved in gangs.

7. (A) On or about October 12, 2012, Respondent confiscated a cell phone from one of her students, A [REDACTED] O., because he was violating the Eagle Rock High School Cell Phone Policy (Phone Policy). The Phone Policy essentially forbade students from using cell phones during the school day.

(B) Teachers who confiscated cell phones were, required to turn the devices over to the Dean before the end of the day, because the students were authorized to retrieve their confiscated cell phones at the end of the day, if they were accompanied by a parent. If the Dean was unavailable, the phone could be left at the administration office, as it was open until 4:30, and there was a place to secure the phone at that office.

² As amended at the end of the hearing

(D) On three occasions between November 20, 2009 and June 6, 2012, Respondent had been reminded, in writing, that confiscated phones or other electronic devices had to be turned in the day they were confiscated.

(D) Respondent did not turn the phone over to the Dean, or the administration office, on October 12, 2012. Instead, she took it home, despite knowledge of her obligations, thereby failing to follow policy and directives previously given to her. Her excuse was that she could not find the Dean in his office, and that her work day was over at 3:07 p.m., and that she was entitled, under the union contract to go straight home, and she was not obligated, after school, to locate the Dean, or otherwise take steps to turn the phone in. This ignores the fact that she could have taken the phone to the administration office on her way out of school, which would have secured the phone but left it accessible to the Dean or another administrator if the student and their parent came to retrieve the phone.

8. (A) In approximately September 2012, Respondent directed a student named E [REDACTED] to tape a picture of a creature that looked like a monkey or an ape onto the chest of another student, M [REDACTED]. Respondent then told M [REDACTED] to come to the front of the room, which he refused to do.

(B) The picture in question was, according to Respondent, an artist's likeness of "Lucy," considered to be the oldest hominid, and precursor in the evolutionary chain, to humans. However, to a casual observer, it would appear to be a picture of some sort of ape.

(C) At some point during the interaction, Respondent stated that the picture was a picture of M [REDACTED]. M [REDACTED] and other students took this to be Respondent making fun of M [REDACTED], who is somewhat hairy, with heavy eyebrows, and who, as a child, was sensitive to being "hairy."

(D) By telling M [REDACTED] to come to the front of the room, Respondent intended to make him the butt of some joke she had in mind. That he would not go to the front of the room indicates he perceived he was to be made the butt of her joke. Respondent's conduct was demeaning to M [REDACTED] and was perceived that way by other students.³

9. (A) On October 25, 2012, Respondent discussed confidential information pertaining to her student A [REDACTED] with the another student, and the other student's mother. It was improper for her to do so.

(B) The discussion took place during a student-led parent teacher conference that took place in Respondent's classroom on the evening of October 25, 2012. Respondent was meeting with her student, K.S., and the student's mother (Mom). At some point during the conference, Mom told Respondent that her daughter's grades had been declining, and she

³ See exhibit 41, p. 3, where a student named S [REDACTED] described this event to a police investigator.

asked Respondent if she could explain the drop in performance. Respondent replied that the daughter, K.S., was hanging around with the wrong friends, and then named A [REDACTED] as the negative influence on K.S. Respondent told Mom that A [REDACTED] just wanted to fool around, and that she had demonstrated behavioral issues around school.

(C) At some point during this conversation, Respondent discussed A [REDACTED]'s grades with K.S. and Mom. Mom and her daughter both testified in a credible manner, that Respondent told them about A [REDACTED]'s grades in Respondent's history class, and Respondent told them about A [REDACTED]'s Spanish class.

(D) As a result of Respondent's statements about A [REDACTED], Mom told K.S. that she could no longer be friends with A [REDACTED]. K.S. told A [REDACTED] of her mother's edict the next day, and she told A [REDACTED] that Respondent had told her and her mother about A [REDACTED]'s grades.

10. (A) On October 24, 2012, Respondent engaged in assaultive and abusive behavior toward a student, known as Z [REDACTED], when Z [REDACTED]⁴ was sent to her classroom by another teacher. The facts and circumstances follow.

(B) On the day in question, Z [REDACTED] and A [REDACTED] (referenced in Factual Finding 9), were brought to Respondent's classroom by Mr. Dominguez, who taught the two students Spanish in a nearby classroom. Dominguez asked Respondent if the two students could be placed in her room for awhile, as they were acting up in the Spanish class. Mr. Dominguez said he had some work that the two students could do. Respondent agreed with Dominguez's request.

(C) While discussing the matter, Dominguez said of Z [REDACTED] that the student was acting up, and that he had the devil in him, or words to that effect. Respondent told Z [REDACTED] and A [REDACTED] where to sit, which was in desks near the back right section of the classroom.

(D) Respondent went to the back of the room near Z [REDACTED] and splashed or poured some water on him, and sprayed him with a spray bottle labeled as whiteboard cleaner. She said words to the effect that the water was to get the devil out of him, implying some sort of exorcism needed to take place.

