

BEFORE THE  
COMMISSION ON PROFESSIONAL COMPETENCE  
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Dismissal of:

LEE BLACKWELL,

A Permanent Certificated Employee,

Respondent.

OAH No. 2011060543

**DECISION**

On January 23, 2012, a Commission on Professional Competence heard this matter in Los Angeles, California. The Commission included Michael A. Scarlett, Susan Mercer, and Israel Avila.

Sandra J. Garcia, Attorney at Law, represented Complainant, Nancy Nichols-Nolasco, Director of Human Resources, Lynwood Unified School District (District). Richard J. Schwab, Attorney at Law, represented Respondent, Lee Blackwell (Respondent), a permanent employee of the Lynwood Unified School District, who was present throughout the hearing.

Oral and documentary evidence was received and the matter was submitted for Decision on January 23, 2012. The Commission on Professional Competence finds as follows:

**FACTUAL FINDINGS**

1. Nancy Nichols-Nolasco, Director of Human Resources for the District, made and filed Accusation and Statement of Charges, the First Amended Accusation, and the Second Amended Accusation in her official capacity. The Commission proceeded on the Second Amended Accusation and Statement of Charges.

2. Respondent is a permanent certificated employee of the District. His most recent position with the District was as a Math and Geometry teacher at Lynwood High School. He started teaching at the District in October 2005. Prior to his employment at the District, Respondent was a substitute teacher at the Los Angeles Unified School district for two years. Respondent also was employed as an engineer at General Dynamics, McDonnell Douglas, Lockheed and General Electric for approximately 16 years before becoming a

teacher. Respondent has a Bachelor of Science degree in Physics and a Masters degree in Math and Engineering.

3. The Statement of Charges was filed on April 6, 2011, and recommended that Respondent be suspended for a period of 20 days pursuant to Education Code sections 44932, subdivisions (a)(1)(immoral or unprofessional conduct).

4. On April 6, 2011, the District provided Respondent a Notice of Disciplinary Action providing Respondent a copy of the Statement of Charges and advising him that the District intended to recommend to the District's Governing Board that Respondent be suspended for his alleged actions. On May 24, 2011, Respondent, through his attorney, submitted a request for hearing, and denied the allegations contained in the Statement of Charges.

5. On June 9, 2011, the District issued its Accusation against Respondent alleging that on November 1, 2010, after assisting a female student, L.Q., with a math problem, Respondent "slapped L.Q. on her buttocks." The District's accusation alleged that Respondent's conduct evidenced unfitness for service pursuant to Education Code section 44932, subdivision (a)(5). The District sought to suspend Respondent from his permanent teaching position for a period of twenty (20) days. On June 15, 2011, Respondent submitted his Notice of Defense. On January 10, 2012, the District issued its First Amended Accusation with the same allegations against Respondent, but reducing the suspension sought from twenty days to five days. On January 20, 2012, the District issued its Second Amended Accusation again with the same allegations, but reducing the suspension sought from five days to two days.

6. All jurisdictional requirements have been met to proceed to hearing.

#### *November 1, 2010 Incident*

7. On November 1, 2010, during Respondent's third period Algebra class he was reviewing math quizzes with his students. Respondent called each student to his desk in front of the class to discuss their performance on the quizzes. Respondent called L.Q. to his desk to discuss her last math quiz and to assist her with problems she had gotten wrong on the quiz. L.Q. was seated in a chair next to Respondent's desk. After concluding his review session, L.Q. testified that she got up to return to her seat when Respondent "slapped" her on the buttocks. L.Q. was stunned and turned and asked Respondent "Did you slap my ass?" L.Q. stated that Respondent started laughing and said he was "joking" and that "I meant to pinch it." L.Q. did not see whether Respondent was looking at her when she felt the slap on her buttocks. L.Q. returned to her seat and was "shocked" and "nervous" after the incident.

8. Respondent stated that he inadvertently "patted" Respondent on her butt and that his intent was to pat L.Q. on her back to congratulate her for improving her math grade. According to Respondent, L.Q. had been having difficulty on past math examinations and

quizzes. L.Q. had also failed Algebra I with a different teacher and was retaking the class with Respondent. Respondent was reviewing quizzes with L.Q. and going over some of the problems. He was discussing L.Q.'s quiz grades while reviewing her past examinations on his computer. Respondent testified that L.Q. had made significant improvement and that when he completed his review with L.Q., he attempted to pat her on the back to give her encouragement. L.Q. confirmed that Respondent told her that her grade had improved from a "F" to a "C" when he was going over her quizzes. Respondent stated that because he was still looking at the computer screen and making notes, he did not notice that L.Q. had stood up from her chair and started to return to her desk. He stated that he "patted" her on her buttocks inadvertently, while intending to give her a pat on the back. He was extremely embarrassed after realizing what had occurred. Respondent testified that he apologized to L.Q. after the incident, but his apology did not appear in a written statement he prepared a few days later on November 4, 2010.

