

BEFORE THE  
COMMISSION ON PROFESSIONAL COMPETENCE  
STATE OF CALIFORNIA

In the Matter of the Dismissal of:

TROY SMITH (EN 597977),  
a permanent certificated employee,

Respondent.

OAH No. 2015040618

**DECISION**

The Commission on Professional Competence (Commission) heard this matter on September 21, 22, 24, and 28 through 30, 2015, in Los Angeles, California. Howard W. Cohen, Administrative Law Judge (ALJ) with the Office of Administrative Hearings, State of California, Gordon Brown, and Robin Scott constituted the Commission. ALJ Cohen presided.

Susan Hyman, Assistant General Counsel, represented complainant Justo H. Avila, Chief Human Resource Officer for the Los Angeles Unified School District (District). Richard J. Schwab, Trygstad, Schwab & Trygstad, represented respondent Troy Smith.

Prior to the presentation of evidence, respondent brought a pre-trial motion. The ALJ considered and ruled on that motion as well as on motions made during the course of the hearing, as reflected on the record. During the hearing, complainant moved for leave to amend the Amended Accusation by striking charges 2 through 4 on page 2 and by striking charge 10 on page 4. There was no opposition, and the motion was granted.

The ALJ ordered that any testimonial reference to the names of minor students be replaced in the hearing transcript by each student's first name or first name and last initial. Counsel for the parties represented that they had redacted students' names in all exhibits so that students are identified only by first name and last initial.

Oral and documentary evidence was received and argument was heard. The record was held open until October 16, 2015, to allow the parties to file post-hearing briefs. The District's post-hearing brief was marked for identification as Exhibit 54, and respondent's post-hearing brief was marked for identification as Exhibit AAA.

The record was closed and the matter was submitted for decision on October 16, 2015. The Commission considered the record in executive session.

## FACTUAL FINDINGS

### *Jurisdiction and Parties*

1. On March 11, 2015, complainant filed and served on respondent a Notice of Board of Education Intention to Dismiss and Placement on Immediate Unpaid Suspension, with a Statement of Charges. On April 6, 2015, respondent timely requested a hearing.

2. Acting in his official capacity, complainant filed an Amended Accusation on respondent on April 30, 2015. Respondent timely served a Notice of Defense.

3. Respondent is a permanent certificated employee of the District on unpaid leave status. He has taught fifth grade at the same school, Ritter Elementary School, in the District from 1988 to the present. Respondent holds a clear multi-subject credential and a Cross-cultural, Language, and Academic Development (CLAD) Certificate.

### *Complainant's Charges Against Respondent*

4. In the Amended Accusation against respondent, as amended at hearing, in nine separate charging allegations, complainant alleges that cause exists to dismiss respondent from his employment as a permanent certificated employee of the District for:

a. Immoral conduct, including but not limited to egregious misconduct, under Education Code section 44932, subdivision (a)(1);<sup>1</sup>

b. Unprofessional conduct, under section 44932, subdivision (a)(1);

c. Unsatisfactory performance, under section 44932, subdivision (a)(4);

d. Evident unfitness for service, under section 44932, subdivision (a)(5);

e. Persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of public schools by the State Board of Education or by the governing board of the school district employing him, under section 44932, subdivision (a)(7); and

f. Willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing school district, under section 44939.

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<sup>1</sup> All further statutory references are to the Education Code unless otherwise specified.

*Complainant's Charging Allegation 1(2012/2013 School Year)*

5. Complainant alleges at Charge 1 that, on January 14, 2013, respondent committed the following acts toward student B■■■■ G.: “a. Grabbed B■■■■ from under both B■■■■’s arms; b. [p]ulled B■■■■ out of his chair forcing him to stand; c. [o]nce standing, pushed B■■■■ towards the classroom door; and d. [t]ook B■■■■’s jacket that was hanging over a chair and threw it at B■■■■, causing the jacket to cover B■■■■’s face and head and causing B■■■■ to stumble and fall as he left the classroom.” (Ex. 8, p. 2.)