(E) Z [REDACTED] was surprised and shocked by Respondent's conduct. An exchange followed, and during the course of that exchange Respondent told Z [REDACTED] to get his finger out of his ass.⁵

⁴ The student's first and middle name was R [REDACTED] Z [REDACTED], and he went by the name Z [REDACTED]. Some of the students knew him as R [REDACTED]. (See ex. 41, p. 3.)

⁵ Respondent told a police officer, when interviewed by him the next day, that she told Z [REDACTED] to get his head out of his ass and to get some work done. That version of the event is

(F) At another point during the exchange, Respondent held a metal rod, at times during the proceeding described as a dipstick for an automobile engine, and said it was for checking Z█'s oil, and moved the stick up and down in a gesture perceived as obscene by Z█.

(G) Z█, who is openly gay, perceived that Respondent was attacking him on that point. He made a complaint to the school administration before the day was out.

(H) The interchange was witnessed by several students. One of them, S█, later described Z█ as "that poor guy" who "looked like he was in shock." He went on to say "that poor guy [Z█] just looked freaked by the time he left the class." (Ex. 41, pp. 2-3.)

11. The District established that Respondent had, during the relevant time period, received direction and counseling regarding her behaviors. The District has had policies in place that governed the actions of permanent teachers such as Respondent, and Respondent had notice of those policies. Those policies proscribed Respondent's misconduct.

12. (A) On May 29, 2009, following the events involving C█, Respondent had a conference with an assistant principal that dealt, in part, with the events regarding that student. Respondent received a memo regarding the conference. That memo cited provisions of the California Standards for the Teaching Profession (Cal. Standards), the LAUSD Code of Conduct (Conduct Code), LAUSD Code of Ethics (Ethics Code), and the LAUSD Respectful Treatment of All Others Policy (Respect Policy).

(B) According to the memo, Cal. Standards sections 2.2, 2.3, and 2.4 were discussed with Respondent. Also discussed was the Conduct Code, numbers 3 and 5, the Ethics Code, wherein it is stated teachers must treat students with respect, as well as similar provisions of the Respect Policy.

(C) Copies of the Conduct Code, Cal. Standards, Ethics Code, and Respect Policy were transmitted to Respondent along with a copy of the memo issued after the May 28, 2009 meeting.

13. (A) At the beginning of every school year, all the teachers at Eagle Rock High School received a number of documents that set out District policies and procedures. In the school years 2010-2011, 2011-2012, and 2012-2013, Respondent received copies of such documents at the beginning of each school year.

(B) The documents received by Respondent at the beginning of each school year included the District's Code of Conduct with Students, Conduct Code, Ethics Code, Cal.

not credited by the Commission, but is a tacit admission of improper conduct. She also attacked Z█'s credibility, claiming he had a chip on his shoulder. (Ex. 41, p. 3.)

Standards, and the School Board's Resolution pertaining to the respectful treatment of all persons.

(C) The aforementioned documents put Respondent on notice of what she should know in any event: that conduct tending to insult or demean students was improper.

14. During the hearing Respondent stated she had never read the Ethics Code. It is inferred she had not read the other policy materials that had been transmitted to her on a yearly basis.

Other Matters

15. (A) Z█ did not testify at the hearing because he now resides in Arizona, beyond the reach of a subpoena. He was deposed by both parties in June 2015. Respondent argued that the credibility of his testimony should be scrutinized in light of the many times he claimed, while being examined by Respondent's counsel, not to recall something.

(B) As noted in the Legal Conclusions below, discerning a witness's credibility from a cold transcript is problematic. Z█'s nearly complete refusal to answer questions put to him by Respondent's counsel, following a barrage of objections by District's counsel has harmed, but not destroyed, Z█'s credibility regarding the incident in October 2012. However, the bulk of his claims were corroborated by other witnesses and contemporaneous statements. In this regard, the statements by S█ to the police the next day, memorialized in exhibit 41, supported the findings made on the incident with Z█.

16. Respondent's credibility suffered during her testimony, in that she herself had memory lapses, and sometimes had a truculent demeanor during cross examination. Further, testimony she gave in a deposition taken in connection with this proceeding, a deposition taken in connection with her workers' compensation claim against the District, and testimony during a workers' compensation hearing, provided inconsistent positions on some of the key events. And, Respondent had made some damning admissions. As noted above, when questioned by police the day after the incident with Z█, she denied telling him to get a digit out of his ass, instead saying she told Z█ to get his head out of his ass. During the conference in May 2009, where her attitude toward Hispanic students was questioned, she said "you get called a racist all the time. Doesn't everyone?" (Ex. 32, p. 105.)