9. After class, L.Q. went to the principal's office to report the incident. She stated that she was unable to enter the office because she did not have a "pass" to allow her to be out of class. Later that day, during sixth period, L.Q. informed William Lee, the Dean of Discipline/Security, that Respondent had slapped her on the buttocks during his third period class. Lee requested that L.Q. prepare a written statement, after which L.Q. submitted a written "Complaint-Initial Report of Incident" form detailing her version of the incident. L.Q.'s statement indicated that Respondent "slapped my ass" and that she asked him "did you slap my ass? To that question L.Q. stated that Respondent said "I meant to pinch it." Mr. Lee notified the Assistant Principal of the school, Mrs. Wilson. L.Q.'s written statement differs somewhat from her testimony at hearing in that she did not state in the written statement that Respondent laughed and joked when he slapped or patted her on the buttocks.

10. Thereafter, that same afternoon, Mr. Lee, Mrs. Wilson, L.Q., and B.A., another student believed to have witnessed the incident in Respondent's third period class, all met in Carlos Zaragoza's office, the Principal of Lynwood High School. Mr. Zaragoza interviewed both students about the incident. L.Q. essentially conveyed to Mr. Zaragoza the same version of the incident she had told Lee, except that she told Mr. Zaragoza that when she asked Respondent "did you slap me in the ass?" Respondent replied "*My bad*, I meant to pinch you" (Emphasis added).

11. B.A. told Mr. Zaragoza that she saw the incident but did not hear the verbal exchange between Respondent and L.Q. However, in B.A.'s written statement provided to Mr. Lee prior to her interview, B.A. stated that she saw Respondent "slapped her [L.Q.] ass," and L.Q. said "what the fuck." B.A.'s written statement also indicated that Respondent said "Oh my bad I meant to pinch you," when replying to L.Q., suggesting that B.A. did hear the verbal exchange between Respondent and L.Q. At hearing B.A. testified that she could not hear Respondent's discussion with L.Q. regarding her quiz, but she did hear the exchange between L.Q. and Respondent after the incident. B.A. testified that Respondent told L.Q. "I meant to pinch you," which was slightly different from her recollection in her written statement. B.A. also testified that when Respondent slapped L.Q. on the "butt," he was not looking at his computer. But B.A. recalled that Respondent was working on his computer/laptop when he was reviewing each student's quiz. B.A. testified that after the

incident several other students were saying “what the hell a teacher is not suppose to do that,” suggesting that other students may have witnessed the incident. However, Mr. Zaragoza’s incident report indicated that only one student, B.A., witnessed the incident. B.A. was seated approximately five rows back from the front of the class where Respondent was reviewing quizzes.

12. The next day, on November 2, 2010, Mr. Zaragoza interviewed Respondent about the incident. Respondent had not contacted Mr. Zaragoza about the incident prior to their meeting the next day. Respondent told Zaragoza that he had “patted” L.Q. on the buttocks, but stated that it was a “congratulatory pat” and not sexual in nature. He did not recall whether he had made the comment “My bad I meant to pinch you” to L.Q, but stated that he may have made the comment. Respondent testified at hearing that he told Principal Zaragoza that he may have made a comment about “pinching baby fat.” In a written statement about the incident prepared by Respondent on November 4, 2010, Respondent attempted to clarify the circumstances surrounding the “pinching” comment. Respondent initially believed he was being accused of pinching L.Q. as well as patting her buttocks. In his written statement prepared two days later, Respondent denied pinching L.Q. and suggested that the “pinching” comment or reference may have resulted when another student who was sitting close to his desk made a comment about L.Q.’s buttocks size.

13. It is not clear from the record whether the student’s purported remarks about L.Q. were in response to the incident that occurred or whether the student was just teasing L.Q. unrelated to the incident. According to Respondent’s written statement, Respondent made a comment “maybe pinching baby fat and that she [L.Q.] should stop eating so much junk food” in response to the student’s comment. Respondent testified that he made this comment in an attempt to diffuse the situation, because L.Q. was already upset about his patting her on the butt and the student was making a comment about the size of L.Q.’s butt. Respondent stated that he believed L.Q. may have overheard him responding to the other student’s comment and misinterpreted what he was saying. It is not clear why Respondent believed his comment would have placated or diffused the situation and his explanation at hearing was equally confusing. L.Q. testified that she did not hear another student making a comment about her size, but that the other students were laughing after the incident occurred.