6. The evidence supported Charge 1, in part. Testimony and corroborative documentary evidence established that respondent did not grab B■■■■ G. Rather, by his own admission, respondent put his arms under B■■■■ G.’s arms and applied upward pressure, lifting B■■■■ G. up from his chair. Evidence, including B■■■■ G.’s testimony, that respondent pushed B■■■■ G. towards the door and threw the jacket at B■■■■ G., causing B■■■■ G. to fall, was contradicted and ultimately unpersuasive. Most of the student statements offered in support of the charge represented that respondent tossed, passed, or gave B■■■■ G.’s jacket to him, not that respondent threw the jacket at B■■■■ G. None of the evidence confirmed the allegation that the toss of his jacket caused B■■■■ G. to stumble and fall; even B■■■■ G. did not testify that it caused him to fall, and respondent denied that he caused B■■■■ G. to fall.

*Complainant's Charging Allegation 5 (2011/2012 School Year)*

7. Complainant alleges at Charge 5 that, on October 21, 2011, respondent “grabbed fifth grade student T■■■■ H. by the arm, digging his fingernails into T■■■■’s arm and causing the skin to break.” (Ex. 8, p. 2.)

8. The evidence established that, on the date alleged, respondent grabbed T■■■■ H. by the arm, but not that respondent dug his fingernails into T■■■■ H.’s arm or broke the skin.

*Complainant's Charging Allegations 6 through 9 and 13 (2010/2011 School Year)*

9. These charges pertain to events that are alleged to have occurred in January or Spring 2010 through the end of the 2010/2011 school year.

10. Complainant alleges in Charge 6 that respondent “regularly intimidated his 5th grade students through his actions including, but not limited to, the following:

- a. Slammed a ruler and/or a clipboard on students’ desks;
- b. Slammed his hand on students’ desks;
- c. Threatened the students with paddling.
- d. Threatened to “Tell your parents to put the belt to your rear end.”
- e. Said, “One day, I’m gonna come to your house and ask your momma if I can give you a tune up (whooping.)”

- f. Screamed and yelled at students.
- g. Threw markers at students.
- h. Told students that if they reported him, “no one will believe you.”
- i. Numerous students reported being afraid of [respondent].” (Ex. 8, pp. 2-3.)

11. The evidence, including the testimony of students and, in some aspects, of respondent himself, established charging allegations 6.a, b, d, f, and i: respondent caused his students to fear him by, on many occasions, slamming a ruler, clipboard, or his hand on students’ desks, threatening to tell students’ parents to hit them with a belt or threatening to ask parents to let respondent hit their children, and screaming and yelling at students. The evidence, including student testimony and written statements, as well as the testimony of respondent, did not support charging allegations 6.c, e, g, and h.

12. Complainant alleges in Charge 7 that respondent “regularly made demeaning remarks to his 5th grade students including, but not limited to, the following:

- a. “Some of you are not going to graduate.”
- b. “You’re not going to amount to anything.”
- c. “Shut up.”
- d. [Respondent] regularly addressed male students as “boy” instead of their names.” (Ex. 8, p. 3.)

13. The evidence, including but not limited to respondent’s admissions, established that, as alleged in Charge 7.c, respondent often told students to “shut up,” a demeaning remark. The statement in Charge 7.a is taken out of context; it was established that respondent told students that they would not culminate unless they finished their classwork or extra-credit work; this was not a demeaning statement. The other charges were not supported by the evidence.

14. Complainant alleges in Charge 8 that respondent “regularly engaged in corporal punishment of his 5th grade students including, but not limited to, the following:

- a. Regularly sent students to sit at a table outside the classroom without supervision.
- b. Made students write standards.
- c. Made students run laps and singled out misbehaving students to run extra laps.

d. Made students stand with their noses against the chalkboard or in the corner.” (Ex. 8, p. 3.)

