BEFORE A
COMMISSION ON PROFESSIONAL COMPETENCE
SAN FRANCISCO UNIFIED SCHOOL DISTRICT
CITY AND COUNTY OF SAN FRANCISCO
STATE OF CALIFORNIA

In the Matter of: MICHAEL S. JUNCKER, a certificated teacher, Respondent.	OAH No. 2011061199

DECISION

Administrative Law Judge David L. Benjamin served as the chairperson of the Commission on Professional Competence. Patricia Hlinka and Tom Rust served as members of the commission. The matter was heard in Oakland, California, on August 23-26, 29-31, September 1-2, and October 17-18, 2011.

Laura J. Schulkind and Alison C. Neufeld, Attorneys at Law, Liebert Cassidy Whitmore, represented complainant Roger Buschmann, Chief Administrative Officer of the San Francisco Unified School District.

Peder J. V. Thoreen, Attorney at Law, Altshuler Berzon LLP, represented respondent Michael S. Juncker, who was present.

The record closed and the matter was submitted on October 18, 2011.

FACTUAL FINDINGS

Jurisdiction

1. On April 27, 2011, complainant Roger Buschmann, Chief Administrative Officer of the San Francisco Unified School District (SFUSD), issued a statement of charges against Michael S. Juncker (respondent), a certificated employee of the district. On June 9, 2011, complainant issued an accusation against respondent. Respondent filed a notice of defense. On or about August 15, 2011, complainant issued a first amended accusation and, on August 25, 2011, he issued a second amended accusation. The second amended accusation was withdrawn at hearing and the matter was heard on the first amended accusation.

The first amended accusation alleges that there is cause to dismiss respondent based on immoral conduct, dishonesty, evident unfitness for service and persistent violation of, or refusal to obey, school laws and regulations. With respect to dishonesty, the accusation alleges that respondent was dishonest on his application to the district concerning his criminal and employment history; that he was dishonest on his application to the California Commission on Teacher Credentialing concerning his criminal history; and that he was dishonest with CAO Buschmann concerning a domestic violence incident that occurred in July 2010. The allegations of evident unfitness and persistent violations of laws and regulations concern respondent's conduct in the classroom, where it is alleged that he yelled at students and improperly used physical contact with students to manage their behavior. The accusation does not expressly identify the alleged conduct that complainant believes is immoral.

Respondent's professional background

2. Respondent is a 37-year-old elementary school teacher. He received his undergraduate degree from Youngstown State University in Ohio in 1996, and a master's degree in early childhood education from the same institution in 2001. Respondent began his teaching career in a parochial school in Ohio, where he taught fifth grade from 1996 to 1998. He was also a fifth grade teacher for the Geneva Area City Schools, a public school district in Geneva, Ohio, from 1998 to March 2003. Respondent then taught fifth grade from July 2003 to June 2006 in North Carolina. He was hired by SFUSD for the 2006-2007 school year as a second grade teacher at Drew Elementary School. Respondent later transferred to Garfield Elementary School, where he taught first grade until he was placed on leave on October 13, 2010. He has not returned to the classroom since then.

Respondent's criminal and employment history

3. On October 19, 2001, in Ashtabula Municipal Court in the State of Ohio, respondent was convicted on his plea of no contest of a violation of Ohio Revised Code section 2917.11, subdivision (A)(3) (disorderly conduct).

4. The facts and circumstances leading to this conviction are that, on numerous occasions while commuting to work in Geneva, respondent would pull up next to cars with male drivers and no passengers and solicit sexual encounters. Respondent had a one-hour commute from his home to Geneva along infrequently-traveled rural roads. Using the passing lane, respondent would pull up next to the other vehicle and try to make eye contact with the driver. If the other driver sped up or slowed down, respondent would do the same; he would stay with the other car for as little as two minutes or as long as one-half hour. If respondent felt that the other driver was interested in his advances, he would make gestures simulating sex acts to make his intentions clear. On occasion, respondent and the other driver would pull over and have a sexual encounter. Respondent's conviction followed numerous complaints to the Ohio State Highway Patrol by other drivers. An Ohio state trooper warned respondent three times to stop his driving behavior, which other drivers found threatening and intimidating, but respondent did not change his behavior.

5. On January 29, 2002, a criminal complaint was issued against respondent for the crime of "aggravated menacing." The complaint alleged that, since his conviction in October 2001, respondent had harassed another driver. In January 2002, law enforcement officers went to the school where respondent was teaching and arrested him.

6. After respondent's arrest, the superintendent removed him from the classroom and placed him on home assignment; the superintendent's notice to respondent informed him that he was being reassigned "pending disposition of charges," which respondent understood to mean the criminal charges against him. Respondent was informed by the superintendent that the reassignment was not disciplinary in nature. During the time that he was on home assignment, from January 2002 to March 2003, respondent did not teach.

7. Respondent's criminal prosecutions were the subject of extensive print and radio publicity in Ashtabula County. Newspaper articles noted respondent's status as a public school teacher with the Geneva Area City Schools.[1] Two radio stations made public service announcements which described respondent and his vehicle, and urged members of the public to contact law enforcement officers if they saw him. For respondent, who had himself attended school in the Geneva Area City Schools District, and who had family members who worked for the district, it was a time of public humiliation.