14. There is no dispute that Respondent touched L.Q. on her buttocks and that L.Q. was shocked, surprised and offended by Respondent’s actions. Respondent admitted he “patted” L.Q.’s butt, but insisted that his action was inadvertent and intended to give L.Q. a congratulatory pat on her shoulders for improving her math grade. Respondent credibly testified that he was still looking at his computer screen when his discussion with L.Q. concluded and that he did not see her stand up to go back to her desk. He thought L.Q. was still seated when he attempted to pat on her back. L.Q. had her back to Respondent did not see whether Respondent intentionally touched her buttocks. Understandably L.Q. was upset and embarrassed. However, beyond these facts the evidence did not establish that Respondent intentionally touched L.Q. in a sexually harassing manner.

15. The only other witness to the incident, B.A., was not consistent in her recollection of the events and exhibited some bias in her testimony towards Respondent. In

her written statement, B.A. said that she heard L.Q. say “what the fuck” after being touched on the buttocks by Respondent. However, this statement is not consistent with L.Q.’s own testimony that L.Q. said “did you slap my ass?” after being touched by Respondent. B.A.’s recollection of what Respondent said to L.Q. was also exactly what was reported by L.Q. as Respondent’s statement after the incident. Further B.A. told Mr. Zaragoza that she did not hear the verbal exchange between Respondent and L.Q. when interviewed by Zaragoza. B.A. testified that she actually saw Respondent “slap” L.Q.’s buttocks and that he was not looking at the computer when the incident occurred. B.A. was seated at least five rows back from the front of the class and was apparently far enough away that she either could not hear the verbal exchange between L.Q. and Respondent or she was unable to hear the exchange clearly. Again, L.Q. confirmed that Respondent was working on his computer when reviewing quizzes with the students, including L.Q.

16. Another example of B.A.’s inconsistent recollection was her testimony that the students in the class were saying “what the hell a teacher is not supposed to do that”, referring to Respondent’s touching of L.Q.’s buttocks. However, no other student in Respondent’s classroom came forward to state that they witnessed this incident and L.Q. testified that she did not hear any comments made by other students, only recalling that the students were “laughing.” Additionally, Respondent was reviewing each student’s quiz and grades individually, calling the students to the front one at a time. While working individually with each student at the front of the class, the other students conceivably were not focused on Respondent and engaged in other activities. This would explain why no other student witnessed the incident. It is more likely that B.A. was distracted and engaged in other activities as well when this incident occurred, which may also explain her inconsistent recollection of the incident.

17. B.A.’s unequivocal testimony that Respondent intentionally “slapped” L.Q.’s buttocks is not convincing given B.A.’s inconsistencies in her recollection of the events. Additionally, B.A.’s testimony evidenced bias towards Respondent. She testified that she had observed inappropriate conduct by Respondent with other students, such as calling them “bitches, stupid, and dumb asses.” However, B.A. never reported such incidents and there is no other evidence in the record to support these assertions. Respondent denied ever making such comments about other students. B.A. and L.Q. were admittedly school friends and B.A.’s attempt to help or support L.Q. appears to have influenced B.A.’s testimony.

18. Respondent’s testimony was credible, although his explanation and recollection of the “pinching” comment was tortured and confusing. Respondent initially stated to Principal Zaragoza that he did not recall making the comment, but then attempted to explain or give context to his comment by suggesting L.Q. misheard or misinterpreted a statement he was making to another student. The obvious problem with Respondent’s explanation of course is that he should not have been making any reference, or responding to any statement by another student about the size of L.Q.’s butt. His assertion that this was an attempt to diffuse the situation was not convincing. But given the circumstances surrounding the incident, i.e., Respondent’s inadvertent touching of a female student’s buttocks, it is not inconceivable that during his very embarrassing realization that he had inadvertently touched

the student, Respondent was unable to clearly recall what was actually said in the seconds after the incident.

19. All other aspects of Respondent's testimony were corroborated and credible. He was reviewing quizzes and grades with L.Q. and expressed to her that her grade had improved. He was working on his computer while reviewing L.Q.'s past quizzes and grades. Respondent credibly testified that his intent was to give L.Q. a "congratulatory pat" on her back while she remain seated in the chair next to his desk. However, unbeknownst to Respondent due to his attention being on his computer screen, L.Q. had stood up to return to her desk as they were finishing the review session. Respondent's inadvertent touching of L.Q.'s but was neither intended nor sexual in nature. There is no evidence that Respondent has ever made any inappropriate statements or unwelcomed overtures of a sexual nature towards to L.Q. or any other student. Given the absence of credible and persuasive evidence to the contrary, Respondent's conduct as established by the preponderance of the evidence, does not support imposition of discipline, i.e., suspension by the District.

20. Finally, there are no prior or current allegations of unprofessional or immoral conduct by Respondent cited by the District. Respondent's teacher evaluations indicate that he has met or exceeded District standards and there apparently have been no prior student or parent complainant regarding his instruction and conduct, and the District has not sought prior disciplinary action against Respondent. By all accounts Respondent has been a responsible, conscientious, competent teacher who enjoys teaching students and appears to be well qualified to perform his duties.