15. The evidence established that respondent regularly sent students to sit at a table outside the classroom; the table could not be seen from most areas of the classroom, but respondent provided periodic supervision by visiting or observing the table. The evidence also established that respondent made students write standards. The evidence was insufficient to establish that respondent singled out misbehaving students to run extra laps, and there was no evidence to support the allegation that he made students stand with their noses against the chalkboard or in the corner. None of these findings support the gravamen of this charge, that respondent regularly engaged in corporal punishment.<sup>2</sup>

16. Complainant alleges in Charge 9 that respondent “singled out students for corporal punishment as follows:

- a. Pulled F [REDACTED] S. by the hood of his sweatshirt and choked him;
- b. Put his hand on the back of F [REDACTED] S.’s neck and squeezed it while saying, ‘shut up, be quiet, stop.’
- c. Grabbed the following students by the back of the neck in a ‘C clamp’ and/or arm: T [REDACTED] K., M [REDACTED] B., F [REDACTED] S., R [REDACTED] d, and L [REDACTED] D.
- d. Pulled students by their ears.
- e. Grabbed student, T [REDACTED], by the legs and dragged him several feet across the room.
- f. Picked up student, T [REDACTED], from a seated position and pulled him from the auditorium.” (Ex. 8, pp. 3-4.)

17. The evidence, including student testimony and corroborating written statements, supported the allegations in Charge 9.a, b, and c; respondent’s denials were not persuasive. With respect to Charge 9.c, the evidence supported a finding that, to enforce compliance with his instructions, respondent deliberately and frequently grabbed students by

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<sup>2</sup> “Corporal punishment” is defined by District policy as “willful infliction of, or willfully causing the infliction of, physical pain on a pupil. Corporal punishment refers to the intentional application of physical pain as a method of changing behavior. . . . Corporal punishment does not include the amount of force that is reasonable and necessary for a person employed by or engaged in a public school to quell a disturbance threatening physical injury to persons or damage to property, for purposes of self-defense, or to obtain possession of weapons or other dangerous objects within the control of the pupil.” (Ex. 17.) Those of respondent’s acts that are raised in this particular charge do not satisfy that definition.

the sweatshirt and pulled back, and grabbed and squeezed students by the back of the neck and by the arm. Among those students was F ■■■ S.; there was insufficient evidence to identify that among those students were T ■■■ K., M ■■■ B., R ■■■, and L ■■■ D. The acts alleged in Charge 9.a, b, and c and established by the evidence constitute corporal punishment, as defined by District policy. (See Factual Finding 15, fn. 2.) There was insufficient evidence to establish the truth of the allegations in Charge 9.d, e, or f.

18. Complainant alleges in Charge 11 that respondent “singled out student, T ■■■, as follows:

- a. [Respondent] yelled to T ■■■, ‘Shut the hell up!’
- b. [Respondent] took T ■■■ into a closet located in the classroom, pushed him up against the wall, pinched him, poked him, and got in his face and yelled at him on a daily basis;
- c. [Respondent] yelled to T ■■■, ‘Get your ass up!’ and pushed him against the wall.
- d. [Respondent] made T ■■■ run extra laps as punishment four or five times.
- e. [Respondent] came to T ■■■’s house several times to talk with T ■■■’s mother.
- f. [Respondent] grabbed T ■■■ by his shirt or wrist with a tight grip and said, ‘Stop playing around!’” (Ex. 8, p. 4.)

19. The evidence supported the allegations in Charge 11.f, establishing that respondent grabbed T ■■■ roughly by the arm or collar and pulled him.<sup>3</sup> The evidence supported the allegation in Charge 11.b, in part, in that it established that respondent frequently yelled at T ■■■, but not that respondent engaged in the other alleged conduct. There was insufficient evidence to establish the truth of the allegations in Charge 11.a, c, d, and e.

