

**BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
SAN DIEGO UNIFIED SCHOOL DISTRICT**

In the Matter of the Proceeding to Suspend:

JAMES ZEMAN, Respondent

OAH No. 2020070285

DECISION

This matter was heard before the Commission on Professional Competence (Commission) by videoconference on December 2 and 3, 2020, pursuant to the November 3, 2020, order converting this matter to a videoconference hearing due to the COVID-19 pandemic. The Commission is comprised of the following members: Kimberly A. Binning-Chevlin, Thomas Lawrence, and Abraham M. Levy, Administrative Law Judge, Office of Administrative Hearings, State of California, who presided over the matter.

Kari D. Sullivan, Deputy General Counsel, San Diego Unified School District, represented San Diego Unified School District (the District).

Jon Cadieux, Attorney at Law, Smith Steiner Vanderpool, represented James Zeman, respondent, who was present.

Oral and documentary evidence was received. The hearing record was closed, and after the Commission completed its deliberations, the matter was submitted for decision on January 22, 2021.

SUMMARY

The District seeks to affirm a five-day suspension against Mr. Zeman due to alleged unprofessional conduct he engaged in between 2018 and 2020 as documented by the principal at the school where he is employed. After reviewing the evidence of record and applicable sections of the Education Code and District policy, the Commission finds that the District failed to prove that Mr. Zeman engaged in any unprofessional conduct under the Education Code and District policy. The Suspension Charges are dismissed.

FINDINGS OF FACT

Jurisdictional Matters

1. James Zeman has been a teacher for 40 years and employed by the District since approximately 1999. Mr. Zeman teaches second grade at Marvin Elementary. However, during his time at the District he has mostly taught fourth grade.

2. Acacia Thede, Chief Human Resources Officer, signed the Notice of Intent to Suspend respondent and the Suspension Charges on May 5, 2020, in her official capacity.

The District detailed in the Suspension Charges the facts, laws and District policy on which the District relied to seek to suspend Mr. Zeman from employment with the District due to persistent violations or refusal to obey regulations and district policies pursuant to Education Code section 44932, subdivisions (a)(2), and (a)(8), and unprofessional conduct pursuant to District Administrative Procedure section 7045. The Suspension Charges did not identify a time period for the proposed suspension

but in a document prepared by the principal at Mr. Zeman's school, Armando Tovar, dated March 11, 2020, he recommended a five-day suspension. In closing arguments the District confirmed it is seeking a five-day suspension. The District in the Suspension Charges also did not identify the specific subdivisions of District Administrative Policy section that were allegedly violated. However, Cara Marshall, a human resources officer with the District who processed Mr. Tovar's suspension recommendation, testified that the applicable sections of Section 7045 the district is alleging are (b)(2), (b)(4), (c)(1), and (d)(1).

3. The factual assertions in the Suspension Charges are detailed below.

4. On June 10, 2020, Mr. Zeman timely appealed the suspension action, denying that grounds for suspension from employment exists, and this hearing followed.

The Allegations in the Suspension Charges

5. The District makes a number of factual allegations in the Suspension Charges based on conduct that is alleged to have occurred in 2018, 2019, and 2020. During this time, Mr. Tovar was the principal at Mr. Zeman's school. Mr. Tovar issued a "Letter or Warning-Unprofessional Conduct" to Mr. Zeman on December 6, 2018, and a "Letter of Reprimand-Unprofessional Conduct" to him dated September 12, 2019. In addition, Mr. Tovar documented a discussion he had with Mr. Zeman on March 20, 2019, regarding issues they discussed. On November 25, 2019, a 45-day Notice of Unprofessional conduct was issued pursuant to Education Code section 44938 by Ms. Marshall with the District. Mr. Tovar assisted Ms. Marshall in the preparation of that notice.

6. The Suspension Charges also reference two incidents of Mr. Zeman's alleged conduct Mr. Tovar observed on February 19, 2020, and March 4, 2020.

