

**BEFORE THE
COMMISSION ON TEACHER CREDENTIALING
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

ARCHER NISHIOKA, Respondent.

Agency Case No. 2-106732082

OAH No. 2022010005

PROPOSED DECISION

Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference on May 23 through May 26, 2022. The record closed and the matter was submitted for decision at the end of the hearing.

Artin DerOhanian, Deputy Attorney General, represented complainant.

Ellen N. Doty, Esq., represented Archer Nishioka (respondent), who was present throughout the hearing.

SUMMARY

Complainant seeks to discipline respondent's teaching credentials based on allegations he inappropriately touched female students and colleagues, and was persistently defiant during his employer's investigation of his conduct.

Complainant clearly and convincingly established that respondent, while a charter high school math teacher and girls' tennis coach, acted unprofessionally by rubbing and massaging female students' backs and shoulders, and by doing the same to at least one female colleague after having been directed four years earlier to refrain from massaging colleagues. Respondent's misconduct also demonstrated a character trait touching on his fitness to teach. Application of the so-called *Morrison* factors indicate respondent's misconduct has a direct relationship to his fitness to teach, but that discipline less than revocation will not jeopardize public protection. Instead, a one-year suspension of respondent's credentials is warranted.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Complainant is Mary Vixie Sandy, Ed.D, who is the Executive Director of the California Commission on Teacher Credentialing (the Commission). (Ex. 1.)

2. On July 1, 2012, the Commission issued a Clear Single Subject Teaching Credential (CSST credential) to respondent. The CSST credential was in full force and effect at all times relevant and will expire on August 1, 2022, unless renewed. Respondent's CSST credential allows him to teach mathematics, biology, and economics. (Ex. 2.)

3. On April 23, 2013, the Commission issued a Level II Education Specialist Instruction Credential (Level II credential) to respondent. The Level II credential was in full force and effect at all times relevant and will expire on May 1, 2023, unless renewed. (Ex. 2.)

The Level II credential allows respondent to provide instruction and special education support to individuals with a primary disability of specific mild/moderate learning disabilities, mild/moderate intellectual disabilities, other health impairment, and emotional disturbance.

Respondent's Level II credential also authorizes him to provide instruction, and special education related services, to individuals with a primary disability of autism; and authorizes him to provide instructional services to English Language Learners.

The CSST credential and the Level II credential are collectively referred to hereinafter as respondent's credentials.

4. Respondent was first authorized to teach by the Commission in July 2000, when it issued to him an Education Specialist Instruction Credential waiver, which expired on July 10, 2003. From that date to when his credentials described above were issued, respondent was issued a series of emergency authorizations and permits, a preliminary single subject credential, and a Level I credential. (Ex. 2.)

5. On November 23, 2021, complainant brought the Accusation against respondent in her official capacity. (Ex. 1.)

6. Respondent timely filed a Notice of Defense, which contained a request for a hearing to challenge the Accusation. (Ex. 1.)

Respondent's Pertinent Background

7. Respondent is a 52-year-old divorced man. (Testimony [Test.] of respondent.)

8. Respondent became licensed to practice chiropractic in this state in the 1990s. Respondent thereafter continued his studies to obtain his credentials described above. (Test. of respondent.)

9. Respondent began teaching in 2000. (Test. of respondent; Ex. 2.) From 2000 to 2009, he mostly taught in private and charter schools. (Test. of respondent.)

10. In 2009, respondent was hired to teach at Granada Hills Charter High School (GHCHS). (Test. of Julia Howelman.) While at GHCHS, respondent mainly taught mathematics in general and special education classrooms, as well as served as the girl's tennis team coach. (*Ibid.*)

Warning to Respondent in 2013

11. On April 2, 2013, respondent had an office conference with then Administrative Director of GHCHS, Jennifer DaCosta. The Administrative Director (or AD) essentially fulfills the duties of a typical high school principal. During the office conference, AD DaCosta warned respondent about massaging the shoulders and necks of his colleagues. Respondent was directed to use appropriate and professional workplace behavior; directed to not engage in the massaging of his colleagues during the workday, even if requested to do so; and advised that unwanted touching is a form of unlawful harassment that is strictly prohibited at GHCHS. (Ex. 10; Test. of respondent.)