20. Complainant alleges in Charge 12 that Charges 1 through 11 identify conduct that violates District rules and regulations, specifically the Code of Conduct with Students, the Employee Code of Ethics, the Abolition of Corporal Punishment, the Prohibition of Child Abuse and Neglect, the Anti-Bullying and Hazing Policy, the Prohibition of Sexual Harassment, and the Board Resolution on the Respectful Treatment of All Others.

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<sup>3</sup> One student wrote, in a statement corroborating admissible evidence, that respondent grabbed T ■■■ “like a rat.” (Ex. 26.)

21. The evidence supports the allegations in Charge 12 that respondent violated the following District policies:

a. Employee Code of Ethics, which provides, among other things, that District employees are expected to be “committed to creating an environment of trust, care and respect” and to “not tolerate discriminatory or harassing behavior of students or colleagues” (Ex. 16, paragraph A.2), and to be “committed to following our Code of Ethics, laws, and District rules, regulations, bulletins, policies and procedures, recommending changes required to make them better, and will not tolerate improper conduct (Ex. 16, paragraph A.5).

b. District policy bulletin on the Abolition of Corporal Punishment (see Factual Finding 15, fn. 2.)

c. Prohibition of Child Abuse and Neglect, which defines “child abuse” as including “where any person willfully causes, inflicts or permits unjustifiable physical pain or mental suffering . . .” (Ex. 14, section VII.E.) The policy excludes from the definition of “child abuse” any use of force “that is reasonable and necessary . . . to quell a disturbance threatening physical injury to a person(s) or damage to property, for purposes of self-defense, or to obtain possession of weapons or other dangerous objects within the control of the pupil.” (Ex. 14, section VIII.A.) The evidence did not support a finding that any of the policy exclusions apply to respondent’s conduct.

d. Anti-Bullying and Hazing Policy, which prohibits “bullying, hazing, or any behavior that infringes on the safety or well-being of students . . .” The policy defines “bullying” as “any severe or pervasive physical or verbal act(s) or conduct . . . that has, or can be reasonably predicted to have, the effect of . . . [r]easonable fear of harm to person or property. (Ex. 12, section I.A.1.) The policy requires staff to “[s]hare responsibility for modeling appropriate behavior and creating an environment where mutual respect, tolerance, civility, and acceptance among students and staff are promoted, and students understand that bullying and hazing are inappropriate, harmful and are taken seriously.” (Ex. 12, section V.A).

The evidence was insufficient to establish violations of the other policies as alleged.

22. Charging allegation 13 recites the legal conclusion that the previous charging allegations support respondent’s dismissal.<sup>4</sup> Charging allegation 13 is addressed in the discussion of causes for dismissal at Legal Conclusions 13 through 23, *post*.

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<sup>4</sup> Complainant offered no evidence that respondent willfully refused to perform regular assignments without reasonable cause.



### *Notices and Warnings Issued to Respondent*

23. Complainant offered conference memoranda dated prior to Spring 2011 to show that claimant was on notice that the District would find certain conduct objectionable.<sup>5</sup> Among the conference memoranda that administrators issued to respondent were the following, which included, among other things, assistance and guidance and, on occasion, directives:

- a. An October 1995 memorandum cautioning respondent to follow “an administrative directive not to have students run laps as a means of enforcing discipline.” (Ex. 40.)
- b. A January 1996 memorandum directing respondent “[n]ever to place or stand students outside on the balcony.” (Ex. 41.)
- c. A May 2007 memorandum encouraging respondent “to utilize a more progressive type of discipline plan that is more respectful of the student,” and cautioning respondent to avoid discipline “in [a] manner that is considered borderline corporal punishment.” (Ex. 45.)
- d. An October 2007 memorandum notifying respondent that he is not to discipline students by grabbing their sweatshirt, that he is not to use corporal punishment as a form of discipline, that he is to use a progressive discipline plan, that he may “not touch any student unless he is endangering himself or others; for their safety,” and that he must “[c]omply with all District policies and procedures, including those prohibiting the use of corporal punishment, bullying, and disrespectful treatment of students.” (Ex. 46.)