## LEGAL CONCLUSIONS

### *Burden and Standard of Proof*

1. The standard of proof in a teacher dismissal proceeding is a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1039-1040.) Proof by a preponderance of the evidence requires a showing that it is more likely than not to be true. In other words, the evidence is more convincing than that which is offered in opposition. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

2. A permanent employee may be dismissed for cause only after a dismissal hearing. (Ed. Code, §§ 44932, 44934, and 44944.) When a school board recommends dismissal for cause, a Commission on Professional Competence may only vote for or against the dismissal; the Commission may not dispose of a charge seeking dismissal by imposing probation or an alternative sanction. (Ed. Code, § 44944, subds. (c)(1)-(3).) The Commission's decision is deemed to be the final decision of the district's governing board. (*California Teachers Ass'n v. State of California* (1999) 20 Cal.4th 327, 331.) A Commission has broad discretion to determine the issues before it, including whether dismissal is the appropriate sanction. (*Ibid.*, at p. 343.)

3. Education Code section 44932, subdivision (a)(5) provides the District may suspend or dismiss a permanent employee for “evident unfitness for service.” Education Code sections 200, 201, and 230 prohibit sexual harassment by a District employee.

4. “Evident unfitness for service” is not synonymous with “unprofessional conduct,” and the term means clearly not fit for teaching, ordinarily by reason of temperamental defects or inadequacies; it connotes fixed character trait, presumably not remediable merely on receipt of notice that one’s conduct fails to meet expectations of the school district. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444.) “Evident unfitness” includes in its definition “unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies.” To terminate the teacher on grounds of immoral conduct, unprofessional conduct, or evident unfitness for service, it must also be established that the conduct renders the teacher unfit to teach. (*Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229-230.) Thus a determination of evident unfitness requires an analysis based on criteria set forth in *Morrison*.<sup>1</sup> In reaching a conclusion that grounds exist to dismiss a certificated employee on the basis of evident unfitness for service, not all *Morrison* factors need be examined, only the pertinent ones. (*Governing Board v. Haar* (1994) 28 Cal.App.4th 369, 384.)

#### *Evident Unfitness for Service*

5. The District did not establish the existence of a fixed character defect or a temperamental inadequacy. The single inadvertent incident that occurred on November 1, 2010, does not establish Respondent’s evident unfitness, as defined by the statute and applicable case law, including under the factors established in *Morrison*. Respondent credibly testified that he mistakenly and inadvertently patted or touched L.Q. on the buttocks when he was attempting to give her a congratulatory pat on the back for improving her grade in his Algebra I class. The investigation of the incident by the Mr. Zaragoza, the Principal at Lynwood High School, revealed that L.Q. did not actually see Respondent when the incident occurred and only one other student in the entire class purportedly witnessed Respondent intentionally “slapping” L.Q. on the buttocks. However, B.A.’s testimony was found to be inconsistent and biased. Respondent’s untended inadvertent touching of the female student, although unfortunate, does not rise to the level of sexual harassment or evident unfitness for service as alleged by the District. To the contrary, the evidence showed that Respondent was

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<sup>1</sup> In *Morrison*, the Supreme Court of California held that the determination of whether a person is fit to teach must be based on an objective and analytical approach, consisting of a review of the teacher’s conduct and an assessment of a variety of specific factors including: (1) the likelihood of recurrence of the questioned conduct; (2) the presence of extenuating or aggravating circumstances; (3) the effect of notoriety and publicity; (4) the likelihood that the conduct adversely affected students or fellow teachers; (5) the disruption of the education process; (6) the motive underlying the conduct; and (7) the proximity or remoteness in time of the conduct.

a responsible, conscientious, and competent teacher. Based upon the totality of the evidence offered at hearing, the Commission unanimously concludes that the District failed to show by a preponderance of the evidence that Respondent evidently unfit to serve as a certificated teacher with the District.

7. Accordingly, cause does not exist pursuant to Education Code section 44932, subdivision (a)(5), to suspend Respondent from his permanent teacher position with the District for a period of two days, by reason of Factual Findings 1 through 20, and Legal Conclusions 1 through 6.

### ORDER

The determination of the Governing Board of the Lynwood Unified School District seeking to suspend Respondent Lee Blackwell for two days pursuant to Education Code section 44932, subdivision (a)(5) is not upheld. Accordingly, the Second Amended Accusation and Statement of Charges are hereby dismissed.

DATED: May 18, 2012

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MICHAEL A. SCARLETT  
Administrative Law Judge,  
Office of Administrative Hearings,

DATED: \_\_\_\_\_

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SUSAN MERCER  
Commission Member

DATED: \_\_\_\_\_

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ISRAEL AVILA  
Commission Member