12. Respondent was given a memorandum confirming the office conference, and advised he could respond in writing. (Ex. 10.) No evidence presented indicates respondent so responded.

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Respondent's Conduct From 2017 through 2020

13. In December 2019, GHCHS Dean Victoria Marzouk received a student complaint that respondent was inappropriately touching female students. (Test. of Howelman; Ex. 4.) The student making the complaint was a male, SS, who was friends with some of the involved female students. (Initials are used to protect the students' privacy.)

14. Dean Marzouk initiated an investigation of SS's complaint. SS and other identified students were asked to write statements about respondent's conduct. Other female students in respondent's classes and members of the girls' tennis team also were asked to write statements. Some, but not all, of the students contacted advised they had been inappropriately touched by respondent. (Test. of Howelman; Exs. 4-5.)

15. Julia Howelman was the AD of GHCHS during the 2019-2020 school year. (Test. of Howelman.) AD Howelman asked Dean Marzouk to interview students in respondent's classrooms, while AD Howelman interviewed members of the girls' tennis team and some staff members familiar with respondent. (Test. of Howelman; Exs. 4-5.)

16. Based on information she learned from the investigation, AD Howelman reported respondent to the appropriate child protective services agency and the Los Angeles Police Department (LAPD). (Test. of Howelman; Ex. 6.)

17. After the LAPD concluded its investigation in early 2020, AD Howelman interviewed respondent. (Test. of Howelman; Exs. 4, 9.)

18. The Commission became aware of the situation involving respondent after receiving notices from GHCHS and LAPD. (Exs. 3, 4, 8.)

STUDENT AW

19. AW was a female 9th grader in the 2018-2019 school year when she was enrolled in respondent's fifth period Algebra I class. She was 14 years old when that school year began. (Test. of AW; Ex. 5, pp. A156-157.)

20. AW persuasively testified respondent occasionally stood behind her and rubbed her shoulders and neck while she did work or asked a question. This happened to her at least once per week. AW also persuasively testified that sometimes, when respondent engaged in this massaging, he would touch her hair or move her bra strap. (Test. of AW; Ex. 5, pp. A156-157.)

21. Sometimes AW asked respondent to stop touching her, but respondent either would proceed with this behavior or stop only to do it again another day. (Test. of AW; Ex. 5, pp. A156-157.)

22. AW observed respondent touching and rubbing the shoulders of other female students in her class. (Test. of AW; Ex. 5, pp. A156-157.)

23. AW also observed respondent rubbing the back and shoulders of respondent's female co-teacher in the classroom, who was referred to by students as "Ms. K." Seeing respondent touch Ms. K made AW feel uncomfortable. (Test. of AW.)

24. AW also testified respondent looked down her shirt, which made her feel uncomfortable. However, AW's testimony in this regard was not persuasive. AW testified this happened when respondent was standing behind her, begging the question how she could see respondent was looking down her shirt. AW was not sure if respondent looked down the other girls' shirts, meaning she could not corroborate her own experience in this regard by seeing respondent do it to other girls.

25. AW often went to respondent's classroom after school for one-on-one tutoring because she was struggling in respondent's class.

26. AW testified that on one occasion during Fall 2019, when she was in respondent's classroom alone for tutoring after school, respondent cupped her buttocks with both hands while standing behind her at the whiteboard. AW described respondent as almost squeezing her buttocks. (Test. of AW; Exs. 5, 6.) She also testified that on two other occasions respondent "grazed" her buttocks with his hand while walking past her.

27. Complainant failed to establish by clear and convincing evidence that respondent squeezed, cupped, or grabbed AW's buttocks. Primarily, respondent presented a credible alibi for the purported cupping incident. As the girls' tennis team coach, respondent had to be at team practices or matches soon after classes ended each day during Fall 2019. Also, unlike respondent's established misconduct discussed above and below, AW is the only student to accuse him of grabbing her buttocks. Finally, AW told LAPD that respondent grabbed her buttocks three times, but testified he only grabbed them once. (Ex. 6.) Under these circumstances, the veracity of AW's testimony in this regard was undercut, and it lacked corroboration from other witnesses.