8. On September 3, 2002, in Ashtabula County Court, State of Ohio, respondent was convicted upon his plea of no contest of a violation of Ohio Revised Code section 4511.20 (reckless operation of a motor vehicle), a misdemeanor, with a penalty enhancement because it was the second such offense within one year. Respondent was placed on supervised probation for two years on conditions that he serve 30 days in jail, with 28 days suspended; pay a fine of $250, costs and other fees; continue counseling and prescribed medications; and perform 40 hours of community service.

9. On December 31, 2002, respondent signed a separation agreement with the Geneva Area City Schools in which he agreed to resign effective March 4, 2003, and the district agreed to pay him his salary and benefits through the end of the school year. Respondent submitted his resignation on December 31, and the district then approved the separation agreement. The Geneva Area City Schools never brought formal disciplinary charges against respondent.

Respondent's application to SFUSD

10. On July 12, 2006, respondent signed and electronically submitted an employment application to SFUSD. By signing the application, respondent certified that

[1] The newspapers characterized respondent's cases as "road rage" incidents in which respondent threatened other drivers with obscene gestures; the articles were silent concerning respondent's solicitation of sex.

> I have made true, correct and complete answers and statements on this application in the knowledge that they may be relied upon in considering my application, and I understand that any omission or falsely answered statement by me on this application . . . will be sufficient grounds for failure to employ or for my discharge should I become employed with the school district . . . .

11. Question 1 on the application under the heading "Legal Information" asks:

> Have you even been convicted of a felony or misdemeanor, or do you currently have a felony or misdemeanor charge pending? Convictions include a plea of guilty, nolo contendere (no contest) and/or a finding of guilty by a judge or a jury. (Note: *Exclude convictions for marijuana-related offenses for* [*sic*] *more than two years old.*) [Original emphasis.]

Respondent answered "yes." The application directs applicants to explain all "yes" answers. Respondent wrote:

> Disorderly Conduct – About five years ago. I was driving to [*sic*] close to other cars and the other driver accused me of an obsense jesture [*sic*]. I was following too close and not aware of how other drivers might feel about my driving so I entered a plea of no contest. I'm now much more aware of other drivers [*sic*] needs.

12. Respondent's explanation is misleading and false. His explanation states, in essence, that he was an inconsiderate driver. What it does not state is that the conduct that led to his conviction was predatory, intimidating and dangerous, or that he purposely engaged in that conduct to solicit sex. Respondent's explanation assures the district that he corrected his behavior after his conviction, which is not true.

13. Respondent reviewed his answer to question 1 at hearing and testified that he believes what he wrote is true.

14. On his application, respondent did not disclose his September 2002 conviction for reckless operation of a motor vehicle.

15. The application has a section entitled "Record of Work Experience," in which the applicant is asked to give detailed information about his or her past employment. Respondent wrote that from August 1, 1998, to March 1, 2003, he worked for the Geneva Area City Schools and that his "Reason For Leaving" was "Moved to North Carolina."

16. Respondent's explanation is false and misleading. It is true that, after resigning from the Geneva Area City Schools, respondent moved to North Carolina where his wife was then working. It is not true, however, that respondent's reason for leaving his employment was to move to North Carolina. Respondent left Geneva Area City Schools after he had been removed from the classroom, suffered a second criminal conviction, and exposed himself and the district to extensive negative publicity that made his continued employment as a fifth grade teacher untenable. There is no evidence that, when the 2002-2003 school year began, respondent intended to leave mid-year and move to North Carolina.

17. At hearing, respondent reviewed his answer and testified that he believes what he wrote is "absolutely true."

18. The application asks, "Have you ever been dismissed, retired, resigned from, non-re-elected [*sic*], suspended withouth [*sic*] pay, or otherwise left employment because of allegations of misconduct or while allegations of misconduct were pending?" Applicant answered "no."

19. Respondent's answer is false. Respondent resigned from the Geneva Area City Schools pursuant to a separation agreement because of the allegations of criminal misconduct that were brought against him January 2002, and his subsequent criminal conviction in September 2002. The evidence does not establish any other reason for respondent's resignation in December 2002. Respondent testified that he answered "no" to the question because, when he chose to resign in December 2002, there were no district allegations of misconduct against him. The question, however, is broader than the narrow meaning that respondent gives it. It asks whether he left employment because of allegations of misconduct, and it is plain that respondent did so.

20. Under the heading "Credential Information," the SFUSD application asks the applicant to state his or her "Total years of professional experience in your credential or license." Respondent answered, "Ten." Respondent's answer is false as it included approximately 14 months at Geneva Area City Schools when he had been removed from the classroom and placed on home assignment.

21. Angie Sagastume is the Executive Director of Certificated Recruitment and Staffing for SFUSD. She has held that position for 15 years. Sagastume testified that if respondent had accurately disclosed the circumstances leading to his first conviction, he would not have advanced to the eligibility list because the facts leading to the conviction show reckless behavior and a lack of judgment. She testified further that if respondent had accurately disclosed the circumstances under which his employment with Geneva Area City Schools ended, his application would not have been advanced to the eligibility list. The district enjoys a robust pool of qualified applicants, and it would not have moved forward the application of someone who left employment because of allegations of misconduct. Sagastume's testimony on these points was uncontradicted and persuasive.

