

BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
CAPISTRANO UNIFIED SCHOOL DISTRICT
COUNTY OF ORANGE
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

KIRK LAST,

Respondent.

OAH Case No. L2009101455

DECISION

This matter came regularly for hearing before the Commission on Professional Competence, Capistrano Unified School District, County of Orange, State of California (Commission), in San Juan Capistrano, California, on June 7, 8, 9, and 10, and August 23 and 24, 2010. The Commission consists of the following members:

Samuel D. Reyes, Chairperson
Administrative Law Judge
Office of Administrative Hearings

Judy Berndt, Member
Selected by Respondent

Holly Jefferson, Member
Selected by the Governing Board

Anthony P. De Marco and Heather A. Dozier, Attorneys at Law, represented the Capistrano Unified School District (District).

Carlos R. Perez, Attorney at Law, represented Kirk Last (Respondent), who was present throughout the hearing.

The District seeks to dismiss Respondent on grounds of alleged immoral conduct, dishonesty, evident unfitness for service, and persistent refusal to obey school laws. Respondent disputes the allegations and maintains that grounds for dismissal do not exist.

Oral and documentary evidence, and evidence by written and oral stipulation on the record, was received at the hearing and the matter was submitted for decision on August 24, 2010.

FACTUAL FINDINGS

Parties and Jurisdictional Findings

1. Respondent is a permanent certificated employee of the District.
2. Respondent received a Bachelor's Degree in physical education from California State University, Long Beach. He thereafter received a credential from California State University, Fullerton, that authorizes him to teach physical education, and a credential from the University of California, Irvine, that allows him to teach special education. He has also received a master's Degree in education administration from National University.
3. On October 5, 2009, Assistant Superintendent, Personnel Services, Jodee Brentlinger (Brentlinger) submitted a Statement of Charges recommending Respondent's immediate suspension and dismissal to the District Governing Board pursuant to Education Code¹ sections 44934 and 44936. The Governing Board approved the recommendation, and on October 12, 2009, Brentlinger sent notice to Respondent of the District's intent to immediately suspend him without pay and to dismiss him. On October 21, 2009, Respondent made a timely request for hearing.
4. On October 26, 2009, Brentlinger filed an Accusation pursuant to section 44944 and Government Code section 11507 seeking Respondent's dismissal. On November 3, 2009, Respondent filed a timely Notice of Defense.
5. On November 24, 2009, the parties stipulated to waive the time requirements set out in section 44944, subdivision (a), regarding commencement of the hearing.
6. All prehearing jurisdictional requirements have been met.

Respondent's Employment and Assignments

7. Respondent has been employed by the District for 17 years, starting in the 1993-1994 school year. He has been teaching middle school students. He has taught a variety of subjects, including physical education. He was transferred to the Marco Forster Middle School at the start of the 2007-2008 school year.

¹ Unless otherwise stated, all further statutory references are to the Education Code.

2006-2007 School Year

8. One of the incidents alleged to constitute grounds for dismissal allegedly occurred in January 2006, while Respondent was working at Las Flores Middle School. No student or other witness in Respondent's class testified in support of the allegations that Respondent made offensive comments about gays. Respondent recalled a discussion in class about the "1000 Steps" beach in Laguna Beach, in which he stated that he did not go to that beach because of its clientele, but denied making any offensive comments about homosexuals. The allegations set forth in paragraph 47 of the Statement of Charges, therefore, were not established.

2007-2008 School Year

9. Respondent taught seventh grade physical education classes during the 2007-2008 school year. The classes typically adhered to the following routine. After changing into physical education clothes in the locker room, students assembled on a specified area in the blacktop referred to as the physical education and basketball courts area. They sat on the ground on preassigned numbers. Once warm-up exercises were completed, students moved to the specific area of instruction. The basketball area, which contained several courts, was surrounded on three sides by classrooms and other structures. North of the basketball courts were grass fields and a track. Two classrooms had been converted into a fitness room with various exercise machines and free weights.

10. a. In October 2007, a student in one of Respondent's classes, R [REDACTED] H.², continued talking to other classmates and getting up from his assigned area in the fitness room despite Respondent's directives against such behavior. Frustrated with the disruption, Respondent walked over to the student, who was again trying to get off the ground, and placed his hand on the student's shoulder to keep him from standing. The student was approximately four to six inches off the ground, and Respondent applied sufficient force to prevent him from fully standing up and to cause the student to sit back down.

b. R [REDACTED] H. reported the incident to Assistant Vice Principal Jeff Jones (Jones). Jones also spoke to other students in the classroom who had witnessed the incident. When asked what happened, Respondent told Jones that he had placed two fingers on the boy's shoulder and applied pressure for the student to sit down.

² Initials have been used for the students' last names in order to protect the students' privacy.

c. On October 31, 2007, Jones counseled Respondent about the incident, and told him there was no need to ever place his hands on a student. Respondent acknowledged the directive. On November 5, 2007, Jones issued a written confirmation of the counseling, which document stated, in pertinent part: "I informed you that your conduct negatively impacted the safety of the student and yourself. You were directed to refrain from using any physical contact in disciplining students. Failure to comply with this directive may result in further disciplinary action." (Exhibit 3, at p. 81.)