28. Respondent's actions adversely effected AW. She wore bulky clothing, even on warm days, to dissuade respondent from rubbing her shoulders. AW also became leery of speaking to male teachers when alone with them. (Test. of AW.)

STUDENT SM

29. Student SM was a female 9th grader during the 2017-2018 school year. She was enrolled in respondent's 2017 Summer Algebra I class, part of GHCHS's

Summer Training Academy (STA) classes offered to students the summer before they started at GHCHS. SM was then 14 years old. (Test. of SM, Howelman.)

30. SM persuasively testified she observed respondent touching the shoulders and rubbing the backs of female students in her class.

31. SM also persuasively testified she observed respondent hugging and massaging female staff members, particularly Ms. K. Seeing respondent touch the female staff members made SM feel uncomfortable.

32. However, SM's testimony was not persuasive that respondent also rubbed her shoulders and played with her hair. In the statement she wrote for GHCHS, SM did not assert respondent touched her back, shoulders, other parts of her body, or her hair. In fact, on cross-examination SM admitted she wrote in her statement that respondent did not touch her body or hair "because I told him to back off." SM also admitted that once she told respondent to "back off" he did not attempt to touch her again. (Test. of SM; Ex. 5, p. A175.) Thus, while it is clear respondent attempted to touch SM, it was not established that he ever did.

33. Respondent's actions adversely effected SM. She stopped asking respondent questions in class for fear he would try to touch her; she believes her grades suffered as a result. SM also wore hoodies and other bulky clothes in order to dissuade respondent from touching her. (Test. of SM.)

STUDENT JH

34. JH was a female 9th grader during the 2017-2018 school year. She also was enrolled in respondent's 2017 Summer Algebra I class. (Test. of JH.)

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35. JH persuasively testified she observed respondent standing unnecessarily close to female students in her class. She also observed respondent frequently touching female students with his hands on their backs when he was assisting them with assignments. (Test. of JH; Ex. 5, p. A166-167.)

36. JH persuasively testified she observed respondent rubbing the backs of female students and playing with their hair. (Test. of JH; Ex. 5, p. A166-167.)

37. JH also persuasively testified that respondent once attempted to play with her hair; JH quickly stepped away, telling respondent to stop. Respondent seemed surprised by the confrontation and walked away. Respondent did not get close to JH again.

38. Respondent's actions adversely effected JH to a modest degree. Respondent made JH feel uncomfortable in his class. (Test. of JH.)

STUDENT EC

39. Student EC was a female 11th grader during the 2019-2020 school year when she was enrolled in respondent's fifth period Algebra II class. She was then 15 years old. (Test. of EC.)

40. EC persuasively testified she observed respondent being "too friendly" with his female students. (Test. of EC.)

41. EC persuasively testified respondent once rubbed her right shoulder with one of his hands for a few seconds; and that he once briefly played with her hair. (Test. of EC.)

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42. EC also persuasively testified she saw respondent rub the shoulders and play with the hair of other female students in his class, which seemed inappropriate to her. (Test. of EC; Ex. 5, p. A162.)

43. EC testified she was afraid to tell respondent to stop touching her, but acknowledged she heard other female students tell respondent to stop touching them.

44. Respondent adversely effected EC to a slight degree. While respondent's actions caused EC some discomfort, she still was able to focus on her studies. Instead of asking respondent questions in class, EC would ask the female co-teacher. (Test. of EC.)

OTHER COLLEAGUES

45. Complainant established by clear and convincing evidence that, at least in 2017 and 2018, respondent frequently massaged the shoulders and neck of a female colleague, his math co-teacher Ms. K. Although none of the staff members interviewed during GHCHS's investigation of respondent testified, this finding was established by the persuasive testimony of students AW and SM discussed above, as well as respondent's admissions on cross-examination.