24. During the 2010/2011 and the 2013/2014 school years, respondent received conference memoranda from, variously, Charlene Green, then the principal, and Alfredo Montes, operations coordinator, regarding classroom discipline. The memoranda contained certain assistance and guidance for respondent, directives issued to him, and a warning that disciplinary action might follow.

25. On May 27, 2011, respondent received a Notice of Unsatisfactory Acts and a Notice of Suspension (for 15 days) that recited charges related to respondent’s alleged discipline of students between October 2010 and April 2011. (Those charges are included in charges described at Factual Findings 7, 9, 10, & 16.)

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<sup>5</sup> The memoranda were not, however, offered to show that respondent actually engaged in the conduct the memoranda described, nor were they offered as independent grounds for discipline. Respondent provided the school administration with written responses to most of the conference memoranda.



26. On May 19, 2011, respondent received a performance evaluation that noted that, with respect to classroom performance, respondent met applicable standards and that he “established and maintained standards for student behavior and created a climate that promoted fairness and respect. He was observed to consistently provide a[n] effective classroom environment.” The evaluation noted that, with respect to developing as a professional educator, respondent performed adjunct duties effectively and “collaborated with his 5th grade colleagues to improve the school science program.” (Ex. EE.) The school principal who wrote the evaluation, Charlene Green, is deceased and cannot explain apparent discrepancies between her favorable notations in the evaluation and the nearly simultaneous Notice of Unsatisfactory Acts and Notice of Suspension she issued to respondent on May 24, 2011. The Commission has given appropriate weight to respondent’s evaluation while considering it in the context of all admissible evidence.

27. On April 29, 2014, respondent received a Notice of Unsatisfactory Acts and a Notice of Suspension (for 15 days) reciting new charges concerning respondent’s alleged discipline of students and stating that respondent had not corrected deficiencies identified in the 2011 Notice of Unsatisfactory Acts. (The new charges are included in charges described at Factual Finding 5.)

## LEGAL CONCLUSIONS

### *Jurisdiction*

1. The Commission has jurisdiction to proceed in this matter under section 44944. (Factual Findings 1 through 3.)

### *Burden of Proof*

2. The District has the burden of proof in this matter, since it is seeking to dismiss respondent from employment as a certificated employee. The District must prove its case by a preponderance of the evidence. (*Gardiner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1040.)

### *Statutory Grounds for Dismissal*

3. The governing board of a school district may dismiss a permanent certificated employee if one or more of the causes enumerated in section 44932, subdivision (a), or 44939 is established. In the Amended Accusation, as further amended at hearing, the District alleged six of those causes: immoral conduct (including, but not limited to, egregious misconduct), unprofessional conduct, unsatisfactory performance, evident unfitness for service, persistent violation of school laws or regulations, and willful refusal to perform regular assignments without reasonable cause. (Factual Finding 4.) Some of those terms have been further elucidated by the courts and by the legislature.

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## IMMORAL CONDUCT AND EGREGIOUS MISCONDUCT

4. “Immoral conduct” has been defined to include conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, dissoluteness, or as 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 Ed. of San Francisco Unified School Dist. v. Weiland* (1960) 179 Cal.App.2d 808, 811.) Immoral conduct includes “egregious misconduct,” which in turn is defined in section 44932, subdivision (a)(1), as immoral conduct “that is the basis for” an offense described in certain Penal Code sections. Implicated by the allegations in this case are Penal Code sections 11165.3 and 11165.4, in Part 4 of the Penal Code, Title 1, Chapter 2, Article 2.5, which concerns child abuse and neglect. The District must prove, by a preponderance of the evidence, that respondent engaged in conduct that would provide the basis for such an offense.<sup>6</sup>

5. Penal Code section 11165.3 prohibits the “willful harming or injuring of a child or the endangering of the person or health of a child,” defined to mean “a situation in which any person willfully causes or permits any child to suffer, or inflicts thereon, unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of the child to be placed in a situation in which his or her person or health is endangered.”