11. a. On December 17, 2007, Respondent was involved in an incident with a student, G ■ R., in an open area between classrooms. The student did not testify, and it was not established that Respondent pushed the student against a kiosk. As Respondent recalled at the hearing, G ■ R., as was typical, was misbehaving during class, which involved a "dodge ball" activity. Respondent removed G ■ R. from the class activity and placed him by a basketball pole. The student continued to talk and disrupt the class from his location. Respondent directed him to stop, to no avail. Finally, Respondent asked another teacher to watch his class and accompanied G ■ R. to the office. When they were walking, Respondent in the lead and the student about two paces behind, G ■ R. made an offensive remark. As Respondent turned around, G ■ R. ran into him. Respondent stated that he grabbed the student to keep him from falling, and that the student tried to move away and hit the kiosk.

b. As a result of the incident, on January 28, 2008, Respondent received a written reprimand for failure to provide an effective learning environment. In pertinent part, the reprimand stated: "Effective immediately, you are to cease and desist from ever physically touching a student as a behavioral consequence." (Exhibit 3, at p.78.)

c. Principal Carrie Bertini (Bertini), in the presence of Assistant Principal Judith Roman (Roman) and Respondent's union representative, asked Respondent about the incident after school on December 19, 2007. Respondent said he was so angry that he did not remember what happened.

d. At the hearing, Respondent testified that he did not necessarily recall the incident on December 19, 2007, and he told Roman that he had to write down the details before he could talk about the incident. He further testified that on January 28, 2008, when he received the reprimand, he has "his story straight" and could talk about it.

e. Respondent's statement to Bertini on December 19, 2007, is not credible. Bertini's inquiry was made close in time to the incident and the event was fresh in Respondent's mind. Rather than truthfully answer, Respondent told Bertini he did not remember so that he could, as he said at the hearing, get his story straight.

12. a. On December 20, 2007, while students were gathering in the blacktop area by their numbers, a developmentally disabled student in Respondent's class, J ■ A., was running and jumping in the blacktop area, by the numbers. Respondent tried to ignore the disruption and addressed the other students, but was unable to effectively attend to the others while J ■ A. was moving about the area. As the student passed close to Respondent, Respondent grabbed him by the shoulder with both hands and, in a loud voice, told J ■ A. to "sit still." The student became still, and Respondent let him go.

b. Respondent did not dispute that he grabbed J ■ A. or that he raised his voice for the student to sit still, but testified that he did so after the student refused to obey him and to prevent the student from hurting himself. However, in light of the fact that Respondent tried to ignore J ■ A. for some time, this generalized claim that the activity was dangerous is insufficient to justify the force used. Rather, the totality of the circumstances establishes that Respondent grabbed J ■ A. in order to stop the disruptive behavior.

c. Bertini spoke to Respondent, and Respondent stated that he had become frustrated and that he did not know that J ■ A. was a special education student. The principal reiterated that Respondent was not to touch any student as a form of classroom management.

13. a. On May 16, 2008, a student named G ■ R. had been mocking Respondent throughout the day by calling him "Ultimo," a Spanish translation of Respondent's last name. At about 8:00 or 8:15 a.m., G ■ R. had called out "Ultimo" to Respondent from across campus, apparently on his way to another class. The taunt continued in the afternoon class with Respondent, while the teacher gathered the students by the numbers. As punishment for the behavior, Respondent retained G ■ R. by a basketball pole while the rest of the class went to the fitness room. G ■ R. refused to stay by the pole, and joined his classmates in line to enter the fitness room. As Respondent testified, when G ■ R. "got in his face" and again called him "Ultimo," Respondent grabbed the student by the sweatshirt sleeve and pulled him out of the line to enter the fitness room. Respondent stated that he only used two fingers and that he applied "slight" force. Respondent also stated that the two might have "scuffled a bit." Respondent placed the student in an area outside the classroom, and G ■ posed no additional problems that day. The student did not testify, and it was not established that Respondent pulled the student back for approximately five feet.

b. The student complained to Bertini, who in turn spoke to Respondent about the incident. Respondent did not deny grabbing or pulling the student, and told Bertini that he had been angry and frustrated because the student did not want to participate in class and kept calling him "Ultimo." Bertini disputed Respondent's claim that the force had been insignificant, and again told him not to touch any student as a form of classroom management.

c. Bertini placed Respondent on administrative leave while the incident was investigated. After a third-party investigation, Respondent was suspended for three days for his conduct toward G [REDACTED] R. In the letter recommending the discipline, then Deputy Superintendent Suzette Lovely wrote: "This type of behavior will not be tolerated and, if continued, will force the district to initiate proceedings to terminate your employment as a teacher." (Exhibit 3, at p. 76.)

14. During the 2007-2008 school year, Bertini had received complaints from other staff members about Respondent's students being disruptive of other teachers' classes and about their destruction of school property and equipment shared by others. However, with the exception of incidents involving Respondent's students jumping out of the low-level classroom window on a couple of occasions, no other specific incident, as set forth in paragraph 42 of the Statement of Charges, was established at the hearing by competent evidence. Nevertheless, Bertini relied on the reported incidents, as well as those set forth in factual finding numbers 10, 11, 12, and 13, to evaluate Respondent at the conclusion of the school year.

15. On May 6, 2008, Bertini gave the 2007-2008 Formal Evaluation to Respondent. In the evaluation and in the discussion about the evaluation, she criticized him for failing to maintain an effective learning environment, primarily by not having appropriate classroom control and by not enforcing school-wide disciplinary policies. Respondent was formally placed on a Personal Improvement Plan (PIP) for the 2008-2009 school year that would include formal and informal observations by Bertini. The following were listed in the PIP as specific areas of concern: assessing student learning and communicating with students, family, and others about student progress; creating and maintaining effective environment for student learning, and establishing and maintaining standards for student behavior that creates a climate that promotes fairness and respect; planning instruction and designing learning experiences for all students; and developing and sequencing instructional activities and materials for student learning. The principal also urged Respondent to seek the assistance of a consulting, or mentor, teacher through the District's Peer Assistance and Review Program (PAR).