22. Respondent argues that none of the false statements he made in his employment application can be used to discipline him because he filed his application more than four years before the district filed its notice of intent to dismiss him, and therefore the application is time-barred by Education Code section 44944. The district asserts that respondent's dishonest answers on his application preclude him from relying on section 44944. As explained in Legal Conclusions 2-4, resolution of this legal issue turns on whether the district was ignorant of the true facts at the time it hired respondent.

23. As to respondent's failure to disclose his September 2002 conviction, the district failed to establish that it was unaware of that conviction when it hired him. Before respondent was hired, the district requested a criminal background check of respondent through Live Scan Service, and it received a Live Scan report. The results of that report, however, are not known; district does not retain the Live Scan reports (it is not allowed to), and Sagastume has no personal knowledge of the contents of the report. Sagastume testified that it is the district's practice to compare the Live Scan results with the matters stated on the application. If the district discovers that the applicant has a criminal conviction that he or she did not report, the applicant is automatically disqualified as the district considers non-disclosure to be falsification. In this case, however, Sagastume does not know what the Live Scan report said, and does not know whether district employees followed the practice of comparing the report to respondent's application. The district failed to show that it was unaware of respondent's second criminal conviction when it hired him.

24. As to the remaining false and misleading statements on respondent's application, the evidence established that the district was unaware of the circumstances leading to respondent's first conviction and unaware of the circumstances under which respondent left employment with the Geneva Area City Schools. The district did not investigate those matters and did not learn of them until after it placed respondent on leave in October 2010. The district relies on applicants to respond truthfully and accurately to the questions on the employment application. In 2006, the district received about 1,000 applications. The district does not have the resources to investigate the truth of all the statements made by an applicant on his or her application.

Respondent's application to CTC

25. On January 29, 2010, respondent signed an application to the California Commission on Teacher Credentialing (CTC) for a clear multiple subject credential with CLAD. By signing the application, respondent certified under penalty of perjury that all of the statements in the application are true and correct.

26. Question 3 on the application asks "Professional Fitness Questions." The applicant is instructed that if he or she answers "yes" to any question, "a full explanation is required . . . . You must disclose all criminal convictions (misdemeanors and/or felonies) including convictions based on a plea of no contest. You must disclose a conviction no matter how much time has passed even if the case has been dismissed pursuant to Penal Code Section 1203.4. You may omit misdemeanor marijuana-related convictions that occurred

more than two years prior to this application . . . . [¶] Warning: Failure to disclose any information requested is considered falsification of your application and is grounds for denial of your application and/or disciplinary action against your credential."

27. Question 3b asks,

> Have you ever been convicted, including a conviction based on a plea of no contest, of any felony or misdemeanor in California or any other place? You must disclose your conviction even if the case was dismissed pursuant to Penal Code Section 1203.4. You may omit misdemeanor marijuana-related convictions . . . . [¶] If the answer is yes, you must submit a full explanation . . . .

Respondent answered "yes," and submitted the following explanation:

> With regret and remorse, I start my explanation of my bad driving habit that led to a plea of no contest and conviction of a misdemeanor4 [*sic*]: Disorderly Conduct on October 29, 2001.
>
> Every day I made a two hour round trip commute to work. The highway that I traveled was very rural and traffic was light. I developed a habit of driving next to or just behind any of the sparse vehicles that I would encounter. I had a problem controlling my speed so, I thought staying with the other vehicles would help me avoid speeding tickets and stay alert.
>
> After doing so for several months the highway patrol had received some complaints. They decided on October 17th to cite me with a disorderly conduct. I quickly came to the realization that the other drivers may have perceived my driving as dangerous and I plead [*sic*] no contest in court on October 29th. I was accused of obscene gestures so my legal adviser said to plead no contest. I agreed to poor driving but not to making obscene gestures. My intent was never anger, just daily travel.
>
> After months of driving this way there were many complaints brought to my attention and I quickly resolved to become a more careful, courteous, and alert driver. As embarrassing as this mistake was, having to list it on all my applications for the rest of my life reminds me to be as professional and perceptive in my vehicle as I am in my classroom.

28. Respondent's explanation of the circumstances leading to his October 2001 conviction is misleading and false, for the reasons set forth in Finding 12.

29. At hearing, respondent reviewed his answer to question 3b and testified that it is "an accurate statement of the events leading to my conviction."

30. On his application to CTC, respondent did not disclose his September 2002 conviction for reckless operation of a motor vehicle.

31. Respondent testified that he understood CTC would do a full background investigation, and no one from CTC ever told him that his application was incomplete.

32. Respondent also testified that he did not disclose his second conviction to CTC because he thought it was a traffic violation, or perhaps an infraction, not a misdemeanor. Respondent's explanation is not persuasive. The application form does not state that "traffic violations" need not be disclosed. Respondent disclosed his first conviction, even though the circumstances leading to that conviction were the same as the circumstances leading to his second conviction. Having falsely informed the CTC that, after his first conviction, he "quickly resolved to become a more careful, courteous, and alert driver," respondent could not acknowledge that he suffered a second conviction for the same conduct a year later. Respondent's failure to disclose his second conviction was intentional.