6. Penal Code section 11165.4 prohibits “unlawful corporal punishment or injury,” defined, in pertinent part, to mean:

a situation where any person willfully inflicts upon any child any cruel or inhuman corporal punishment or injury resulting in a traumatic condition. It does not include an amount of force that is reasonable and necessary for a person employed by or engaged in a public school to quell a disturbance threatening physical injury to person or damage to property, for purposes of self-defense, or to obtain possession of weapons or other dangerous objects within the control of the pupil, as authorized by Section 49001 of the

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<sup>6</sup> The ALJ considered argument as to whether the standard of proof for establishing immoral conduct “that is the basis for” an offense under the Penal Code should be proof beyond a reasonable doubt. There is no authority to support that standard. Applying that standard would be contrary to the rules governing proceedings in administrative hearings, both under the Education Code and the Administrative Procedures Act, and would be contrary to the express purposes of the amendment to the Education Code and to section 44932, subdivision (a)(1), in particular, effective January 1, 2015, which are to increase protections for children and to establish a “streamlined process for cases in which an employee is accused of egregious misconduct.” (*Concurrence In Senate Amendments, AB 215 As Amended May 20, 2014*, p. 7, Staff Comments by Legislative Intent Service.)

Education Code. It also does not include the exercise of the degree of physical control authorized by Section 44807 of the Education Code.

7. A finding that respondent engaged in conduct that is the basis for an offense described in Penal Code sections 11165.3 or 11165.4 satisfies the definition of egregious misconduct under Education Code section 44932, subdivision (a)(1).

#### UNPROFESSIONAL CONDUCT

8. “Unprofessional conduct,” as used in section 44932, subdivision (a)(1), is conduct that violates the rules or ethical code of a profession or that is unbecoming a member of a profession in good standing. (*Board of Ed. of City of Los Angeles v. Swan* (1953) 41 Cal.2d 546, 553 overruled on other grounds by *Bekiaris v. Board of Ed.* (1972) 6 Cal.3d 575.) The conduct in question, to amount to unprofessional conduct, must demonstrate unfitness to teach. (*Perez v. Commission on Professional Competence* (1983) 149 Cal.App.3d 1167, 1174.)

#### UNSATISFACTORY PERFORMANCE

9. “Unsatisfactory performance” is not defined in section 44932, subdivision (a)(4), but the term is not intended to encompass any of the other causes for dismissal specified in section 44932. (§ 44938, subd. (c).) “Unsatisfactory performance” generally denotes a failure to meet reasonable teaching standards. School districts establish requirements for all teachers concerning fundamental duties such as attendance, adherence to adopted curriculum and methodology, presentation of classroom instruction, engagement of students, and professional development. These requirements serve as the standards by which teaching performance is measured. (See *Perez v. Commission on Professional Competence* (1983) 149 Cal. App.3d 1167, 1174.)

#### EVIDENT UNFITNESS FOR SERVICE

10. Evident unfitness for service is established by conduct demonstrating that the teacher is “clearly not fit, not adapted or suitable for teaching, ordinarily by reason of temperamental defects or inadequacies.” (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444 (*Woodland*).) “‘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.*)

#### PERSISTENT VIOLATION OF SCHOOL LAWS OR REGULATIONS

11. To establish cause for discipline based on the violation of school rules, there must be a “showing of intentional and continual refusal to cooperate.” (*San Dieguito Union High School Dist. v. Commission on Professional Competence* (1985) 174 Cal.App.3d 1176, 1196.) The violation must be persistent or “motivated by an attitude of continuous

insubordination.” (*Governing Bd. of the Oakdale Union School Dist. v. Seaman* (1972) 28 Cal.App.3d 77, 81-82.) Isolated events or incidents involving an issue unresolved over a period of time are generally not considered persistent. (*Bourland v. Commission on Professional Competence* (1985) 174 Cal.App.3d 317 (*Bourland*).)