2008-2009 School Year

16. Respondent taught eighth grade physical education classes during the 2008-2009 school year. The students followed the same routine of assembling by the numbers on the blacktop area before moving to the specific class activity of the day.

17. a. On September 25, 2008, Bertini conducted an informal observation of Respondent's fifth period class. After students ran a warm-up lap, Respondent separated the students into those that would perform a "shuttle run," and those that would engage in free play, which consisted of basketball or handball. Two female students left the group and went to the water fountain near the locker rooms. They were out of Respondent's sight for approximately five minutes. Respondent noticed they were absent when he called their names for the run.

b. On September 29, 2008, Bertini discussed her observations with Respondent, and provided a written record of them, which contained suggestions for improvement. She encouraged Respondent to continue to issue tickets to reward good behavior and suggested that a greater variety free play activities might engage a greater number of students in physical activity.

18. During another class on September 25, 2008, Respondent directed two students who were not participating in the class activity to walk around the track as a form of punishment. Respondent did not have the students within his line of sight for part of the walk, and the students disrupted other students using the track. Respondent failed to properly supervise the two students, and he made no effort to redirect them when they disrupted the other class.

19. Bertini returned to Respondent's class on October 7, 2008, this time to observe a second period class. Respondent was providing instruction through a soccer dribbling drill. Cones were set up in a line, and students were instructed to dribble the ball through a series of cones to and from the end of the cones. Some of the students did not dribble on the return trip. Respondent walked around the students, repeating instructions to dribble in both directions. However, Respondent did not effectively clarify the instructions, and several students still did not perform the drill as instructed. The scene appeared chaotic to Bertini, and she suggested, during a post-observation discussion on October 9, 2008, that he could have better positioned himself to instruct the students and that he could have had some students model the activity while the rest watched.

20. On October 9, 2008, Respondent met with Bertini after school, and left her office at approximately 3:50 p.m. Respondent testified that he injured his back after arriving home that afternoon, and that he called the District to report his problem and to request a substitute. The District charged Respondent with dishonesty, alleging that he actually called to request a substitute teacher before he left the school. The District did not present any credible evidence regarding the time Respondent actually requested the substitute, and, therefore, it was not established that he engaged in dishonest conduct.

21. On October 10, 2008, Respondent was absent from school, and left a lesson plan for a substitute teacher. The students in one of Respondent's classes misbehaved, pulling down the school's volleyball nets. However, it was not established that the misbehavior was the result of Respondent's failure to provide adequate lesson plans.

22. a. The next observation by Bertini occurred on October 16, 2008, during the fifth period. During the warm-up period, two students were lying down on the blacktop and were not participating. When the students finished warming up, Respondent told everyone to stand up. The two non-compliant students continued to lie down and Respondent did not attempt to correct or direct them.

b. Respondent then guided the students to the track, and directed some to run one mile and others to walk one lap. While his back was to three of the students, the students left the track and wandered into the class of another teacher. The other teacher had to direct Respondent's students back to their class.

c. Bertini discussed her observations with Respondent, suggesting that he provide non-compliant students with immediate feedback and redirection, that he follow classroom behavioral expectations consistently, and that he consider his location to maximize supervision. With respect to the latter, Bertini told Respondent that he could have positioned himself on the south end of the track to better observe all students.

23. On October 22, 2008, Respondent directed his students to a reading activity in a classroom. One of the students, A█, went into the room ahead of Respondent and took the teacher's book from the cabinet before moving to his seat. Respondent saw the student take the book, and asked A█ why he took it. A█ asked if was accusing him of taking the book because he was Mexican. Respondent replied, sarcastically, with something like, "oh, yeah, sure, that's it." The student's parents complained to the principal about the comment, which they deemed racist. Bertini told respondent that the comment was inappropriate even if said in a sarcastic tone. Respondent called A█'s parents and told them that he was not being racist with his comment, but that A█ is always "pushing the envelope."

24. On November 7, 2008, Bertini conducted an informal observation of Respondent's fourth period class. The class activity was for students to run a lap in the grass field. Students from another class were also using the field, to run cross-country. Respondent directed his students to return to the blacktop after they finished their lap. Some students remained in the field for an undetermined period of time after finishing their lap, interfering with the students in the other class who were still running. In discussing her observations, Bertini reminded Respondent to better position himself to maximize supervision.

25. a. On November 12, 2008, Bertini observed students in Respondent's fourth period as they performed activities in the fitness room. One student arrived late, and was not dressed for the activity. Respondent directed the student to seat by a location near the radio. The student changed the radio stations during the class, despite Respondent telling him to stop doing so. Respondent did not take further action to prevent continued interference by the student. His classroom management was therefore ineffective.

b. Several students failed to properly use the handles on a trampoline-like machine called the "rebounder," despite Respondent's verbal instructions. Respondent moved around the room, but did not stay long enough with the students to ensure that his instructions were followed. In addition, Respondent did not have an effective method of signaling students to move from one machine or activity to another, resulting in some students not being able to consistently access all the equipment.

c. As discipline for misbehaving during the class, Respondent excluded four students from the fitness center activities for five to ten minutes. He had them stand outside the classroom, in an area where he could see them through the classroom window. While outside, some of these students looked into another classroom and disrupted the other classroom. Respondent failed to properly supervise the students in that he placed them where he could not fully observe their activities, or, if he saw their misbehavior, failed to take corrective action.

d. Respondent released the class approximately three minutes early in order to talk to one student in private, leaving the majority of the students unsupervised for one to two minutes while they walked from the fitness center to the locker rooms.