Domestic violence incident in July 2010

33. On July 10, 2010, respondent had an argument with his roommate at the time, Jonathan Silvaggio. Respondent and Silvaggio were in the apartment they shared in San Francisco when Silvaggio accused respondent of stealing Ativan pills from him. Angry words were exchanged. Silvaggio went out to the patio and sat down, and respondent followed and stepped on Silvaggio's foot. The two of them exchanged punches. According to Silvaggio, respondent grabbed the three-pronged metal burner from the barbeque and hit him on the head with it; respondent claims that they fell over and Silvaggio hit his head on the burner. They separated and respondent went into the kitchen. Silvaggio became fearful that respondent was seeking a weapon, left the apartment and called 911. The police officer who responded noted that Silvaggio was bleeding from a wound to the head that looked like a "gouge." Respondent was arrested. Silvaggio obtained a temporary restraining order against respondent.

34. Notice of respondent's arrest was sent to SFUSD. On August 13, 2010, district CAO Buschmann called respondent to find out about the circumstances of his arrest. Respondent told Buschmann that he had gotten into a "scuffle" with his roommate. Buschmann asked him if there was a weapon involved, and respondent said "no."

35. On August 6, 2010, respondent appeared in court, represented by counsel, to oppose Silvaggio's "Request for Orders to Stop Harassment." Two days before the hearing, on August 4, respondent filed with the court a declaration in opposition to Silvaggio's request. In his declaration, which he signed under penalty of perjury, respondent stated:

> Based on what I know of the Plaintiff and his history, I believe he is unstable and has a pattern of turning himself into a victim whenever he is attacked. I deny the allegations made by the Plaintiff and wish the court to know that I have no history of violence or any sort of criminal record.

Respondent's declaration that he has no criminal record is false.

36. Asked at hearing to review this portion of his declaration, respondent initially stated, "This is true." Later in his testimony, respondent stated that he did not draft the declaration and that he signed it without reading it.

37. It is determined that Silvaggio's account of the event is more persuasive than respondent's. Silvaggio has no motive to lie, and the wound observed by the responding police officer is consistent with the blow Silvaggio described. Respondent's credibility, on the other hand, is poor. He was not truthful on his application to SFUSD, on his credential application to CTC, or in his August 4, 2010 declaration to the court. It is concluded, therefore, that respondent was not truthful with CAO Buschmann, when he assured Buschmann that there was no weapon involved in his fight with Silvaggio.

Yelling at students

38. In a memorandum to respondent on November 10, 2009, Karen Law, at that time the principal of Garfield Elementary School, informed respondent that she had received a complaint from a parent that respondent was "yelling angrily at students at the bottom of the hill at dismissal time." Law went on to write, "[s]ince I have had to address the issue of yelling with you in the past, I would like to remind you to please be more cognizant of this tendency, and make every effort to speak to students in a firm, but calm and collected tone of voice at all times."

39. At hearing, respondent denied that he was yelling angrily at the students. He testified that he spoke loudly because he felt the situation was unsafe: the students were being unruly and roughhousing on a steep hill. According to respondent, the teacher who was supposed to be supervising the students had "given up" and the principal "was not supporting me." Respondent feels that the principal was partly to blame for the students' behavior.

40. Soon after the beginning of the 2009-2010 school year, Student #13, a student in respondent's first grade class, told his mother that he did not want to go to school. This was unusual for Student #13, who had enjoyed kindergarten. His mother spent four days in respondent's classroom. Student #13's mother testified that there "seemed to be a lot of yelling at children," and that it was so loud it "jolted the students out of what they were doing." If respondent was reading a book and a child was not looking directly at him, respondent yelled at the student to look at him. Student #13's mother tried, unsuccessfully, to secure a transfer for her child to another school.

41. On January 27, 2010, Principal Law gave respondent a "Letter of Verbal Warning" concerning yelling and using an inappropriate tone of voice toward students. In the letter, Law described two incidents.

> Incident #1: While working at my desk around 12:50 p.m. on Friday, I heard you yelling angrily at a student in the 2nd floor lobby. My office and the lobby are separated by two walls. I went outside to look. You were standing in the lobby directing traffic while students transitioned to their club activities.
>
> Incident #2: Around 1:35 p.m. I heard you shouting again, in your classroom. I left my office again to see what was going on. As I walked towards your classroom, I heard you yelling in an agitated tone, "Sit down. Sit." As I entered your classroom, most of the students were sitting on the floor at one corner of the room. One student was in the process of joining them. You were picking up some materials from some desk-tops nearby. Upon my entering the room, you softened your tone of voice as you continued giving directions to students.

The letter went on to warn respondent that continuing such conduct could subject him to formal disciplinary action.

Respondent remembers the incidents Law described in her letter. Regarding the first incident, respondent testified that he was correcting students who were running in the hallway. Regarding the second incident, respondent testified that he never saw Principal Law come into the room, that his voice got less loud as the students sat down and became more organized.