### *The Morrison Factors*

12. To establish cause for discipline under section 44932, subdivision (a), based on unprofessional conduct, immoral conduct (including egregious misconduct), or evident unfitness for service, courts require an evaluation of whether a teacher’s alleged misconduct demonstrates the teacher’s unfitness for service using criteria that the Supreme Court enunciated in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 227-230 (*Morrison*): the likelihood that the conduct had or may have an adverse effect on students or fellow teachers; the degree of the adverse effect; the proximity or remoteness in time of the conduct; the type of teaching certificate held by the party involved; extenuating or aggravating circumstances, if any, surrounding the conduct; the praiseworthiness or blameworthiness of the motives resulting in the conduct; the likelihood of recurrence of the questioned conduct; and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. These criteria are commonly referred to as “the *Morrison* factors.”<sup>7</sup> The *Morrison* 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.” (*Id.*, at p. 235; see also *Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208 (*Fontana*); *Woodland, supra*, 4 Cal.App.4th at pp. 1444-1445; *Bourland, supra*, 174 Cal.App.3d at p. 321.)

13. Not all *Morrison* factors need be present for the *Morrison* test to be satisfied. (*Governing Bd. v. Haar* (1994) 28 Cal.App.4th 369.) Nor must the *Morrison* analysis be conducted on each individual fact established; it may be applied to the accumulated facts established collectively. (*Woodland, supra*, 2 Cal.App.4th at p. 1457.)

### *Analysis*

14. The District’s Amended Accusation charged respondent with various acts to support the six statutory grounds for dismissal. The Commission examined each charged act to determine whether it was proven. For each charged act proven, the Commission considered whether the act violated one or more of the statutory bases for dismissal, as alleged, and applied the *Morrison* factors where appropriate.

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<sup>7</sup> There is no reason to apply the *Morrison* factors to analyze causes for dismissal for unsatisfactory performance or for persistent violation of laws and regulations (*Morrison, supra*, 1 Cal.3d at pp. 227-230), or for willful refusal to perform regular assignments without reasonable cause; it may be presumed that such conduct is related to fitness to teach.

15. The District established that the acts alleged in the following charges occurred:

Charge 1 (in part): Respondent physically forced B■■■■ G. up from his chair in January 2013. (Factual Findings 5-6.)

Charge 5 (in part): Respondent grabbed T■■■■ H. by the arm in October 2011. (Factual Findings 7-8.)

Charge 6.a, b, d, f, and i: Respondent caused his students to fear him by frequently slamming a ruler, clipboard, or his hand on students' desks, threatening to tell students' parents to hit them with a belt or threatening to ask parents to let respondent hit their children, and screaming and yelling at students. (Factual Findings 10-11.)

Charge 7.c: Respondent often demeaned students by telling them to "shut up." (Factual Findings 12-13.)

Charge 9.a, b, and c: To enforce compliance with his instructions, respondent deliberately and frequently grabbed students by the sweatshirt and pulled back, and grabbed and squeezed students by the back of the neck and by the arm. Among those students was F■■■■ S. These acts constitute corporal punishment. (Factual Findings 16-17.)

Charge 11.b (in part) and f: Respondent frequently yelled at T■■■■ H., and grabbed T■■■■ H. roughly by the arm or collar and pulled him. (Factual Findings 18-19.)

Charge 12: In engaging in the conduct described above, respondent violated various school and District policies and rules. (Factual Findings 20-21.)