26. a. On December 10, 2008, Bertini conducted an observation of Respondent's fifth period class, in the fitness room. The students had seven minutes of physical activity with the equipment, instead of the regular 20 minutes. However, it was not established that the reduced time was the result of Respondent's actions.

b. Some students misused the equipment on December 10, 2008. They did not hold the handles on the rebounder. They failed to perform step exercises. One student sat incorrectly, sideways, on a machine called the "trunk twister." Respondent moved about the room attempting to redirect the students, but was unsuccessful. Respondent imposed no consequences for the students' failure to follow his directions. Respondent still did not have an effective method of signaling students to move from one machine or activity to another. Bertini characterized her observation as "seven minutes of chaos that Respondent could not stop or correct."

c. Bertini shared her observations with Respondent, and provided the following suggestions: "Reteach students the appropriate manner to use the machines. [¶] Pick a spot in the room where you have good visual coverage of the students. Use a megaphone if necessary to correct behavior and to be heard. [¶] Maximize time on task. Students only utilized the machines for about 7 minutes. I would expect a use time closer to 20 minutes. [¶] Observe your peers when they are in the fitness center to get management ideas." (Exhibit 3, at p. 61.)

27. a. On January 12, 2009, in the fitness room, Respondent was addressing his class about physical fitness. A student proudly referred to his physique as a "six pack." Respondent pointed to his stomach and joked that he had a "keg." Another student, J■■■■ A., who was overweight, joined in by lifting his shirt and moving his stomach mass up and down. Respondent joked that J■■■■ A. had "a whole brewery." The students laughed at the comment.

b. Respondent apologized to J■■■■ A. the following day, stating that he did not mean to make a disparaging comment and that he was just joking. The student accepted the apology, and no complaint was filed about the incident. At the hearing, Respondent testified that the comment was probably inappropriate and that he should not have made it.

28. a. In January 2009, Respondent noticed that J ■ F., a student who was seated on the blacktop in the front of the class, about one foot from him, had both hands inside his pants. Respondent got close to the student and told him to stop doing what he was doing. The student replied with a snide remark, and Respondent sent him to stand by a basketball pole. As the rest of the class walked to the assigned physical activity, Respondent walked over to J ■ F. and, in private, told the student that he could not continue to do what he was doing. Respondent followed up with a call to the student's mother, who seemed to appreciate the teacher's report.

b. The student did not testify, and it was not established that Respondent told him, in a tone loud enough for the class to hear, to "stop touching himself," or that the student was embarrassed by comment by Respondent.

29. a. On February 11, 2009, Bertini observed Respondent's second period class. Respondent supervised fitness testing of the boys while the girls played basketball. He faced the boys, and the girls were behind him. Respondent periodically turned around to supervise the girls. Some of the girls were not on task for at least part of the time. Five of the girls were talking by a fire hydrant and another five were talking by a restroom, all outside Respondent's line of sight. Respondent either did not notice that ten girls were not engaged in the activity, or, if he did, did not act to redirect them. The principal told the students to return to play basketball.

b. After the observation, Bertini expressed her concern about the supervision of the girls, and suggested: "When planning an event that does not involve all students, plan a structured activity for non participants. [¶] Be certain that at all times al of your students stay within an area that you can visually scan." (Exhibit 3, at p. 59.)

30. a. On March 23, 2009, Respondent noticed that a student, I ■ V., took a shortcut instead of completing the entire assigned run activity. Respondent told the student to do the proper run, and the student replied that he had done it. Respondent told I ■ V. that he "was full of crap," and to complete the run. The student refused and was sent to the office.

b. The student complained to the principal, stating that Respondent had said he "was full of shit." In response to Bertini's inquiry, Respondent denied using profanity and said he had told the student he was full of "crap."

c. Neither I ■ V. nor any other student testified at the hearing about the incident. Hearsay handwritten statements are insufficient, given Respondent's contrary recollection, to establish that Respondent told I ■ V. that he was "full of shit." Accordingly, the statement made by Respondent to Bertini was not shown to have been false.

31. a. On March 30, 2009, during a third period class observation by Bertini, Respondent directed his class to run a warm-up lap. Four students walked instead of running the lap. Respondent told the students that they would lose points if they did not run the lap. Respondent's statement did not alter the students' behavior, and he told them to stay after class. The students did not stay, and there is no evidence that they received any consequence for such failure.

b. After the warm-up lap, students were directed to a shot put activity. After providing some background and instruction, Respondent lined up the students, by sex, so that one from each line would take a shot. Respondent situated himself between the two shot putters and provided direction and instruction. His location was appropriate for the activity. Some of the boys in line engaged in disruptive activities, such as wrestling and throwing clods of grass. Respondent addressed the misbehavior, first by telling the students to stop, and, second, when they failed to do so, by directing them to walk around the track.

c. While a boy was preparing to take his shot, a girl in the other line, who had taken her shot, started to move to retrieve the ball. She briefly entered the throw zone, which was a safety hazard. However, Respondent saw the girl and immediately told her to return, which she did.

32. On March 30, 2009, N [REDACTED] O. came to Respondent's class in loaned physical education clothes. This indicated to Respondent that the student had again failed to bring her own appropriate physical education clothing, something she did about twice each week. Trying to motivate the student, Respondent told her that she was going to have a difficult time passing classes in high school, especially physical education, if she was not come prepared. Respondent also asked N [REDACTED] O. where she had gotten the shorts she was wearing. If she did not complete high school, Respondent continued, she might end up eating out of trash cans. The girl said something like "you're not being very nice, Mr. Last."

33. It was not established, as alleged on paragraph 18 of the Statement of Charges, that Respondent failed to supervise students on April 20, 2009. No witness with personal knowledge of the events testified at the hearing, and Respondent did not recall the incident.