42. Valerie Chan is a special education teacher at Garfield Elementary School. In the 2009-2010 and 2010-2011 school years, Chan's classroom was in the same pod as respondent's. (There were four classrooms that each opened into a common work area; respondent was in room 204 and Chan was in room 202, with room 203 between them.) Chan noticed respondent's loud voice and was concerned about it. She felt it was "such a loud voice for little kids." She could hear respondent's voice for about half the day. Chan heard him say, "Stop," and, "Did you hear what I said?" There was a "fierceness" to his voice, "direct" and "loud" and "sharp." Chan heard respondent use words to the effect that the students were "making him yell."

Chan spoke to Elias Barlow about her concerns. Barlow's classroom was in the same pod. In his declaration, Barlow writes that when he was in the common area, he regularly heard respondent yelling at his students. To Barlow, respondent was yelling in a manner that expressed anger and frustration. Barlow heard respondent use phrases like "You are making me yell" and "You are making me upset."

43. Ana De Arce took over as principal at Garfield Elementary School for the 2010-2011 school year. In an interview with De Arce in January 2011, respondent denied that he yelled at students. He told De Arce that he had a loud voice. Respondent's testimony at hearing was to the same effect: he has a "loud assertive voice" that he used on a daily basis, but he did not yell at students. The observations of respondent's former principal, fellow teachers, and a parent, however, are more persuasive than respondent's testimony.

44. De Arce has been with SFUSD for about 10 years. She has a master's degree in education. De Arce has taught third grade, fourth grade and fifth grade, and she has been a Peer Assistance and Review (PAR) coach. As a PAR coach, De Arce's job was to observe classroom teachers and analyze their classroom methods in light of the California Standards for the Teaching Profession, and to help them use more effective teaching methods.

De Arce testified that yelling at students is inconsistent with the California Standards and it is not an appropriate classroom management technique. Yelling at students detracts from the creation of a safe learning environment, which is a fundamental goal of classroom teaching. Students who are yelled at become antagonistic and less willing to participate in class. De Arce acknowledged that a classroom teacher must present himself or herself with authority, but the teacher must also create an environment of trust, caring and safety. De Arce stated that it is not appropriate for a teacher to tell students that "they are making you yell." Statements like that are harmful because they create guilt and frustration in the students, and also undermine the teacher by showing the students how they can hurt the teacher and make him or her mad. As a principal, De Arce is concerned that respondent did not recognize his tone of voice or the content of his message. De Arce's testimony on these points was persuasive.

Physical contact with students

45. On or shortly before October 12, 2010, Student #5 went to Principal De Arce's office for ice. He had a bump on his head and he told De Arce that he had fallen out of his chair during a birthday party for Student #17. The next day, De Arce received a call from Student #5's mother, in which the mother stated that she had heard that respondent had pushed Student #5 out of his chair. De Arce began an investigation.

46. On October 13, De Arce interviewed five students in respondent's class, Student #5, Student #2, Student #21, Student #15, and Student #18. De Arce brought all five students into the waiting room outside her office, interviewed each child separately, and took each student directly back to the classroom after each interview. When she had finished all of the interviews, De Arce was satisfied that Child #5 had fallen out of his chair and hit his head because he was playing on the chair, not because respondent had pushed him.

47. In the course of her interviews, however, De Arce found that the students reported instances of respondent yelling at them or having physical contact with them. Student #5 reported that respondent "screams," that he "squeezed his shoulder hard," and that respondent "sat him down hard." Student #2 reported that if students are not behaving

respondent "put them in [a] chair." Student #21 reported that Student #18 got "put" in her chair because she played around, and that respondent "tapped students" with a stick. Student #15 reported that respondent used a ruler to hit Student #5 on the head. And Student #18 reported that respondent kicked students' chairs when they did not sit close enough to their desks; that he takes students by the arm and "puts" them in the chair; and that he has a big yardstick and taps kids in the head with the stick, and that some students had cried in the class. De Arce is obligated to refer complaints such as these to the executive director of Human Resources. De Arce therefore faxed the notes of her interviews to Executive Director Joanne Hepperly. Hepperly told De Arce that respondent would be put on administrative leave with pay the following day, October 14, while the matter was investigated.

48. Respondent was placed on administrative leave beginning October 14, 2010, and has not been allowed to return to work since that date.

49. De Arce interviewed the remaining students in respondent's class on October 14, 15, and 18, and heard complaints consistent with those of the five students she interviewed on October 13.

50. In an interview with De Arce and Hepperly in January 2011, in his subsequent deposition, and in his testimony at hearing, respondent admitted to much of the conduct that the students reported to De Arce, but he states that the students mischaracterized or misunderstood it.[2]

As respondent describes his classroom management style, he has a very authoritative presence and he is a "tactile" teacher. If he is sitting on the rug with the students reading them a story, and one of the students is not paying attention, he will use a pointer with a plastic tip or a yardstick to gently tap the student on the head or shoulder to "redirect" the student and get the student to "focus." If a student is standing in line and not facing forward, respondent will turn the student's head to face forward. Respondent teaches students to have their chairs up against the desk; if the student is slouching with the chair out, he will use his foot to push the chair in. If a student gets up to get a pencil when he or she should be sitting down, respondent will "lead" or "guide" the student back to his or her seat by "grabbing" the student by the hand, or by putting his hand on the student's biceps or shoulder and applying "a little pressure," as a "nonverbal redirection." Respondent used these "tactile" methods on a daily basis. At the beginning of the year, he holds "training sessions" in which he instructs students to recognize his "physical cues." Respondent warns parents at back-to-school night that "I'm a tactile teacher. Your kids will talk about me touching them and yes, I'm going to be touching them." He gives the parents his cell phone number so that they can call him with any concerns.

