

BEFORE THE  
COMMISSION ON PROFESSIONAL COMPETENCE  
CALEXICO UNIFIED SCHOOL DISTRICT  
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

JOHNNY ESQUER,

Respondent.

OAH No. 2009100094

**DECISION**

The Commission on Professional Competence heard this matter in Calexico, California, on February 10, 2010. The Commission included Michael Campbell, David Casper and Administrative Law Judge Vallera J. Johnson, State of California, Office of Administrative Hearings, who served as the chairperson.

Eric Bathen, Esq., Law Offices of Eric Bathen, represented Christina Luna, Ed.D., Superintendent, Calexico Unified School District.

John W. Breeze, Esq., Plourd and Breeze, represented Respondent Johnny Esquer, who was present in the hearing.

The matter was submitted on March 9, 2010.<sup>1</sup>

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<sup>1</sup> The hearing occurred on February 10, 2010. The record remained open for the (1) Amended Accusation and Statement of Charges and (2) written closing argument.

On February 22, 2010, the Superintendent filed Notice of First Amended Accusation and First Amended Statement of Charges (Exhibit 21). On February 23, 2010, Respondent filed his objection to the First Amended Statement of Charges (Exhibit G). The Superintendent filed her response on March 3, 2010 (Exhibit 22). Respondent's objections are overruled. Notice of First Amended Accusation and Amended Statement of Charges (Exhibit 21) is admitted for jurisdictional purposes only.

On March 9, 2010, the Superintendent filed Calexico Unified School District's Post-hearing Brief; it was marked Exhibit 23. Respondent's Post-hearing Brief was filed on March 8, 2010 and marked Exhibit H.

On March 9, 2010, the record was closed, and the matter was submitted.

The Commission on Professional Competence deliberated on April 2, 2010.

## FACTUAL FINDINGS

1. Christina Luna, Ed.D., is the Superintendent (Superintendent) of Calexico Unified School District (District).

2. Johnny Esquer (Respondent) is a permanent certificated teacher, employed by the District. At all times relevant herein, he was assigned to Calexico High School.

3. On September 8, 2009, the Superintendent executed a Notice of Intent to Dismiss and Notice of Intent to Suspend, alleging that cause existed to dismiss Respondent pursuant to Education Code section 44932, subdivision (a)(5), Evident Unfitness for Service, and 44939, Immoral Conduct; further, she explained (1) the factual bases for the charges were set forth in the Statement of Charges [and included a copy of the Statement of Charges] and (2) his legal rights.

On September 16, 2009, Respondent filed a Notice of Defense, requesting a hearing.

4. The Superintendent made and filed an Accusation against Respondent, dated September 28, 2009, alleging that cause for immediate suspension and dismissal existed based on the factual and legal allegations in the Statement of Charges.

5. During the hearing, Respondent made a Motion to Dismiss the cause for discipline under California Education Code section 44932, subdivision (a), [Evidence Unfitness for Service]. Respondent argued that the cause was initiated pursuant to Education Code section 44934 on September 8, 2009, in violation of Education Code section 44936,<sup>2</sup> which prohibits initiating such proceedings between May 15 and September 15. Having considered the facts and the legal arguments, the Administrative Law Judge granted

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<sup>2</sup> Education Code section 44936 states, in pertinent part:

“The notice of dismissal or suspension in a proceeding initiated pursuant to Section 44934 shall not be given between May 15<sup>th</sup> and September 15<sup>th</sup> in any year. . .”

Education Code section 44934 states, in pertinent part:

“Upon the filing of written charges, duly signed and verified by the person filing them, with the governing board of the school district, or upon a written statement of charges formulated by the governing board, charging that there exists cause, as specified in Section 44932 or 44933, for the dismissal or suspension of a permanent employee of the district, the governing board may, upon majority vote, except as provided in this article if it deems the action necessary, give notice to the permanent employee of its intention to dismiss or suspend him or her at the expiration of 30 days from the date of service of the notice, unless the employee demands a hearing as provided in this article. Suspension proceedings may be initiated pursuant to this section only if the governing board has not adopted a collective bargaining agreement pursuant to subdivision (b) of Section 3543.2 of the Government Code.

Any written statement of charges of unprofessional conduct or unsatisfactory performance shall specify instances of behavior and the acts or omissions constituting the charge so that the teacher will be able to prepare his or her defense. It shall, where applicable, state the statutes and rules which the teacher is alleged to have violated, but it shall also set forth the facts relevant to each occasion of alleged unprofessional conduct or unsatisfactory performance. . .”