34. a. In addition to the discussions after classroom observations, Principal Bertini provided Respondent with quarterly PIP updates. She summarized any progress, and set forth incidents or continuing problems. For instance, on the positive side, it was noted that had not been any incidents involving the touching of students, and some parental complaints had decreased. On the other hand, there were still parental complaints; continued concerns existed regarding Respondent's classroom management; and, other teachers reported that Respondent's lack of classroom control was disrupting their classes. Bertini presented the last PIP update report on April 23, 2009.

b. With respect to one of the new complaints presented with the document, Respondent agreed that he shared confidential information about a student with the noncustodial grandfather. He did not realize he was not supposed to share the information, and subsequently apologized to the complaining parent.

35. Also on April 23, 2009, Bertini presented Respondent with the 2008-2009 Formal Evaluation. Citing her observations as support, Bertini noted ongoing deficiencies in Respondent's performance, particularly in the area of creating and maintaining effective environments for student learning. In this regard, Bertini noted Respondent's inadequate supervision and inconsistent application of discipline; she also pointed out that sarcastic and other inappropriate comments undermined the creation of a climate of fairness and respect. Respondent's overall performance was rated as "unsatisfactory."

36. a. On May 13, 2009, Respondent utilized a substitute teacher for his classes. He left a lesson plan for the substitute, which plan was not submitted in evidence. However, Respondent conceded that he does allow his students to engage in "free play," and that his lesson plans, including the one for this day, refer to such activity. Respondent testified, and submitted a copy of a lesson plan used on May 11, 2009, to show that he typically limits "free play" to specified activities, such as basketball or a game called "elimination." He denied leaving instructions for the substitute teacher to permit an activity called "jungle ball," and no evidence was presented to contradict this testimony.

b. It was reported to Bertini that on May 13, 2009, students engaged in "jungle ball," and that one student was hurt during the activity, requiring the school nurse to treat a swollen eye, a scraped knee, and bruising. However, it was not established that, even if students played "jungle ball" and that one of them was injured, that the game or the injuries were the result of Respondent's lesson plan.

37. On June 4, 2009, after receiving complaints of disruptions by Respondent's students, Bertini and Assistant Principal Sean McNamara, went to the athletic field to investigate. Bertini did not observe any actual disruption, but did see a student hiding behind a storage container. Three others were seated on a bench not within Respondent's line of sight. Respondent explained that the students on the bench had earned the privilege of being there by obeying the rules. Bertini told Respondent it was his responsibility to supervise the three students, even if they had a free pass from the class activity. Respondent confirmed that a student was missing, or "AWOL," and told Bertini that he had tried to find the student without success. Bertini told Respondent that he should have reported the matter to the office so that a campus supervisor could have searched for the student. Respondent testified at the hearing that the student hiding behind a storage container was subsequently placed on detention.

38. On June 8, 2009, as Respondent was walking in front of his students, guiding them to the athletic field. One of the students behind Respondent, B[REDACTED], jumped on top of a 12-foot container. Once there, the student threw a plastic cone and a chair to the ground. Respondent noticed the student after he was on top of the container, although it was unclear whether he had done so before the chair and cone hit the ground. Respondent told the student to come down from the container, which he did without the assistance of a ladder. Respondent did not impose any discipline for Bruno's actions.

39. On June 8, 2009, Respondent sent a student to the office for making offensive remarks to another student. Respondent could not see the student travel the entire distance to the office, and he did not seek or assign an escort for the student. The student did not go to the office, and his location for the rest of the day was not established at the hearing.

40. On June 17, 2009, one of the students in Respondent's fifth period class, F[REDACTED] E., repeatedly disobeyed Respondent's directive for him to sit on the blacktop by his number and continued to talk to two of his classmates. Respondent subsequently walked the class to the library, where they were to view pictures projected to a screen. F[REDACTED] E. continued to talk to his two friends, and refused to sit down once in the room. Respondent had F[REDACTED] sit next to him, and away from the other two students. However, after seating in the front of the class for two or three minutes, F[REDACTED] E. started to get up again. When his verbal commands for the student to sit down were disregarded, Respondent placed his hand on the student's shoulder and applied sufficient force for the student to fall back to the floor. The student was not fully upright when Respondent pushed him down. Surprised, F[REDACTED] E. stated something like "why the f--- did you push me down!" The student was sent to the office after the incident, and was suspended for the one day left in the school year for using profanity.

Assistance by Consulting Teacher

41. Following issuance of the PIP, Bertini referred Respondent to PAR. Respondent agreed to participate, and Lisa Ezratty (Ezratty), a physical education teacher at another school, served as Respondent's mentor from September 2008 through May 2009. Ezratty and Respondent met approximately nine times and communicated by electronic mail on several others. She observed Respondent's classroom approximately five times. Ezratty arranged for Respondent to visit physical education classes at another of the District's middle schools.

42. Ezratty had been told by Bertini that Respondent needed assistance in the areas of classroom management and communication with students. Based on her observations, Ezratty concluded that Respondent had not made clear his expectations and consequences for failing to meet them. She also felt that Respondent did not have interpersonal rapport with the students. As a result of both deficits, students did not always follow Respondent's directions and refused to perform class assignments. Starting after her first observation, on December 9, 2008, Ezratty provided suggestions for Respondent to address these issues.

43. Ezratty suggested that Respondent should be more personable with the students. He should have clear and definite standards regarding what was expected in class, provide clear consequences for failure to adhere to the rules, and consistently enforce the rules. She concluded that Respondent's lesson plans were adequate, and made no suggestions in this area.

44. The mentor teacher's last observation of Respondent's classroom was on May 21, 2009. She did not observe improvement in his classroom management. He had to repeatedly redirect the students, and did not seem to apply consequences for misbehavior. The students appeared out of control and were disrespectful. Ezratty felt she had done everything she could for Respondent. She concluded that Respondent had not made sufficient progress, and that he was no longer being effective.