The December 6, 2018, Letter of Warning, Evidence in Support of Allegations, and Commission's Findings

7. As noted on December 6, 2018, Mr. Tovar issued a Letter of Warning to Mr. Zeman in which he memorialized meetings he had with him on November 30, 2018, and December 4, 2018. The "issues" they discussed were:

- Zeman teaching about lynching and disembowelment "gutting" of African Americans;
- Zeman discussing the beheading/killing of Jewish people by Nazis;
- Zeman teaching about the killings/mistreatment of other ethnic groups throughout history that are not aligned with grade level standards; and
- Three staff persons and a parent witnessing Zeman publicly humiliating a student after school by screaming at the child.
- Zeman admitted to each of these things but expressed no remorse and indicated he'd reached a point of frustration with the student;

8. In support of these allegations the District called Mr. Tovar. He stated he discussed these alleged incidents with Mr. Zelman on November 30, 2018, and December 4, 2018, and recorded these discussions in a document captioned "Letter of Warning-Unprofessional Conduct" dated December 6, 2018. Mr. Tovar did not sign or date it. Mr. Zeman signed the letter and wrote, "I have seen the letter."

9. In this document Mr. Tovar wrote that at their meeting on November 30, 2018, Mr. Tovar acknowledged that he had taught the subjects identified in Mr. Tovar's memo, that "he did not always teach from the rigid standards" because students need to have a wide range of experiences, and he was not sorry for his "actions." Mr. Tovar testified that "murder and mayhem" are not part of the curriculum. He agreed, however, that a teacher may depart from the curriculum if he or she obtains approval. In the Letter of Warning Mr. Tovar cited District Administrative Policy 7045 subdivision "C.2.e." He wrote the following:

This code is a set of ideals which the teaching profession expects its members to honor and follow. . . . You violated this when you created a pattern of misconduct for a variety of issues which have been documented. . . . Your unprofessional conduct has had a profound negative impact on the school community. . . .

10. In his hearing testimony, Mr. Zeman explained that the topics identified in the bullet points in the letter related to the subjects of the African-American experience in the United States, the history of slavery in the United States specifically, the Native Americans' experience in the United States, and the experience of Jews during the Holocaust. He said two prior principals who supervised him had authorized him to teach these subjects. He further stated that he had provided Mr. Tovar with the materials from which he taught these subjects, and he stopped teaching them in response to Mr. Tovar's concerns.

Mr. Zeman commented that students in the fourth grade are required to be taught California history; he said they need to be taught about Native Americans;

some of the people who came for the gold rush, he said, part of their job was to “get rid” of Native Americans.

11. After considering the pertinent and relevant evidence of record, the Commission finds that the District did not prove that Mr. Zeman violated District Administrative Policy 7045 or standards regarding the teaching of the subject areas identified in the three bullet points under the first paragraph in the Suspension Charges. Mr. Zeman credibly contradicted Mr. Tovar’s testimony that these “topics” were not part of the approved curriculum. Two administrators before Mr. Tovar allowed him to teach these topics as part of lessons concerning the African-American and Native American experiences and the Holocaust. Aside from Mr. Tovar’s vague testimony that these “topics” were not part of the fourth grade curriculum, the District did not offer evidence that these subjects were not part of the fourth grade curriculum.¹ Also, after Mr. Tovar expressed concerns, Mr. Zeman stopped teaching the subjects and turned over his materials to Mr. Tovar. These materials were not provided to the Commission. An adverse inference is drawn that had these materials been submitted, they would have supported Mr. Zeman’s testimony that prior administrators approved their use as part of the curriculum.