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[2] The first amended accusation includes numerous allegations of specific acts of misconduct as reported by particular students. No students, however, were called to testify, and their hearsay statements are insufficient to support a finding on the specific incidents of misconduct that they reported.

51. In addition to the behaviors respondent acknowledges, one parent observed respondent "flick" a student in the head. Special education teacher Chan observed a situation in which one of respondent's students was not sitting back in the chair; respondent put a ruler between the student's back and the chair and then tapped the student and the chair with the ruler to illustrate the gap.

52. Respondent testified that his classroom management techniques are based on the theory of assertive discipline promoted by author and teacher Lee Canter. Respondent states that he establishes a clear set of rules around a philosophy of rewards for correct behavior and consequences for incorrect behavior. He believes, based on Canter, that the teacher must take charge of the classroom and maintain an "interruption-free" learning environment, where there is no excuse for disrupting learning. Respondent acknowledges Lee Canter does not specifically mention the tactile classroom management techniques that respondent employed.

Respondent testified that he never practiced corporal punishment, never intentionally hurt a child and, although he may "tap" a child with the pointer or a yardstick, he would never hit a student with an object or his hand.

53. Respondent acknowledges that there were students 2010-2011 class who cried when they were disciplined, and that the class as a whole cried more than other classes he has taught. Respondent is not sure why this class cried more than others; he was going to raise the issue with parents during parent-teacher conferences, but he was put on leave before those conferences could be held.

54. In Principal De Arce's opinion, there is no acceptable classroom management technique that permits a teacher to use a pointer or a stick to refocus a student, and it is never acceptable for a teacher to touch a student with a pointer or a stick. The district teaches students never to hit with sticks; using a stick to touch a student in class is modeling the very behavior that students are told is prohibited. When a teacher uses a stick to touch students, the implied and unacceptable message is that a stick can be used to solve problems. And using a stick can be perceived by young students as scary, particularly when used by an adult the size of respondent (six feet, two inches and 235 pounds in Fall 2010). Using a stick undermines the district's goal of creating a safe classroom environment by making students feel afraid, or not safe, or not competent, and undermines their self-esteem. De Arce believes that respondent touched students with the stick and that they cried because it was scary for them.

It is not acceptable classroom management, in De Arce's opinion, for a teacher to use his foot to "scootch" in a student's chair while the student is seated. This could be perceived as kicking, and students are taught not to kick; it is modeling behavior that students are taught to avoid.

De Arce's opinions on these matters are persuasive.

55. In January 2011, when respondent learned that the district intended to seek his termination, he volunteered to enter PAR to improve his classroom management techniques. In De Arce's opinion, however, respondent is not a good candidate for PAR. To be successful in PAR, De Arce testified, a teacher must "own every part of his behavior with fidelity." In her view, respondent's dishonesty regarding his criminal history and employment history, his tendency to blame the students for making him yell, his refusal to acknowledge that he yells at students, and his lack of awareness of his own conduct and its impact on the students, make him a poor candidate for PAR. De Arce's opinion on these matters is persuasive.

Adherence to district rules and regulations

56. SFUSD Board of Education Policy No. P 4420 adopts the "Code of Ethics of the Teaching Profession," which states in relevant part that a teacher "[s]hall make reasonable efforts to protect the student from conditions harmful to learning or to health and safety." Board of Education Policy No. P 4430 states that all district employees shall "deal with all people in a . . . respectful . . . way." Board of Education Policy No. P 6000 provides that "all individuals are treated with respect and dignity." Board of Education Policy No. P 6123 states that the teacher shall "[m]aintain discipline conducive to the well-being of both the group and the individual student," and shall [m]aintain a healthful classroom environment." Respondent violated these rules and regulations by tapping students with a pointer or a stick, by using his foot to push their chairs in, by yelling at them, and by telling them that they were responsible for making him yell.

Principle II of the Code of Ethics of the Teaching Profession states that an educator "[s]hall not in any application for a professional position deliberately make a false statement or fail to disclose a material fact related to competency or qualifications" and "[s]hall not misrepresent his . . . professional qualifications." Respondent violated these rules and regulations by making false and misleading statements, and by failing to disclose material facts, on his applications to SFUSD and the CTC, and by his false statement to CAO Buschmann that he had not used a weapon in his fight with Silvaggio.

LEGAL CONCLUSIONS

1. The standard of proof applied to this matter is preponderance of the evidence.

Equitable estoppel

2. A threshold issue is whether respondent can be subject to disciplinary action by virtue of the false statements on his 2006 application for employment, because of the length of time between the date he filed the application and the date the district filed its statement of issues.