Additional Findings Regarding Supervision and Discipline

45. Respondent was cooperative with Bertini and Ezratty, and he tried to follow at least some of their suggestions. Respondent started using a positive reinforcement system in which he used tickets to reward good behavior. He also used positive verbal reinforcement. Starting in the 2008-2009 school year, he discussed the school's Rules and Regulations regarding uniform requirements, grading policy, locker room and blacktop requirements, medical excuses, and behavior expectations, and required students to obtain parental acknowledgement of having reviewed the rules.

46. Respondent testified that he employs a progressive discipline system. Verbal admonitions are followed by increasingly severe penalties, namely, reduction of class points, disciplinary clean-up projects, separation from the class, referral to the office, and recommended suspension.

47. However, the classroom rules and regulations were not always consistently enforced and discipline was not always imposed. As set forth in factual finding numbers 18, 22, 25, 26, 31.a., 38, 42, and 44, Respondent failed on multiple instances to impose consequences for the students' failure to follow his instructions or class rules. Both Bertini and Ezratty had repeatedly emphasized the importance of consistent application of rules clearly explained.

48. As demonstrated in factual finding numbers 17, 18, 19, 22, 24, 25, 26, 29, 37, 38, and 39, Respondent failed to adequately supervise his students. Despite multiple suggestions from Bertini, Respondent repeatedly failed to position himself to maximize his ability to monitor the students. On several occasions, he placed students, some due to disciplinary reasons, in locations where they were not always in his line of sight. In some instances, students were away from class activities longer than they should have and Respondent failed to timely notice their absence.

Additional Findings Regarding Dishonesty

49. Except as set forth in factual finding number 11 involving the G■■■■ R. incident, it was not established that Respondent engaged in dishonest conduct with respect to the other incidents involving physical contact with the students.

Additional Evidence Presented in Support of Continued Employment

50. Respondent enjoys teaching and interacting with students. He has been involved in teaching young people for most of his life. He has coached several sports, including football, surfing, tennis, and volleyball, in settings ranging from little league to college. He has supervised recreational activities and has taught school at his church.

51. a. Respondent presented three witnesses who attested to his good character and judgment. Patrick Gleason (Gleason), a teacher, has known Respondent for approximately 35 years. They have volunteered together on church and other community volunteer projects, and Respondent taught a class in the early 1980s in a program Gleason supervised. In the class, Respondent interacted well with seventh and eighth graders. Gleason described Respondent as one of the most honorable and honest men he knows.

b. Marla McKeown met Respondent 35 years ago in church. She and her family have socialized with Respondent and his family over the years. She described Respondent as a man of character and high integrity.

c. Jim Seiger, a retired principal in the District and Respondent's brother-in-law, has spent considerable time with Respondent over the past 23 years. Respondent is a good father and family man, who regularly attends church. He has never seen Respondent raise his fist in anger, and stated that Respondent possesses the appropriate temperament to be a teacher.

Respondent's Fitness to Teach

52. Respondent's conduct shows unfitness to teach in several respects.³ The

³Courts require evaluation of a teacher's alleged misconduct in terms of its impact on fitness for service utilizing the following criteria first enunciated by the Supreme Court in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214 (*Morrison*): the likelihood that the conduct may have adversely affected students or fellow teachers; the degree of such adversity anticipated; the proximity or remoteness in time of the conduct; the type of teaching certificate held by the party involved; the extenuating or aggravating circumstances, if any, surrounding the conduct; the praiseworthiness or blameworthiness of the motives resulting in the conduct; the likelihood of the recurrence of the questioned conduct; and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the

evidence received at the hearing established several shortcomings in Respondent's teaching, and Respondent repeatedly failed to maintain the necessary environment for learning. He did not always properly supervise students or consistently discipline misbehaving students, and he made comments that further undermined his authority. Despite several admonitions, Respondent physically restrained four students as a method of discipline. The results of his inability or unwillingness to properly discipline and supervise students, disrespectful and disruptive classes, were apparent to others in school. Respondents' students were adversely affected by his conduct, as they lost learning opportunities. The degree of adversity was significant because the disruptions and poor learning environment lasted for most of two school years. In the cases of the four students whom Respondent physically restrained, they were particularly adversely impacted. Other teachers whose classes were disrupted by Respondent's unsupervised students were also adversely impacted. Respondent's conduct is relatively recent. Although Respondent argued that some of students presented particular challenges and were difficult to control, these are not extenuating circumstances. Similarly, Respondent's assertion that he restrained J ■ A. to keep the student from hurting himself was not established by credible evidence, and Respondent's actions with respect to this student were not shown to have been guided by noble motives. While Respondent enjoys teaching, his failure to adequately supervise the students, his inability to consistently enforce disciplinary rules, and his physical restraint of students were not guided by praiseworthy motives. Because Respondent's actions or inactions occurred over a significant period, spanning over most of two school years, they are likely to recur. The other factors are neutral or do not apply.

CONCLUSIONS OF LAW

1. Section 44932, subdivision (a)(1), permits dismissal of a permanent employee for "immoral or unprofessional conduct." The term "immoral conduct" as a basis for dismissal of teachers has long been included in section 44932, subdivision (a)(1), in its predecessors, and in other provisions pertaining to teachers employed in community college districts. The term was first discussed in the context of teacher dismissal in *Board of Education v. Weiland* (1960) 179 Cal.App.2d 808 (*Weiland*), and the court's definition in that case has often been cited by other courts. (See, e.g., *Palo Verde v. Hensey* (1970) 9 Cal.App.3d 967 (*Hensey*).) The *Weiland* Court stated:

constitutional rights of the teacher involved or other teachers. Not all factors may apply in each case, and only the pertinent ones need to be examined. (*West Valley-Mission Community College District v. Conception* (1993) 16 Cal.App.4th 1766, 1777; *Governing Board v. Haar* (1994) 28 Cal.App.4th 369, 384 (*Haar*).) The determination of fitness for service required by *Morrison* is a factual one. (*Board of Education v. Jack M.* (1977) 19 C.3d 691, 698, fn. 3 (*Jack M.*); *Fontana Unified School District v. Burman* (1988) 45 Cal.3d. 208, 220-221; *Haar, supra*, 28 Cal.App.4th at p. 384).