12. Regarding the incident in which Mr. Zeman is accused of yelling at and humiliating a student, it is first noted that the District did not offer the testimony of three staff persons and a parent who purportedly witnessed the incident, as alleged in

¹ As pled, the Suspension Charges incorrectly suggest that the topics Mr. Zeman was teaching were the “lynching” and “disembowelment” of African-Americans and the “beheading” of Jews, as opposed to the broader subject areas of slavery and the Holocaust through materials Mr. Zeman used.

the Suspension Charges.² Also, the Commission found it difficult to glean from the documentary evidence the nature of the incident and when it occurred. The Commission believes that the charge refers to an incident on an undetermined date after school at the school "gate" where Mr. Zeman scolded a student. The Commission's understanding is derived from Mr. Zeman's testimony. Mr. Zeman did not dispute that he confronted the student at the gate. He said he has a "loud" voice which is commonly known, and he was not screaming at the student as the Suspension Charges allege. He said he was speaking loudly to get the student's attention. Kelly Murphy, a fellow teacher who testified in this hearing, confirmed that Mr. Zeman has a loud voice "in general," as did other witnesses who testified in this hearing. Ms. Murphy added that having a loud voice is "just him," meaning a feature of his personality. According to Mr. Zeman, the student was inappropriately trying to go through a gate used for kindergartners, and this posed a safety challenge. He

² The District called two witnesses, N■■■■ F■■■■ and A■■■■ S■■■■, who are the parents of children who went to Marvin. But their testimony is not found to relate to the allegation that he screamed and humiliated "a student". Ms. S■■■■ testified she heard "shouting and yelling" coming from Mr. Zeman's class in "April 2019". Ms. F■■■■ said only that Mr. Zeman went "towards yelling" at students. The District offered Exhibit 4, an email from an unidentified parent who said he or she saw Mr. Zeman "loudly yelling" at "two students" on October 18, 2018, in the morning. This is not the incident charged in the Suspension Charges because this alleged incident the parent documented in the email occurred in the morning and involved two students not "a student" after school.

acknowledged he told Mr. Tovar he had reached “a point of frustration” with the student.

Based on Mr. Zeman’s credible testimony, the Commission finds that the District did not prove that Mr. Zeman screamed at the student or publicly humiliated the student.

March 20, 2019, Summary of Conference and Charges, Evidence, and Commission’s Findings

13. Mr. Tovar held a meeting with Mr. Zeman on March 20, 2019, and recorded that meeting in a document captioned “Summary of Conference.” A “Summary of Conference” does not represent a disciplinary action. In this document Mr. Tovar wrote the following as issues they discussed:

- Mr. Zeman did not take students to a scheduled school-wide talent show on March 3, 2019;
- The school’s office had been receiving personal calls for Mr. Zeman;
- Mr. Zeman did not attend a scheduled IEP meeting on March 18, 2019; and
- Mr. Zeman did not take his students to lunch on time and only allowed them 5 minutes to eat on March 19, 2019.

14. In this summary document Mr. Tovar wrote more specifically that the personal phone calls involved doctor and hair cut appointments and “personal orders” for “wine etc.” In addition, Mr. Tovar stated that the Individualized Education Program (IEP) meeting was on January 7, 2019, not March 18, 2019, as referenced in the

summary. Mr. Tovar documented that Mr. Zeman told him he does not have a cell phone and tries to make calls during breaks. He told Mr. Tovar he did not receive calls for wine orders.

15. Related to the Suspension Charges that are referenced in the March 30, 2019, summary, the District called Brandi Friend. Ms. Friend worked in the office as an administrative assistant and answered telephone calls. Ms. Friend only testified that Mr. Zeman received "personal calls." She did not elaborate further. However, in an email she wrote on March 19, 2019, Ms. Friend stated that "frequent calls" came from Mr. Zeman's doctor, pharmacy and from his hair stylist for haircut reminders. In the email Ms. Friend clarified there was just "one call" for a "wine order" that was ready to be picked up. In this email she disputed Mr. Zeman's contention in his email that this call was from a "Diane" with the "Food and Wine Institute," an organization that sponsors a special program for children about organic farming food preparation and a trip to a farm. She acknowledged that she was familiar with this organization.