46. Although the evidence strongly suggests respondent also touched the shoulders and necks of at least one other female staff member, there was insufficient evidence to clearly and convincingly establish the identity of the other person or the frequency of the touching.

47. Respondent testified that massaging Ms. K did not violate the warning he received in 2013 because Ms. K welcomed it and never told him to stop. Respondent's

testimony was not persuasive. The 2013 warning clearly directed respondent to refrain from massaging other staff members, even if they requested it.

RESPONDENT'S STATEMENTS DURING THE GHCHS INVESTIGATION

48. In 2020, LAPD arrested respondent for lewd conduct with a minor. (Exs. 6, 11.) The gravamen of the arrest were AW's statements that respondent grabbed her buttocks. However, no criminal charges were brought against respondent, and LAPD subsequently deemed respondent's arrest as only a detention. (Exs. F, G.)

49. AD Howelman waited until LAPD concluded its investigation before interviewing respondent in August 2020. (Test. of Howelman.)

50. Prior to AD Howelman's interview, respondent was provided a clear directive to truthfully and completely answer questions, and warned his failure to do so would be deemed insubordination which could lead to his dismissal from employment. Prior to the interview, respondent also was provided with, and signed, a written Lybarger Notice, in which he was advised he had the right to object to any question he believed could self-incriminate him but, if he so objected, he would be required to answer the question; however, respondent was assured his subsequent answer could not be used against him in any criminal proceeding. (Test. of Howelman; Ex. 4, pp. A134-135; Ex. 9.)

51. During the interview, respondent refused to answer many questions concerning whether he had ever been accused of improperly touching a student before, whether he engaged in the acts for which he was arrested (lewd and lascivious conduct), and why he did not report his arrest to GHCHS. In light of the clear directives described above, respondent's refusal to answer those questions constituted

insubordination, as he had no legitimate basis to refuse to answer the questions. (Test. of Howelman; Ex. 4, pp. A134-135.)

52. During the interview, respondent answered various questions concerning his activity with female students by stating he did not touch, rub, or pat female students' shoulders or backs; and that he did not play with female students' hair. Based on the factual findings above, and respondent's concession on cross-examination that he patted female students on the back, respondent's answers were false. In light of the clear directives described above, respondent's false answers to those questions constituted insubordination. (Test. of Howelman; Ex. 4, pp. A134-135.)

53. During the interview, respondent answered various questions concerning his activity with colleagues by stating he did not hug or touch Ms. K in front of students. Based on the factual findings above, and respondent's concessions on cross-examination that he patted female students on the back, respondent's answers were false. In light of the clear directives described above, respondent's false answers to those questions constituted insubordination. (Test. of Howelman; Ex. 4, pp. A134-135.)

Subsequent Events

54. As a result of AD Howelman's investigation findings, including that respondent inappropriately touched female students and staff, and was insubordinate during the investigation interview, respondent was fired from GHCHS, effective September 30, 2020. AD Howelman's testimony at hearing was persuasive that rubbing and massaging students was inappropriate. Respondent presented no position on whether massaging students was appropriate; instead, he denied doing so, and maintained he simply patted students on the back as encouragement. (Test. of Howelman; Ex. 4, p. A102.)

55. After being placed on leave by GHCHS, respondent began looking for other teaching work. He was hired by Valley Charter Middle School (VCMS) in November 2020. However, he was subsequently fired from VCMS in October 2021 after VCMS administrators learned of the events at GHCHS. VCMS administrators told respondent his firing was because he had not been forthcoming with them during his hiring by failing to tell them he was under investigation by the Commission or had been arrested/detained by LAPD arising from events occurring at GHCHS. Respondent testified he disagreed with that assessment, believing he was not required to disclose such information because VCMS administrators never asked him if he was under investigation by the Commission or had been arrested/detained by law enforcement. (Test. of respondent.)