17. Respondent attempted to make these issues of her conduct into a case against the way the District is administered, and not about her behavior. At times she claimed that she was being let go because the District wants to fire its higher-paid teachers. There was no evidence she is among the highest paid teachers, nor was there a hint of such a motive on the District's part. When she received the Notice of Unsatisfactory Acts and Notice of Suspension in January 2013, she stated that the principal and other administrators in the District were acting like Nazis, "just following orders" like the senior Nazis claimed they had been doing when they were brought to justice at Nuremberg after the Second World War.

Such pernicious insults had no justification. She has made claims of sexual harassment and retaliation that went unsupported.

18. The record establishes that Respondent was counseled, informally and formally, that she had to watch her behavior and guard against making hurtful statements. The former principal at Eagle Rock High School testified that Respondent made hurtful comments about his accent, and he tried to get her to understand that she was being inappropriate. Other supervisors testified to hearing occasional complaints from students that Respondent was saying inappropriate things in class, often with racial overtones or making statements that were demeaning of some of the students. Those supervisors counseled Respondent to take care not to act in an offensive manner. Respondent failed to heed those warnings.

19. While trying to shift the focus in this case to the conduct of the students and District administrators, Respondent has failed to take any responsibility for her failure to abide by State and District standards of conduct, and her failure to abide by what most would consider good manners. She has been unapologetic.

The Morrison Factors

20. (A) Where there is conduct that might justify termination of a teacher, an examination must still be made of whether or not that conduct indicates that the Respondent in question is unfit to teach. The misconduct must be shown to have some rational connection, some nexus, to the teacher's ability to teach in the District.

(B) This requirement was first set forth in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229 (*Morrison*). In that case a teacher had been discovered to be homosexual, though there had been no inkling of that fact within the school. The California Supreme Court held that such alone was not enough to discipline his teaching credential, requiring that some connection of his private conduct be made to his job duties and performance had to be shown. The court listed a number of factors that might be considered in determining whether or not unfitness to teach had been established.

21. (A) The first factor to consider is the likelihood that the conduct may have adversely affected students or fellow teachers. In this case, the record establishes an adverse effect upon students, especially C [REDACTED], Z [REDACTED], S [REDACTED], K.S., and her former friend A [REDACTED].

(B) Another factor is the proximity or remoteness in time of the conduct. In this case the misconduct occurred over a four year period between 2009 and 2012. The conduct is relatively recent.

(C) Another factor is the type of certificate held by the teacher, which in this case is a single subject credential allowing Respondent to teach high school students.

(D) Extenuating or aggravating circumstances is another factor under the *Morrison* case. In this case there are no extenuating circumstances. In aggravation, Respondent had notice of District policies. However, she kept herself in ignorance of the District's Ethics Code and, inferentially, other policies. (Factual Findings 11-14.) She had been counseled on a formal and informal basis to watch her behavior and language. She did not.

(E) The praiseworthiness or blameworthiness of the motives resulting in the conduct should be considered. There is no praiseworthiness to the Respondent's conduct. It was blameworthy to act in a manner that would tend to cause hurt. Further, to disclose A [REDACTED]'s grades to another student and parent was wholly inappropriate, and cannot be justified on the grounds that the parent of K.S. wanted to know why her daughter's performance was slipping.

(F) Another factor is the likelihood that the conduct in question will recur. The Commission believes, based on all the evidence that there is a very high likelihood that Respondent's misconduct will recur. This is evidenced, in part, by her attitude toward the District and its administrators. It is also shown by her attitude generally, as illustrated in her statements to the police about Z [REDACTED], and as described in Factual Findings 14 and 16 through 19.

LEGAL CONCLUSIONS

Legal Conclusions of General Application:

1. The Commission has jurisdiction to proceed in this matter, pursuant to section 44944, and Factual Findings 1 through 4.

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

3. "Evident unfitness for service" as used in section 44932, subdivision (a)(5), properly means "clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies." Unlike "unprofessional conduct," "evident unfitness for service" connotes a fixed character trait, presumably not remediable merely on receipt of notice that one's conduct fails to meet the expectations of the employing school district. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, at 1444.)

4. “Immoral conduct,” of which Respondent has been accused, is not confined to sexual matters. It has been defined to mean that which is hostile to the welfare of the general public and contrary to good morals. It includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, and dissoluteness. Or, it can be conduct that is willful, flagrant, or shameless, conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare. (*Board of Education of the San Francisco Unified School District v. Weiland* (1960) 179 Cal. App.2d 808, 811 (*Weiland*); *San Diego Unified School Dist. v. Commission on Professional Competence* (2011) 194 Cal.App.4th 1454, 1466.)

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

6. Even where unprofessional conduct, immoral conduct, evident unfitness for service, or refusal to follow rules and regulations is or are established, it must also be established that such conduct renders the Respondent unfit to teach. (*Morrison, supra*; *Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208; *Woodland Joint Unified School District v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444-1445; See *Bourland v. Commission on Professional Competence* (1985) 174 Cal.App.3d 317, 321.)