Respondent's Motion to Dismiss and ordered the Superintendent to file an Amended Accusation to conform to proof.

6. On February 22, 2010, the Superintendent filed First Amended Accusation and First Amended Statement of Charges. On February 23, 2010, Respondent had no objection to the First Amended Accusation but argued that District added new charges in the First Amended Statement of Charges. The Superintendent filed her reply on March 3, 2010, disagreed with Respondent's argument and asserted that the First Amended Statement of Charges had been amended to conform to proof. The Administrative Law Judge overruled Respondent's objection and granted the request to amend the pleadings.

7. On April 23, 2008, an incident occurred at Calexico High School, during Respondent's fifth period class (Agricultural Biology) that involved Respondent and two students in the presence of other students. Two students across the room from each other had a conversation during the first 15 minutes of class. Respondent instructed the students to step outside of the classroom. Outside the door, these students were talking loudly to each other and peaking through the classroom door. Respondent gathered referral slips for the two students and went outside. As he wrote the referrals, the two students "hissed and complained." He handed the referral to the first student who walked toward the office.

The other student re-entered the classroom. Respondent testified that, once inside the classroom, he went towards the student, and the student was walking backwards, looking at him; he reached and grabbed the student's shirt preventing him from going any further; the student fell on his buttocks. Respondent denied that he pushed the student. He escorted the student outside and completed the referral. The second student left with two school security guards.

At the request of his principal, Respondent submitted a written description of the incident, dated April 24, 2008 (Exhibit 13).

As a consequence of the April 23, 2008 incident, the District placed Respondent on administrative leave through the end of the 2008 school year.

On August 20, 2008, the District issued Respondent a letter of reprimand and informed him that he would be suspended for five (5) duty days without pay and ordered him not to engage in obscenities and physical attacks on students. Respondent filed no protest.<sup>3</sup>

8. On March 12, 2009, during fifth period, Respondent was supervising his students who were unloading fair materials from the school truck and trailer (connected to the truck) and returning the equipment<sup>4</sup> to the storage trailer.

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<sup>3</sup> In the opinion of panel member Michael Campbell, it was not established by a preponderance of the evidence that respondent committed acts that constitute immoral conduct.

<sup>4</sup> The equipment included, among other things, hand tools, brooms, shovels, wheel barrels and fencing materials.

J.A. and two students were assigned to work inside the storage trailer. Others were unloading the storage trailer, bringing the materials up the flight of stairs and leaving the materials to the left of the doorway. Respondent instructed the students who were working inside the trailer to remain inside while the other group transported the materials to the storage trailer.

After students dropped off the materials, J.A.'s group was responsible for placing the equipment in its assigned place.

Prior to the incident, Respondent observed J.A. outside the storage room, on the stairs while other students were walking up the stairs with a sheet of lattice, four foot by eight, flimsy. He was impeding the flow, blocking students who were required to step around J.A. Concerned about the safety of his students, Respondent called to J.A. to move and to go back inside the storage room. The next time that he saw J.A., the student was coming down the flight of stairs between the storage trailer and the livestock trailer. Respondent stepped off the livestock trailer and met him. Respondent testified that he was upset at J.A. and said, "You know what? Stop fucking around. Let's go do something." Respondent grabbed him from the hoodie that he was wearing and angrily pushed him against the lockers. Thereafter, J.A. went back into the storage trailer. Respondent followed him to make sure that he was working.

9. The Calexico Police Department was contacted. On June 6, 2009, Respondent was arrested, interviewed and charged with violating Penal Code sections 242/243, subdivision (a), Battery, a misdemeanor.

10. David Grossbeck (Grossbeck), the Superintendent's predecessor, issued a Letter of Reprimand and 45-Day Notice of Unprofessional Conduct, dated July 24, 2009, based on "incidents of unacceptable behavior"; the specific incidents included (1) his physical contact with students and (2) use of profanity. The letter describes the April 28, 2008 incident, the March 12, 2009 incident, prior progressive discipline efforts and further discipline and directives. Further, Grossbeck suspended Respondent for ten days and ordered him to enroll in and complete an anger management program, approved by the District. Respondent testified that, given the foregoing, he expected that he would meet with Grossbeck, be assigned to an anger management class and returned to work.