Other Evidence Presented by Respondent

56. The severity of respondent's misconduct with female students is tempered by the following. None of the female students interviewed lodged a complaint about respondent with GHCHS staff or requested to transfer out of his class. The members of the girls' tennis team were supportive of respondent's coaching methods. Although there were usually two other adults present in respondent's classroom during instruction (his co-teacher and/or a teacher assistant) who were also mandatory child abuse reporters, the only child abuse report made about respondent was by AD Howelman as her investigation began. (Test. of Howelman, respondent.)

57. Respondent has no record of prior discipline by the Commission. (Ex. 2.)

58. Respondent presented teaching and coaching evaluations of his performance at GHCHS from 2014 through 2019 which were all positive, including some written by AD Howelman. (Ex. C.)

59. In March 2021, after the Commission began its investigation in this matter, respondent completed a 16-hour Professional Boundaries, Ethics, and Professionalism for Educators course (boundaries course). (Ex. A.) Respondent testified the boundaries course taught him other people have their own personal space that he needs to respect; he now understands why students and colleagues were not comfortable with his touching them. He now will keep a comfortable distance from students and will not touch them. Although he should have learned those lessons from the 2013 warning, respondent's testimony indicates the boundaries course was beneficial to him.

60. Respondent presented a number of favorable character reference letters from friends, his brother, former teaching colleagues, parents of former students or tennis players, and former students. (Ex. B.) The letters were admitted only as administrative hearsay and it is not clear from the record or argument how they explain or supplement other evidence admitted without restriction. (Gov. Code, § 11513, subd. (d).) Respondent called as witnesses three of those who submitted a reference letter: Melanie Hiatt (a former colleague at GHCHS); Wendy Nelson (parent of a former student); and Kara Broadway (a former colleague at GHCHS). All three witnesses had positive experiences with respondent. However, their collective testimony has limited probative value: two of three either did not care about the allegations in this case or did not believe they were true; none of them offered any testimony particularly revealing about respondent.

61. In March 2022, forensic psychiatrist Hy Malinek evaluated respondent to determine his risk of committing similar misconduct in the future. (Test. of Dr. Malinek; Ex. D.) Dr. Malinek has the requisite qualifications and impressive experience to make such a determination. (Test. of Dr. Malinek; Ex. E.) Dr. Malinek used

reasonable assessment tools and tests during his evaluation. (Test. of Dr. Malinek; Exs. D, E.)

62. Dr. Malinek believes there is a low risk of respondent committing similar misconduct with students in the future. This is mainly because Dr. Malinek sees no evidence of respondent having a psycho-sexual pathology and does not believe respondent is predisposed to commit an act of sexual aggression. (Test. of Dr. Malinek; Ex. D.) Dr. Malinek's expressed opinions were persuasive and well supported by his evaluation and other known information about respondent developed in the record.

63. Dr. Malinek's credibility was bolstered by a number of concessions he made on cross-examination. For example, he concedes respondent is emotionally naïve and lacks some insight. Dr. Malinek agreed some of the assessments show respondent is somewhat defensive and tends to present himself better than reality supports. Dr. Malinek also expressed appropriate concern over respondent's failure to fully disclose his background to VCMS when applying for a teaching job there.

64. At hearing respondent did not appear remorseful for his actions. He never expressed regret or contrition for his actions. In fact, respondent denied in his testimony rubbing or massaging students' backs, shoulders, or necks, and instead only conceded to "patting them" for encouragement. Respondent's testimony in this regard was contradicted by the persuasive testimony of the four female students in question. Moreover, respondent's excuse that the touching was meant as encouragement is questionable given that he only did so to female students. Nor has respondent accepted much responsibility for his misconduct. He tended to deny in his testimony inappropriately touching female students, being insubordinate to AD Howelman during her interview, or lacking candor with VCMS during the application process.

65. Since being fired from VCMS, respondent has worked as a chiropractor. He would like to retain his credentials because he would rather work as a teacher. Respondent testified it is rewarding to him to see students learn.

LEGAL CONCLUSIONS

Jurisdiction

1. Pursuant to Education Code section 44000 et seq., and California Code of Regulations, title 5, commencing with section (Regulation) 80001, the Commission is responsible for credentialing teachers in public schools in California, including issuing credentials, and taking adverse action against applicants and credential holders. (Undesignated statutory references are to the Education Code.)