16. Mr. Zeman's testimony regarding these incidents is summarized as follows: He said he simply forgot about the March 3, 2019, talent show. He does not have a cell phone, and he does not have a personal email account. He has back problems and was being scheduled for injections to his back, and his doctor's office left messages for him at the school's office late on a Friday. Mr. Zeman was there for the student's IEP but had to leave the meeting early, and the IEP meeting was rescheduled. With respect to the allegation he took students late to lunch, Mr. Zeman said this occurred during a "modified" day when school ends at lunch and the lunch period is brief. Mr. Zeman said his class instruction ran into this period. He said he was not going to let the children miss lunch.

17. After giving due consideration to the relevant documentary and testimonial evidence, applicable Education Code sections and District Policy 7045, the Commission finds that the conduct alleged in the Suspension Charges relating to these allegations does not represent violations of any Education Code section or District Administrative Policy 7045. Mr. Zeman credibly explained that he attended the IEP meeting but had to leave early, and the meeting was rescheduled. On March 3, 2019, Mr. Zeman simply forgot to take his class to the talent show. The phone calls made to the school's office, while inconsiderate, do not constitute unprofessional conduct.

September 12, 2019, Letter of Reprimand, Evidence, and Commission's Findings

18. On September 12, 2019, Mr. Tovar issued a Letter of Reprimand to Mr. Zeman. This letter of reprimand was issued after a meeting the two men had on September 4, 2019. The Letter of Reprimand contains the following specific instances of alleged conduct:

- Mr. Zeman reported your absence in the SAMS [the Substitute Assignment Management System] as ill the first two teacher prep days, as personal necessity the final prep day, and as personal necessity the first two days of instruction;
- Mr. Tovar attempted to contact Mr. Zeman on August 25, 2019, regarding absences and asked Mr. Zeman to call the school site or email to provide information regarding absences and a return date. Mr. Zeman did not respond;
- Mr. Tovar attempted to contact Mr. Zeman by phone on August 27, 2019, and August 28, 2019, regarding his absences and left a voicemail asking

Mr. Zeman to call the school to provide information related to his absences and a return date. Mr. Zeman failed to respond;

- Mr. Zeman's classroom was not prepared for the first day of instruction;
- Upon Mr. Zeman's return on August 28, 2019, Mr. Tovar observed students reading independently for 22 minutes, and then Mr. Zeman called students to the carpet to conduct a read aloud. Afterwards Mr. Zeman sent students back to their desks to read independently for 12 minutes. When questioned if he had lesson plans he response was "no"; and
- Mr. Zeman stated to staff members and families that he did not have instructional materials when materials were available in the back room, and any additional materials should have been requested by completing the materials inventory form that was distributed to all staff on August 12, 2019.

19. Mr. Tovar testified that the conduct detailed in the Letter of Reprimand concerned Mr. Zeman's grade level change from the fourth grade to the second grade, and his failure to be ready for the students on the first class day. Mr. Tovar said he reached out to Mr. Zeman multiple times and received no response. He said that when Mr. Zeman was absent, there were no lesson plans left for the substitute teacher, and when Mr. Tovar arrived on August 28, 2019, students were not engaged in purposeful lessons. Mr. Tovar asked Mr. Zeman if he had done any planning, and he said no planning was done. Mr. Zeman stated that he wasn't given instructional materials. Mr. Tovar further said that Mr. Zeman told families he did not have instructional materials, which was not accurate. The librarian and a grade level colleague had offered to give

him grade level materials. Mr. Zeman failed to pick up these materials. Mr. Tovar said the District also provided the materials, and teachers are instructed if they don't have instructional materials they need "to do something". When Mr. Tovar met with Mr. Zeman they discussed his ability to access grade level plan materials to be taught.

20. In response to not being present the first day of class, Mr. Zeman told Mr. Tovar that teachers call out the first day all the time. Mr. Tovar said that this is not true based on his 19 years of experience.