“The term ‘immoral’ has been defined generally as that which is hostile to the welfare of the general public and contrary to good morals. Immorality has not been confined to sexual matters, but includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, dissoluteness; or as wilful, flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare.” (*Weiland*, supra, 179 Cal.App.2d at p. 811.) Further, whether immoral conduct can form the basis of dismissal must be evaluated in terms of the teacher's fitness for service under the *Morrison* factors. (*Jack M.*, supra, 19 Cal.3d at pp. 696-697.)

Courts have found immoral conduct where a teacher stated that the district superintendent spent too much time “licking up the Board” as he simulated licking of the wall in an up and down manner (*Hensey*, supra); where a teacher knocked a sheriff deputy down with his car after the deputy discovered a partially naked female student in the car (*Board of Trustees v. Stubblefield* (1971) 16 Cal.App.3d 820); where a teacher performed oral copulation in a doorless toilet stall in a public restroom in a department store during business hours (*Governing Board v. Metcalf* (1974) 36 Cal.App.3d 546); where a teacher purchased and received goods known to be stolen (*Pittsburg Unified School District v. Commission of Professional Competence* (1983) 146 Cal.App.3d 964); and where a teacher made repeated comments containing sexual innuendo to middle school girls, tightly hugged female students, and placed his hand on and rubbed a female student’s thigh (*Haar*, supra, 28 Cal.App.4th 369).

Respondent’s conduct does not constitute immoral conduct. The District charged Respondent with three instances of immoral conduct pursuant to section 44932, subdivision (a)(1). However, as set forth in factual finding numbers 11, 20, and 30, it was not established that Respondent pushed Gage R. against a kiosk, that he lied to Bertini about being sick, or that he used profanity in his exchange with I█████ V. Cause for dismissal, therefore, does not exist for immoral conduct under this provision.

2. Section 44939 permits districts to immediately suspend teachers who are charged with immoral conduct. In this case, the District alleged that Respondent’s physical contact with five students constitutes immoral conduct pursuant to this statute. However, as with the three incidents specifically charged to constitute immoral conduct pursuant to section 44932, subdivision (a)(1), Respondent’s conduct toward these students did not rise to the level of immoral conduct. It was not established that Respondent engaged in inappropriate conduct with respect to G█████ R., as set forth in factual finding number 11.a. With respect to the other four incidents, the evidence presented at the hearing, as set forth in factual finding numbers 10, 12, 13, and 40, showed Respondent’s lack of control and frustration, but did not establish his willful desire to hurt students or a reckless disregard for their safety or welfare. Respondent’s conduct toward these four students, whether examined individually or collectively, does not constitute lack of rectitude, corruption, indecency, depravity, or conduct willfully indifferent to good order and public welfare analogous to

conduct previously found by courts to constitute immoral conduct. Therefore, cause did not exist for Respondent's immediate suspension under section 44939. However, because cause does exist under other provisions for Respondent's dismissal, as set forth below, this conclusion does not result in a backpay entitlement for Respondent.

3. Section 44932, subdivision (a)(3), permits dismissal of a permanent employee for "dishonesty." In an often-cited definition, the court stated in *Hogg v. Real Estate Commissioner* (1942) 54 Cal.App.2d 712, 717: "Dishonesty necessarily includes the element of bad faith. As defined in the dictionaries and in judicial decisions, it means fraud, deception, betrayal, faithlessness. [Citations.] As phrased by the court in *Alsup v. State*, 91 Tex. Cr. 224, 'dishonesty denotes an absence of integrity; a disposition to cheat, deceive or defraud; deceive and betray.' "

In *Fontana Unified School District v. Burman*, supra, 45 Cal.3d 208, 220, fn. 12, the Supreme Court required application of the *Morrison* factors to the determination of "dishonesty." As the Court noted: "Dishonest conduct may range from the smallest fib to the most flagrant lie. Not every impropriety will constitute immoral or unprofessional conduct, and not every falsehood will constitute 'dishonesty' as a ground for discipline." (*Ibid*).

As set forth in factual finding number 11, in the only incident of alleged dishonesty established at the hearing, Respondent falsely told Bertini on December 19, 2009, that he did not recall the details of an incident two days earlier involving student G■■■ R. Respondent sought to avoid culpability over the G■■■ R. incident and his statement constitutes more than a small fib. Therefore, his conduct constitutes dishonesty.⁴

However, this single statement is insufficient to demonstrate unfitness to teach under *Morrison*. Thus, while the conduct occurred in the relatively recent past, and the statement was self-serving, it was not established that Respondent's statement was likely to adversely affect students or fellow teachers or that the conduct is likely to recur. The other factors are neutral or do not apply.

4. Section 44932, subdivision (a)(5), permits dismissal of a permanent certificated employee for "evident unfitness for service." 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. [Footnote omitted] 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 District v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444 (*Woodland*).) As a threshold matter, the *Morrison* criteria must be examined to ascertain whether the conduct in

⁴ Member Berndt did not agree that Respondent's conduct constitutes dishonesty.

question indicates unfitness for service. “If the *Morrison* criteria are satisfied, the next step is to determine whether the ‘unfitness’ is ‘evident’; i.e., whether the offensive conduct is caused by a defect in temperament.” (*Id.*, at p. 1445.)