2. Section 44421 authorizes the Commission to take adverse action against an individual's teaching credential for, among many specified causes, immoral or unprofessional conduct, evident unfitness for service, persistent defiance of and refusal to obey public school laws, or for any cause which would warrant denial of an application for a credential. Section 44345, subdivision (e), allows the Commission to deny an application of one who has committed an act involving moral turpitude.

Burden and Standard of Proof

3. Complainant has the burden of establishing by clear and convincing evidence to a reasonable certainty cause for adverse action against respondent's credentials because they are considered professional licenses. (See *Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1038-1039; *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 855-856.)

4. Clear and convincing evidence is "of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the fact for which it is offered as proof." (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 80, 847.)

Cause for Adverse Action

UNPROFESSIONAL CONDUCT

5. Cause exists for adverse action against respondent's credentials pursuant to section 44421, in that it was established by clear and convincing evidence that respondent engaged in unprofessional conduct.

6. Unprofessional conduct in the teaching profession has been defined as that which violates the rules or ethical code of the profession or is unbecoming of a member of the profession in good standing. (*Board of Educ. of City of Los Angeles v. Swan* (1953) 41 Cal.2d 546, 553, overruled on other grounds by *Bekiaris v. Board of Education* (1972) 6 Cal.3d 575.)

7. As established by the persuasive testimony of AD Howelman, it is inappropriate, and unbecoming of a member of the teaching profession in good standing, to rub and massage female students, and to touch female co-workers after having been directed by a supervisor to refrain from doing so. In this case, it was clearly and convincingly established that respondent rubbed and massaged female students in his classes. Two former students testified he touched them in that manner; one testified he attempted to do so but was thwarted when she told him to "back off;" and another testified respondent once tried to play with her hair. All four students observed respondent acting similarly with other female students in their classes. (Factual Findings 19-23, 29-31, 34-37, 39-42, 45.)

ACTS OF MORAL TURPITUDE AND IMMORAL CONDUCT

8. Cause does not exist for adverse action against respondent's credentials pursuant to sections 44421 and 44345, subdivision (e), based on allegations he engaged in immoral conduct or acts involving moral turpitude.

9. "Moral turpitude" has been defined as "everything done contrary to justice, honesty, modesty or good morals." (*Rice Alcoholic Beverage etc. Appeals Bd.* (1979) 89 Cal.App.3d 30, 36.)

10. "Immoral conduct" has been defined generally as "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, 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.)

11. The case of *San Diego Unified School Dist. v. Commission on Professional Competence* (2013) 214 Cal.App.4th 1120 (*Jespersion*) bears some resemblance to the instant case. In that case, a female student was touched by her teacher, Mr. Jespersen, in a way she initially felt was "playful" and not threatening enough to report to her mother or authorities. She observed Jespersen acting similarly with other students. Jespersen always told her, "You did a good job" when he touched her. The student also testified Jespersen touched under her clothing, every day, including over her underwear on her buttocks, but her testimony in that regard was not deemed credible. Among many conclusions, the *Jespersion* court held the record did not support a finding that the teacher's conduct was immoral. (*Jespersion*, at pp. 1149-1150.)

12. In this case, it was not clearly and convincingly established that respondent engaged in immoral conduct or acts involving moral turpitude. While his actions were unprofessional and inappropriate, the *Jespersion* case strongly suggests respondent's conduct did not rise to the level of being so outrageous or offensive as to be immoral. It is true respondent focused his attention solely on female students, and he did far more to them than pat them on the back as a sign of encouragement. Yet there are many facts in this case which have commonality to *Jespersion*. For example, none of the involved female students complained about respondent to their parents, school, or police. His conduct in the presence of other adults in the classroom did not trigger a mandatory child abuse report. Respondent's established misconduct was undertaken while engaging in teaching activity, such as checking students' work or answering questions. (Factual Findings 1-44.)