11. On August 4, 2009, in the Superior Court of California, County of Imperial, Calexico Department, in the case entitled *People v. Johnny Esquer*, Case No. CCM21893, on his plea of no contest, Respondent was convicted of violating Penal Code section 242, Battery, a misdemeanor.

The facts underlying the conviction are that Respondent willfully and unlawfully used force and violence on the person of J.A.<sup>5</sup>

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<sup>5</sup> In the opinion of panel member Michael Campbell, despite the conviction, the underlying facts do not support a finding that Respondent engaged in violent conduct.

As a consequence of the conviction, the Court placed Respondent on informal probation for three years; the terms and conditions included, among other things, that he pay a fine of \$100.00 and perform 40 hours of community service.

12. On August 25, 2009, M████ S████ (S████), J.A.'s mother, filed a claim for damages, on the grounds that her son "was physically assaulted and battered by C.U.S.D. employee Johnny F. Esquer." Neither S████, nor anyone on J.A.'s behalf, has pursued this claim for damages.

13. On more than one occasion, Respondent used the word "fuck" or some derivation of the word in the presence of students during duty hours and during class time. After being reprimanded and suspended without pay for five days, he engaged in the conduct on March 12, 2009.

14. Respondent offered evidence of explanation, mitigation and rehabilitation.

- He denied that he inappropriately touched the students on April 23, 2008 (Finding 7).
- During the incident on March 12, 2009, he was concerned about the safety of students. Further, he was disappointed that J.A. was not working up to his potential.
- He testified that he used profanity, the students' words, to teach students not to use the words.
- He has been a teacher for ten years. He has served as chair of the Department, junior varsity basketball coach and has received a variety of awards through the Future Farmers of American (FFA) or the California Agriculture Teacher Association. He has received the California Teachers Association's Teacher of Excellence award, the Star Future Farmer of America (FFA) Advisor award for the Southern Region, Outstanding Teacher for the Southern Region and Star Teacher for Southern California. Based on the evidence he presented, his evaluations and written feedback have been satisfactory or better.
- David Prichard (Prichard), Yolanda Cota (Cota) and Betty Nunez-Lim (Nunez) testified on his behalf.

Prichard, a teacher for 33 years, teaches Agricultural Science, Agricultural Mechanics and Industrial Arts classes at Southwest High School in the Central Union High School District. He has known Respondent for 11 years and interacts with him on a monthly basis at meetings of area agriculture teachers. He has observed Respondent with his students at FFA events. In his opinion, Respondent is a "very capable" agriculture teacher,

a leader. Among other things, at the fairs, Respondent meets and works with his students, who are excellent and very polite.

Cota is Respondent's colleague at Calexico High School and has been a teacher for 21 years. She teaches Spanish in the same building as Respondent. She has students who are in Respondent's classes. She has observed him with his students. She testified that he has a lot of rapport with his students. In her opinion, he is competent and relied on her knowledge of numerous awards that he has received.

Nunez-Lim has been a teacher employed by the District since 1998. She is in Respondent's Department. Nunez-Lim and Respondent each have served as Department chair. She testified that, given her experience, it can be difficult to maintain discipline in a setting where students are out of the classroom going to other locations to perform certain functions for their classroom assignments. There can be safety issues. Sometimes if students do not follow instructions when using equipment, there can be accidents or injuries.

Each of the foregoing teachers was aware that Respondent had received awards, none of these teachers was aware of complaints from students about Respondent.

- For a small stipend, he has spent numerous hours before and after school working with students on projects for FFA.
- He expressed remorse for his misconduct and acknowledged that his acts on March 12, 2009 were wrong. In his opinion, "the experience has opened his eyes on how to handle discipline issues, on how to work with students more effectively." He is participating in an anger management class. In response to questioning regarding whether the program has given him any insight or helped in terms of controlling his anger, he testified that his parents and wife have noticed "an upbeat spirit" about him. He explained that the class has brought a lot of things into perspective. He has a deeper appreciation of his role as a teacher, the things that he was doing correctly as a teacher, putting his students first and putting their success before his.
- He has complied with all terms of criminal probation.

15. Respondent has a good reputation and is respected among his peers as a teacher. He is dedicated to his students and spends a significant amount of time, before and after school, working with students for a small stipend. Nevertheless, it was established by clear and convincing evidence that he becomes angry when students do not follow his instructions, are not on task, act inappropriately or appear disrespectful to him.