Under Education Code section 44944, subdivision (a), "[n]o testimony shall be given or evidence introduced relating to matters which occurred more than four years prior to the

date of the filing of the notice [of intention to dismiss]." Respondent argues that no discipline can be brought based upon his application to SFUSD, because the application was submitted on July 12, 2006, more than four years before the district filed its notice of intention to dismiss on April 27, 2011. The district, on the other hand, argues that respondent is equitably estopped from asserting the four-year ban because of the dishonest answers on his application.

In *Atwater Elementary School District v. California Department of General Services* (2007) 41 Cal.4th 227, the California Supreme Court held that the four-year ban is not absolute, but may be subject to the doctrine of equitable estoppel. The doctrine is founded on the principle that "no man [may] profit from his own wrongdoing in a court of justice." (*Id.* at p. 232, quoting from *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 383.) Four elements must be present to invoke equitable estoppel: "(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of the facts; and (4) he must rely upon the conduct to his injury." (*Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567, 581.) All four elements must be present to establish estoppel. (*Johnson v. Johnson* (1960) 179 Cal.App.2d 326, 330.) If any element is missing, no estoppel exists. (*Ibid.*) The burden is on the party asserting estoppel, in this case the district, to prove each of these elements. (*Pacific Finance Corporation v. Hendley* (1932) 119 Cal.App. 697, 702.)

3. The district failed to establish that it was ignorant of respondent's second conviction when it hired him in 2006. (Finding 23.) Equitable estoppel does not prohibit respondent from asserting the four-year ban regarding his failure to disclose the September 2002 conviction on his application to SFUSD, and the district may not take disciplinary action against him based on that conduct. The point is largely academic, however, as respondent failed to disclose the same conviction on his 2010 application to the CTC, which is well within the four-year period, and which is also alleged as cause for discipline.

4. The district did establish that, at the time it hired respondent it was ignorant of the true facts leading to his first conviction and ignorant of the facts surrounding respondent's separation from employment with the Geneva Area City Schools. (Finding 24.) At the time respondent submitted his application, the district relied on applicants to truthfully report the facts leading to a criminal conviction, their reasons for leaving prior employment, and their teaching history; in light of the volume of applications the district received, the district did not have the resources to investigate these matters. Respondent, on the other hand, knew the true facts; he intended that the district rely on his false and misleading statements; and the district relied on respondent's false and misleading statements to its injury. Had respondent answered the questions truthfully, the district would not have hired him. It would be contrary to principles of fairness to allow respondent to profit from his dishonesty. Respondent is estopped to invoke the four-year ban as to the matters set forth in Findings 10-12, 15-16, and 18-20.

Grounds for dismissal asserted by complainant

5. Under Education Code section 44932, a permanent employee may be dismissed for "[i]mmoral conduct" (subd. (a)(1)), "[d]ishonesty," (subd. (a)(3)), "[e]vident unfitness for service" (subd. (a)(5)), and "[p]ersistent 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 . . . ." (subd. (a)(7)).

Application of the Morrison factors

6. Before the commission can decide whether there is cause to dismiss respondent for immoral conduct, dishonesty, or evidence unfitness for service, it must decide whether his conduct demonstrates that he is unfit to teach under the eight factors established by the California Supreme Court in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229-230. (*Woodland Joint Unified School District v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1445; *Fontana Unified School District v. Burman* (1988) 45 Cal.3d 208, 220, fn. 12.) The factors are: (1) the likelihood that respondent's conduct may have adversely affected students or fellow teachers; (2) the degree of any expected adversity; (3) the proximity or remoteness in time of the conduct; (4) the type of teaching certificate held by respondent; (5) the extenuating or aggravating circumstances, if any, surrounding the conduct; (6) the praiseworthiness or blameworthiness of the motives resulting in the conduct; (7) the likelihood of recurrence of the conduct; and (8) the extent to which disciplinary action may inflict an adverse impact or chilling effect on the constitutional rights of respondent or other teachers. Only the pertinent factors must be addressed. (*West Valley – Mission Community College District v. Conception* (1993) 16 Cal.App.4th 1766, 1777.) The *Morrison* factors may be applied to all of the charges in the aggregate. (*Woodland Joint Unified School District v. Commission on Professional Competence*, *supra*, 2 Cal.App.4th at 1456-1457.)

Adverse effect on students and teachers. It is highly likely that respondent's conduct in the classroom adversely affected his first grade students by modeling inappropriate behavior, by scaring them, by diminishing their willingness to participate in class, and by failing to provide them with a safe classroom environment. Respondent's yelling was sufficiently disturbing that it distracted two other teachers in his pod and caused them to be concerned for his students.

Degree of adversity. Failing to provide students with a classroom environment in which they feel safe and are encouraged to participate is a serious adverse effect of respondent's conduct.

Proximity in time. Respondent's unacceptable classroom conduct continued up to the time he was placed on leave, and instances of dishonesty occurred just months before he was placed on leave.

Type of teaching certificate. Respondent is an elementary school teacher who teaches by himself in a self-contained classroom. A teacher whose classroom management style is based on touching students, and who cannot be trusted to accurately perceive or honestly report his conduct, presents a danger to elementary school students.