EVIDENT UNFITNESS

13. Cause for adverse action against a teacher's credential is provided under section 44421 for "evidence unfitness for service."

14. This theory is premised on the notion that a teacher's misconduct occurred by reason of temperamental defects or inadequacies. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444.) " '[E]vident 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." (*Ibid.*)

15. In this case, it was clearly and convincingly established that respondent had a fixed character trait compelling him to engage in the inappropriate rubbing or massaging of female students and at least one colleague. The fact he continued to do

so after being warned in 2013 to stop massaging colleagues shows the problem was not remediable simply by notifying respondent it was improper. That he only did this to females shows the presence of a fixed character trait underlying the misconduct. (Factual Findings 19-23, 29-31, 34-37, 39-42, 45, 55, 64.)

PERSISTENT DEFIANCE

16. Section 44421 provides cause for adverse action against a teacher's credentials "for persistent defiance of, and refusal to obey, the laws regulating the duties of persons serving in the public school system."

17. This theory may be based on violation of school rules or school district policies. (*San Dieguito Union High School Dist. v. Commission on Professional Competence* (1985) 174 Cal.App.3d 1176, 1180–1181.) The violation must be persistent or "motivated by an attitude of continuous insubordination." (*Governing Board 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.)

18. In this case, it was not clearly and convincingly established that respondent engaged in persistent defiance of the laws regulating the duties of persons serving in the public school system. While respondent was clearly insubordinate during his interview with AD Howelman, complainant failed to establish by evidence or argument that his doing so defied a school law of this state, or rule or policy of GHCHS. Even if so, respondent's conduct was isolated to one event, his interview, and therefore did not demonstrate a pattern of continuous insubordination. (Factual Findings 48-53.)

Fitness to Teach

19. The amorphous legal concepts of evident unfitness or unprofessional conduct are so general that they must be given meaning in relation to the particular profession involved. (*Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 227–228 (*Morrison*).) In *Morrison*, the California Supreme Court held that adverse action may not be imposed against a teacher in the absence of evidence showing his or her unfitness to teach. The *Morrison* court articulated a number of factors to be considered in determining whether the misconduct in question relates to a teacher's fitness to teach.

20. For purposes of determining the relationship between the misconduct proven and a credential holder's fitness, competence, or ability to effectively perform the duties authorized by the credential, the various factors enumerated in *Morrison* have been codified at Regulation 80302. The criteria are specified and applied to respondent as follows.

THE LIKELIHOOD THAT THE CONDUCT MAY HAVE ADVERSELY EFFECTED STUDENTS, FELLOW TEACHERS, OR THE EDUCATIONAL COMMUNITY, AND THE DEGREE OF SUCH ADVERSITY ANTICIPATED

21. Respondent's misconduct adversely effected at least the four students who testified in this matter, ranging from moderate to slight impact. It was not established respondent adversely effected Ms. K, as the two were good friends and she did not seem to be offended by the touching. (Factual Findings 23, 31, 37, 42.)

THE PROXIMITY OR REMOTENESS IN TIME OF THE CONDUCT

22. The misconduct supporting discipline occurred from 2017 to 2019.

THE TYPE OF CREDENTIAL HELD BY THE PERSON INVOLVED

23. Respondent's credentials may put him in contact with special education students, which is of concern because those students are cognitively and/or emotionally less developed and therefore vulnerable to abuse.

THE EXTENUATING OR AGGRAVATING CIRCUMSTANCES SURROUNDING THE CONDUCT

24. There are various facts mitigating the severity of respondent's inappropriate touching of female students and colleagues. In addition, he is a good teacher and tennis coach with no prior record of discipline by the Commission. Subsequent to his misconduct, respondent took a boundaries course and learned important lessons. More recently, a highly qualified psychiatrist evaluated respondent and concluded respondent does not have a psycho-sexual pathology.