In *Woodland*, during the span of approximately one year, the teacher in question had failed to follow proper instructions for disciplining students, had written sarcastic and belittling notes about students, had insulted students in class, had used profanity in class, had behaved rudely and contemptuously toward parents, had made sarcastic remarks about other teachers in the hearing of students, had displayed insubordination and disrespect toward administrators, had threatened other teachers, and had disrupted the grading process by interfering with the grading policy of a substitute who took over one of his classes. The court concluded that the teacher’s conduct demonstrated unfitness to teach and that the conduct was traceable to a defect in temperament, namely, the contempt for fellow teachers and the administration.

In the instant matter, as set forth in factual finding numbers 10, 12, 13, 17, 18, 19, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 37, 38, 39, 40, 42, 44, 47, 48, and 52, Respondent failed to maintain an environment conducive to learning, failed to properly supervise students, failed to consistently discipline students, made inappropriate comments toward students, and resorted to physical restraint to control misbehaving students, which failures establish unfitness to teach. The fact that the problems have persisted over most of two school years period despite repeated admonitions against touching students and suggestions for improvement indicates that a fixed temperamental defect or inadequacy is at the root of Respondent’s behavior. Of particular concern is the lack of self control displayed in the continued use of physical restraint to modify student behavior. Therefore, in the existing circumstances, Respondent’s unfitness to teach, established pursuant to the applicable *Morrison* factors, has been shown to be the result temperamental defects or inadequacies under *Woodland*, and cause for dismissal exists pursuant to section 44932, subdivision (a)(5).⁵

5. Section 44932, subdivision (a)(7), permits dismissal of a permanent certificated employee for “persistent violation of or refusal 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 or her.”

A violation of section 44932, subdivision (a)(7), must also be established by reference to the *Morrison* factors. If unfitness to teach is shown, then the District must further establish that Respondent’s refusal to follow the laws or regulations was “persistent,” i.e., “stubborn and continuing.” (*San Dieguito Union High School District v. Commission on Professional Competence* (1982) 174 Cal.App.3d 1176, 1183 (*San Dieguito*); *Governing Board of the Oakdale Union High School District v. Seaman* (1972) 28 Cal.App.3d 77, 82 (*Seaman*).) In *Seaman*, the court stated: “The word ‘persistent,’ is defined by lexicographers as ‘refusing to

⁵ Member Berndt does not concur in this conclusion.

relent; continuing, especially in the face of opposition . . . stubborn; persevering . . . constantly repeated.’ [Citation omitted] And in the judicial decisions of this, as well as other states, the word has been interpreted to mean ‘continuing or constant.’ [Citations omitted].” (*Seaman, supra*, 28 Cal.App.3d at p.82.) Isolated incidents or incidents involving an issue unresolved over a period of time are not generally considered “persistent.” (*See, e.g., Bourland v. Commission on Professional Competence* (1985) 174 Cal.App.3d 317; *Seaman, supra*, 28 Cal.App.3d at pp. 81-84).

District Board Policy 4119 makes each teacher responsible for the teaching and supervision of the children in his class. As set forth in factual finding numbers 17, 18, 19, 22, 24, 25, 26, 29, 37, 38, 39, and 48, Respondent repeatedly failed to provide proper supervision to his students. Significantly, such failure occurred despite multiple suggestions and directives from Bertini and Ezratty for Respondent to improve his supervision of students.

District Board Policy 5150 requires teachers to enforce discipline in a firm, fair and consistent manner and to demonstrate respect for students sufficient to establish control and order within the classroom. Respondent continually failed to enforce discipline in a firm, fair or consistent manner, as set forth in factual finding numbers 18, 22, 25, 26, 31.a., 38, 42, 44, and 47. As Bertini and Ezratty concluded, such failure was likely the cause of his inability to establish sufficient control and order in the classroom. His inappropriate comments to students, set forth in factual finding numbers 23, 27, 30, and 32, did not demonstrate respect for students conducive to establishing control and order in the classroom. Respondent’s failure to properly discipline students was also demonstrated by his resort to physical restraint as a form of behavior control in four instances, as set forth in factual finding numbers 10, 12, 13, and 40.

Respondent’s violations of District Board policies 4119 and 5150 were numerous, continuous, and thus “persistent,” pursuant to section 44932, subdivision (a)(7). Moreover, as set forth in factual finding number 52, the conduct that resulted in violation of these policies demonstrates unfitness to teach under *Morrison*.

6. Section 49001 and Policy 5150 prohibit use of corporal punishment as a disciplinary measure. Section 49001 defines corporal punishment as the “[w]illful infliction of, or willfully causing the infliction of, physical pain on a pupil.” However, Respondent’s conduct, despite being serious and repeated, did not meet the statutory definition of corporal punishment. The students did not testify that Respondent caused them pain, and it was not established that Respondent was willfully trying to cause them pain.

7. All evidence presented against dismissal has been considered. However, this evidence is insufficient to mitigate or excuse the conduct found to constitute evident unfitness for service or persistent violation of school laws and regulations. The District has therefore established that dismissal is appropriate and warranted.

ORDER

The District's decision is upheld, and Respondent Kirk Last may be dismissed as a permanent certificated employee of the Capistrano Unified School District.

DATED: _____

COMMISSION ON PROFESSIONAL COMPETENCE

SAMUEL D. REYES, Chairperson
Administrative Law Judge
Office of Administrative Hearings

JUDY BERNDT, Member

HOLLY JEFFERSON, Member