Extenuating/aggravating circumstances. In two of the incidents in which respondent yelled at students, there are extenuating circumstances. In one incident the students were roughhousing on a steep hill and respondent perceived a safety risk, and in another incident he yelled at students who were transitioning in the hall from their classrooms to club activities. No extenuating circumstances, however, justify or excuse respondent's yelling in the classroom, or telling his students that they were making him yell. While respondent claims that his tactile classroom management techniques are based on the teachings of Lee Canter, Canter in fact does not advocate those techniques. There are no extenuating circumstances that diminish the seriousness of respondent's multiple instances of dishonesty.

Praiseworthiness/blameworthiness of respondent's conduct. It is praiseworthy that respondent wants to create a classroom environment in which there are no interruptions in the educational process. Respondent's classroom management techniques, however, which appear to be entirely his own invention, are his responsibility and they are blameworthy, not praiseworthy. Yelling at students, and blaming students for making him yell, is entirely blameworthy. There is nothing praiseworthy about respondent's dishonesty, for which he is entirely to blame.

Likelihood of recurrence. It is recognized that respondent volunteered to participate in PAR, suggesting that he would be open to changing his classroom management techniques. The evidence to the contrary, however, is more persuasive. Respondent sees and describes himself as a tactile teacher and defends his conduct. He does not recognize or admit that he yells at students and, to the extent he acknowledges raising his voice, he blames the students for making him do so. There is a component of anger in his yelling, which suggests that what he characterizes as a management technique may also be an expression of anger, and therefore difficult for him to control. It is concluded that respondent's yelling at students, and his inappropriate physical contact with students, is highly likely to recur.

It is also highly likely that instances of dishonesty will recur. Respondent has been repeatedly dishonest for the purpose of advancing and maintaining his employment as a classroom teacher. In almost every instance, respondent defends his dishonest statements as truthful and accurate.

It is concluded that respondent is unfit to teach.

Immoral conduct

7. Immoral conduct is conduct that is "hostile to the welfare of the general public and contrary to good morals" and "includes conduct . . . showing moral indifference to the opinions of respectable members of the community, and [conduct showing an] inconsiderate

attitude toward good order and the public welfare." (*Board of Education v. Weiland* (1960) 197 Cal.App.2d 808, 811, citing *Orloff v. Los Angeles Turf Club* (1951) 36 Cal.2d 734, 740.) Dishonesty for personal gain, such as that demonstrated by respondent, is immoral conduct. (See *Golde v. Fox* (1979) 98 Cal.App.3d 167, 185.) Cause exists to dismiss respondent for immoral conduct under Education Code section 44932, subdivision (a)(1), by reason of the matters stated in Findings 10-12, 15-16, 18-20, 25-30, and 32-37, and Legal Conclusion 8.

Dishonesty

8. The evidence established multiple instances of dishonesty by respondent. Respondent's dishonesty includes false statements and material omissions in documents where he certified that his statements were true. Cause exists to dismiss respondent for dishonesty under to Education Code section 44932, subdivision (a)(3), by reason of the matters stated in Findings 10-12, 15-16, 18-20, 25-30, and 32-37.

Evident unfitness to teach

9. Under *Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1442-1443, "evident unfitness for service" cannot be based upon the *Morrison* factors alone; it must also be shown that the teacher's conduct is the result of a "defect in temperament." *Woodland* interprets the phrase "evident unfitness for service" to mean

> "clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies." Unlike "unprofessional conduct," "evident unfitness for service" connotes a fixed character trait, presumably not remediable merely on receipt of notice that one's conduct fails to meet the expectations of the employing school district.

(*Ibid.*)

Respondent yells at his first grade students, he insists upon an inappropriate, tactile-style of classroom management, and he is not truthful. That these traits are not remediable is demonstrated by the fact that when a false statement is called to his attention, he does not admit or does not recognize that it is false, and when inappropriate conduct is called to his attention, he denies that he engaged in the conduct or defends his conduct as proper. Cause exists to dismiss respondent due to evident unfitness for service under Education Code section 44932, subdivision (a)(5), by reason of the matters stated in Findings 10-12, 15-16, 18-20, 25-30, and 32-56, and Legal Conclusions 7 and 8.

Persistent violation of school rules or laws

10. Cause exists to dismiss respondent for persistent violation of school rules or laws under Education Code section 44932, subdivision (a)(7), by reason of the matters set forth in Finding 56.

Appropriate disciplinary action

11. Cause to dismiss respondent having been established, the remaining issue is whether dismissal is the appropriate level of discipline. There is no question but that dismissal is appropriate. Respondent has demonstrated that he is not truthful, and that he cannot be trusted to maintain a learning environment in which elementary school students can feel safe.

ORDER

Respondent Michael S. Juncker is dismissed from his position as a certificated employee of the San Francisco Unified School District.

DATED: January 9, 2012

PATRICIA HLINKA
Commission Member

DATED: January 12, 2012

TOM RUST
Commission Member

DATED: January 16, 2012

DAVID BENJAMIN
Chair, Commission on Professional Competence
Administrative Law Judge