25. On the other hand, various aggravating facts also were established, warranting some concern. For example, respondent continued touching females after his 2013 warning to stop touching colleagues. His touching was so frequent many female students had to tell him to "stop" or "back off." Respondent was not candid with AD Howelman during her interview, and at times was insubordinate. Nor was respondent candid with his subsequent employer about his experience at GHCHS, leading to his being fired from a second consecutive teaching job. Perhaps more importantly, respondent has not expressed remorse or contrition for his misconduct.

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**THE PRAISEWORTHINESS OR BLAMEWORTHINESS OF THE MOTIVES RESULTING
IN THE CONDUCT**

26. Respondent deserves only blame for his inappropriate touching of female students, and continual physical contact with colleagues after being directed to refrain from doing so.

THE LIKELIHOOD OF THE RECURRENCE OF THE QUESTIONED CONDUCT

27. Dr. Malinek's opinion that respondent is a low risk of repeating his misconduct provides valid assurance. However, there still is lingering concern whether respondent has truly learned his lesson and will never again inappropriately touch students or colleagues. This concern arises from respondent's lack of remorse, refusal to accept responsibility for his misconduct, lack of candor with AD Howelman and VCMS about his actions, and disregard of the 2013 warning to refrain from touching colleagues.

**THE EXTENT TO WHICH DISCIPLINARY ACTION MAY INFLICT AN ADVERSE
IMPACT OR CHILLING EFFECT UPON THE CONSTITUTIONAL RIGHTS OF THE
PERSON INVOLVED, OR OTHER CERTIFIED PERSONS**

28. The outcome of this case will have no chilling effect on credentialed teachers exercising their constitutional rights. Respondent's novel argument concerning future application of Education Code section 44807 (teacher self-defense) in light of this decision was not persuasive.

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THE PUBLICITY OR NOTORIETY GIVEN TO THE CONDUCT

29. Respondent's misconduct was made known to some students and faculty at GHCHS, and less so at VCMS. But that level of notoriety was not so great as to indicate respondent's future on-campus relationships at other schools will be impaired, provided respondent is candid with prospective employers about his background.

OVERALL CONCLUSION

30. On balance, the *Morrison* factors demonstrate a direct nexus between respondent's misconduct and his fitness to teach. However, the applicable *Morrison* factors present a mixed, and complicated, picture concerning respondent's fitness to maintain his credentials and continue teaching. While some continuing concern is warranted, on balance it is not likely respondent will engage in similar misconduct in the future, provided a significant level of discipline in this case. (Factual Findings 1-64.)

Disposition

31. Licensing disciplinary matters like this are not designed to punish an individual. (*Camacho v. Youde* (1979) 95 Cal.App.3d 161, 165.) Rather, a licensing agency should be primarily concerned with protecting the public. (*Fahmy v. Medical Bd. of California* (1995) 38 Cal.App.4th 810, 817.)

32. Regulation 80300 provides the Commission can take the following action against a teacher's credentials: a private admonition, public reproof, suspension, or a revocation of one or more credentials. Regulation 80300, subdivision (t), specifies a suspension can be stayed and/or actual, and can last for one year or longer.

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33. In this case, respondent's actions were not so extreme or harmful as to indicate revocation of his credentials is the only manner of protecting the public. As Dr. Malinek put it, respondent is a low risk of repeating his misconduct. Thus, revocation of respondent's credentials would be overly harsh and punitive. However, the lingering concerns over respondent's fitness to teach mandate significant discipline. In this regard, public protection will not be jeopardized by an order imposing a moderate level of discipline, in the form of a one-year actual suspension. This period of time will allow respondent to reflect upon his misconduct and the lessons he has learned from his boundaries course. This discipline also will serve as a reminder to respondent of the seriousness of his misconduct and the likelihood that future misconduct may lead to revocation of his credentials. (Factual Findings 1-65; Legal Conclusions 5-7, 13-15, 19-32.)

ORDER

All credentials, certificates, and authorizations issued to respondent Archer Nishioka are suspended for the period of one year from the effective date of this Decision.

DATE: 06/27/2022


Eric C. Sawyer (Jun 27, 2022 14:27 PDT)

ERIC SAWYER

Administrative Law Judge

Office of Administrative Hearings