On the date of the hearing, he had attended five classes of a 52-week anger management program. He did not establish that he has learned to control his anger in a classroom environment, and/or that he has learned more appropriate methods of discipline.

## LEGAL CONCLUSIONS

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.)

2. On August 20, 2008, the District issued a letter of reprimand and suspended Respondent for five days, based on the District's determination that Respondent inappropriately touched a student and use profanity in the classroom; the Superintendent's instructed Respondent not to engage in the foregoing conduct again. Despite the foregoing, on March 12, 2009, Respondent committed assault and battery on J.A., a student, and used profanity during class at Calexico High School. As a consequence of his misconduct, on August 5, 2009, Respondent suffered a conviction of violation of Penal Code section 242 (Battery), a misdemeanor. He remains on criminal probation until August 5, 2012.

Based on these facts, the District seeks to dismiss Respondent and argues that he engaged in acts that constitute immoral conduct. (Cal. Educ. Code, § 44939.)

3. California Education Code section 44939 states, in pertinent part:

“Upon the filing of written charges, duly signed and verified by the person filing them with the governing board of a school district, or upon a written statement of charges formulated by the governing board, charging a permanent employee of the district with immoral conduct, conviction of a felony or any crime involving moral turpitude, with incompetency due to mental disability, as prescribed by reasonable rules and regulations of the employing school district, with violation of Section 51530, with knowing membership by the employee in the Communist Party or with violation of any provision of Sections 7001 to 7007, inclusive, the governing board, may, if it deems such action necessary, immediately suspend the employee from the duties and give notice to him of his suspension, and that 30 days after service of the notice, he will be dismissed, unless he demands a hearing. . . .”

4. As used in the Education Code, the term “immoral conduct” is to be construed according to its common and approved usage having regard for the context in which the Legislature used it. (*Board of Education v. Swan* (1953) 41 Cal.2d 546, 553.)

The meaning of the term “immoral conduct” in the context of a teacher dismissal was discussed at length in the case of *Board of Education v. Weiland* (1960) 179 Cal.App.2d 808, and the *Weiland* court's definition has often been cited by other courts. See, e.g., *Palo Verde etc. School District v. Hensey* (1970) 9 Cal.App.3d 967. In *Weiland*, the Court stated:

“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 willful, flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare.”

5. Immoral conduct cannot be the basis for removal of a teacher unless that conduct indicates that the teacher is unfit to teach under the criteria established by the California Supreme Court in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214. These factors are: 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 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 constitutional rights of the teacher involved or other teachers.

6. Respondent has been a permanent, certificated teacher in the District for ten years. With the exception of his inability to control his temper, based on the evidence in the record, Respondent is an ideal teacher, respected by his colleagues and dedicated to his students. Despite prior discipline for the same or similar acts, he did not correct his behavior; instead, he engaged in the misbehavior thereafter, resulting in a misdemeanor conviction of Battery on a student in the classroom during school hours. Most significantly, there is insufficient evidence in this record to establish that Respondent now has the ability to control his temper and appropriately discipline students in the classroom. As such, if allowed to retain his position, it is likely that without evidence that he has gained insight from the anger management program and has learned more appropriate methods of discipline, it is likely that he will continue to inappropriately touch students and use profanity in the classroom in the presence of students. Considering the foregoing, when the factors in *Morrison* are analyzed, Respondent’s conduct demonstrated that he is not fit to teach at this time.

7. It was established by a preponderance of the evidence that Respondent committed acts that constitute immoral conduct.

8. While no single word or act was sufficient to authorize Respondent’s dismissal, the cumulative effect of his behavior showed a pattern and course of misconduct that requires a conclusion that Respondent’s continued employment with the District is no longer in the best interest of the District and its students. Considering the evidence in this record, with demonstrated anger management and discipline skills, Respondent will be a productive teacher in any district. Nevertheless, at this time, Respondent should be dismissed as a teacher in the District.



ORDER

Respondent Johnny Esquer is dismissed from his position as a permanent certified employee of the Calexico Unified School District.<sup>6</sup>

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

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VALLERA JOHNSON  
Administrative Law Judge  
Office of Administrative Hearings

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

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DAVID CASPER  
Commission Member

DISSENT:

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

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MICHAEL CAMPBELL  
Commission Member

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<sup>6</sup> Except as provided in footnote 4 and the Order, panel member Michael Campbell has no disagreement with the Findings and Legal Conclusions.