7. (A) It is settled that the trier of fact may “accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted.” (*Stevens v. Parke Davis & Co.* (1973) 9 Cal.3d 51, 67.) The trier of fact may also “reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material.” (*Id.*, at 67-68, quoting from *Neverov v. Caldwell* (1958) 161 Cal.App.2d 762, 767.) Further, the fact finder may reject the testimony of a witness, even an expert, although not contradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.) And, the testimony of “one credible witness may constitute substantial evidence,” including a single expert witness. (*Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, 1052.)

(B) The rejection of testimony does not create evidence contrary to that which is deemed untrustworthy. That is, disbelief does not create affirmative evidence to the contrary of that which is discarded. That the trier of fact may disbelieve the testimony of a witness who testifies to the negative of an issue does not of itself furnish any evidence in support of the affirmative of that issue, and does not warrant a finding in the affirmative thereof unless there is other evidence in the case to support such affirmative. (*Hutchinson v. Contractors’ State License Bd.* (1956) 143 Cal.App.2d 628, 632-633, quoting *Marovich v. Central California Traction Co.* (1923) 191 Cal.295, 304.)

(C) “On the cold record a witness may be clear, concise, direct, unimpeached, uncontradicted—but on a face to face evaluation, so exude insincerity as to render his credibility factor nil. Another witness may fumble, bumble, be unsure, uncertain, contradict himself, and on the basis of a written transcript be hardly worthy of belief. But one who sees,

hears and observes him may be convinced of his honesty, his integrity, his reliability.” (*Wilson v. State Personnel Board* (1976) 58 Cal.App.3d 865, at 877-878, quoting *Meiner v. Ford Motor Co.* (1971) 17 Cal.App.3d 127, 140.)

Legal Conclusions Pertaining to the Specific Allegations of the FAA:

8. Respondent’s conduct can be deemed unprofessional conduct. However, Respondent may not be terminated for unprofessional conduct. This is because complainant has not established that Respondent was served with a Notice of Unprofessional Conduct and then provided with an opportunity to cure her unprofessional conduct after receiving such a notice. The record indicates that Respondent was served with a Notice of Unprofessional Conduct on January 23, 2013. (FAA, ex. 21, p. 3, l. 13; ex. 46..) The record indicates that Respondent had been removed from the classroom thereafter, and not returned to the classroom. This is fatal to the unprofessional conduct claim because she was not given the opportunity to cure her unprofessional conduct; a jurisdictional defect. (*Tarquin v. Commission on Professional Competence* (1978) 84 Cal.App.3d 251; *Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1446.) Further, there is no evidence of unprofessional conduct occurring after January 23, 2013.

9. It was established that Respondent is evidently unfit for service within the meaning of section 44932, subdivision (a)(5), as further defined in Legal Conclusion 3. It was established that she has fixed character traits that make her unsuitable for teaching in the District. While there is evidence of positive attributes—her development of an anthropology course is to be credited—her temperament is such that she will invariably say hurtful and negative things to her students, and then attempt to fob off her maladroit statements as a joke gone awry. Despite counseling and advice, she did not change her ways. In the course of this process, which began with the service of the Notice of Unsatisfactory Performance, Respondent has been defiant and unapologetic.

10. It was not established that Respondent engaged in immoral conduct within the meaning of sections 44932, subdivision (a)(1) and 44939, and the cases cited in Legal Conclusion 4. Even the most serious incident—the incident involving Z█—did not quite cross the line to immoral conduct.

11. It was established that Respondent has engaged in persistent disobedience of applicable rules and regulations, because it was established that Respondent’s behavior was motivated by an attitude of disregard for applicable rules and policies. That she kept herself ignorant of those rules speaks volumes. There has been a consistent refusal to follow rules

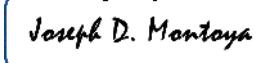
and regulations. Her attitude toward her supervisors during office conferences, and during the hearing, indicates that Respondent has an insubordinate attitude.

12. The Commission agrees unanimously that grounds for termination have been established; this includes consideration of the *Morrison* factors as set forth in Factual Findings 20 and 21.

ORDER

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

February 12, 2016

DocuSigned by:

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Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings

February ____, 2016

Andrea Adauto

February ____, 2016

John Davis

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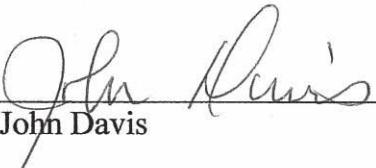
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Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings

January ____, 2015

Andrea Adauto

January 4, 2015


John Davis

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January ____ , 2015

Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings



Andrea Adauto

January 8, 2015

John Davis

January ____ , 2015