Charge 13: The Commission finds that respondent's acts provide cause for dismissal. (See Legal Conclusions 15-21, *post.*)<sup>8</sup>

16. Respondent's acts constituted immoral conduct (including egregious misconduct), unprofessional conduct, and evident unfitness for service. Applying the *Morrison* factors, respondent's immoral conduct, his unprofessional conduct, and his evident unfitness for service relate to his fitness to teach. (Factual Findings 1-27.) Among other things, respondent's conduct has had and would likely have a severe adverse effect on students and their parents, causing fear through his verbal and physical actions and pain through his application of physical force. Respondent has engaged in the objectionable conduct relatively recently. Respondent's continued and repeated violation of assistance, guidance, and directives from school administrators, and of District policies, is an aggravating circumstance; a mitigating circumstance is that respondent appears to be an effective instructor engaged in school activities. (See Factual Finding 26.) Respondent

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<sup>8</sup> The District did not establish that the other charged acts occurred as alleged. The Commission agreed unanimously on the findings of fact; a majority found cause to dismiss.



persistently violated or refused to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him, including the Employee Code of Ethics, the Abolition of Corporal Punishment, the Prohibition of Child Abuse and Neglect, and the Anti-Bullying and Hazing Policy. The evidence presented did not establish that respondent acted out of malice; nevertheless, in imposing discipline that violated the guidance and directives he received and the District's policies, respondent repeatedly behaved insensitively, stubbornly, and willfully. It is likely that his impermissible conduct will recur.

17. Cause for dismissal of respondent exists under section 44932, subdivision (a)(1), based on immoral and egregious misconduct, as set forth in Factual Findings 5 through 8, 10 through 13, and 16 through 21, and Legal Conclusions 1 through 16.

18. Cause for dismissal of respondent exists under section 44932, subdivision (a)(1), based on unprofessional conduct, as set forth in Factual Findings 5 through 8, 10 through 13, and 16 through 21, and Legal Conclusions 1 through 16.

19. Cause for dismissal of respondent does not exist under section 44932, subdivision (a)(4), based on unsatisfactory performance, as set forth in Factual Findings 5 through 27 and Legal Conclusions 1 through 16.

20. Cause for dismissal of respondent exists under section 44932, subdivision (a)(5), based on evident unfitness for service, as set forth in Factual Findings 5 through 8, 10 through 13, and 16 through 21, and Legal Conclusions 1 through 16.

21. Cause for dismissal of respondent exists under section 44932, subdivision (a)(7), based on persistent violation of or refusal to obey reasonable regulations prescribed for the government of the public schools by the governing board of the school district employing him, as set forth in Factual Findings 5 through 8, 10 through 13, and 16 through 21, and Legal Conclusions 1 through 16.

22. Cause for dismissal of respondent does not exist under section 44939, based on willful refusal to perform regular assignments without reasonable cause, as set forth in Factual Findings 5 through 27 and Legal Conclusions 1 through 16.

23. Even where, as here, a school district has established cause for dismissal, the Commission has broad discretion to determine whether dismissal is warranted. (*Fontana, supra*, 45 Cal.3d at pp. 220-222.) "The Commission has broad discretion in determining what constitutes unfitness to teach . . . , and whether dismissal or suspension is the appropriate sanction. [Citing *Fontana*.] '[A] disciplinary discharge often involves complex facts and may require a sensitive evaluation of the nature and seriousness of the misconduct and whether it warrants the grave sanction of dismissal.' [Citation]." (*California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 343-344.)

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24. Dismissal is warranted in this case in view of the serious nature of respondent's misconduct and in order to protect students and others from the likelihood that respondent will engage in similar conduct in the future.

### ORDER

The Amended Accusation and Statement of Charges against respondent Troy Smith are affirmed. Respondent Troy Smith's employment with the Los Angeles Unified School District is terminated.

DATED: **January 7, 2016**

DocuSigned by:  
*Howard W. Cohen*  
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HOWARD W. COHEN  
Administrative Law Judge  
Office of Administrative Hearings

I concur with the Decision and Order set forth above:

DATED: **January 8, 2016**

DocuSigned by:  
*Robin Scott*  
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ROBIN SCOTT  
Commission Member

I concur with the factual findings in the Decision and Order set forth above, but respectfully dissent from Legal Conclusions 16 (in part) through 18, 20, 21, and 24, and from the Order dismissing respondent:

DATED: **January 8, 2016**

DocuSigned by:  
*Gordon Brown*  
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GORDON BROWN  
Commission Member