21. Mr. Zeman's testimony regarding his conduct the first days of class in August 2019 is summarized as follows:

Mr. Zeman is originally from Illinois, and his 97-year old mother still lives there. During the summer he visits and helps arrange her care. Shortly before he was to return to California for the start of school, his mother fell and he was concerned she had stroke. He needed to stay a couple of days longer to make sure she was okay.

Mr. Zeman called to have a substitute for the first days of the school year. He said every student had a mathematics book but there were no social science books. Mr. Zeman said Mr. Tovar should have ensured that these books were available for the students at that time. Regarding his absence, Mr. Zeman pointed out that his personal life is his business, and he called in and arranged to have a substitute teacher. For some reason, that substitute was told to not come in by one of the office secretaries. Mr. Zeman stressed that he did not fail to call in because he was angry about his assignment to the second grade from the fourth grade as the District has implied. He said he thanked everyone at the school for helping him when he returned.

22. The Commission has considered the testimonial and documentary evidence of record with respect to these charges and the applicable sections of the

Education Code and District Procedure section 7045. Based on this evidence of record, the Commission cannot find that Mr. Zeman's conduct on August 28, and 29, 2019, constituted unprofessional conduct, a failure to not have prepared a subject carefully, or a persistently occurring violation of the Education Code or District policy. The Commission has reached this conclusion for these reasons:

That there was no lesson plan on the first day of school does not instantly lead to the conclusion Mr. Zeman did not carefully prepare the subjects he was teaching, though the Commission is concerned that Mr. Zeman did not have a lesson plan prepared for the start of school August 28, 2019. With this noted, the Commission understands that the first day of class at any school is a day when teachers are getting to know their students and organizing their classrooms and materials. Further and importantly, Mr. Zeman's absences at the start of the school year were justified. In fact, he contacted the school to have a substitute teacher for his absence that first day. Although he was not required to explain why he was absent, Mr. Zeman credibly explained he was absent at that time due to concerns about his mother's health. Also, as a factor the Commission has considered, his failure to have a prepared lesson plan at the start of the school appeared to have been an isolated incident. According to the evidence of record, Mr. Zeman has been a dedicated and professional teacher who is committed to his students' education, and it would have been out of character for him to not have carefully planned his teaching subjects. To the Commission, the core of the problem that resulted in this charge seems to have been communication issues between Mr. Zeman and Mr. Tovar.

Mr. Tovar's Observations Regarding Mr. Zeman's Conduct, Recommendation for Suspension, Relevant Evidence, and Commission's Findings

23. As described in the Suspension Charges on February 19, 2020, and March 4, 2020, Mr. Tovar observed two "incidents" involving Mr. Zeman. On March 11, 2020, Mr. Tovar prepared a document captioned "Recommendation for Suspension" in which he recommended that Mr. Zeman be suspended for five days based on the conduct discussed above, in addition to the two incidents he allegedly observed on February 19, 2020, and March 4, 2020. Mr. Tovar cited District Policy 7045 "Section C.2.e." He directed Mr. Zeman to stop yelling at students directly in front of their peers and refrain from leaving students unsupervised. Mr. Zeman refused to sign the document Mr. Tovar prepared. According to Ms. Marshall, the District's human resources officer, Mr. Zeman failed to respond to a request for a "pre-disciplinary meeting," and the District decided to pursue Mr. Tovar's recommendation.

24. Regarding the first of these "new" incidents, as described in the Suspension Charges on February 19, 2020, when Mr. Tovar was walking by Mr. Zeman's classroom, he heard Mr. Zeman yelling "every day every day I have to tell you." Mr. Tovar said he was able to hear Mr. Zeman yelling at the student although the doors and windows of the classroom module were closed. Mr. Zeman said this to the student in the presence of the whole class. The student went outside to get a folder in his backpack. To a question posed to him on cross examination, Mr. Tovar said he talked to the student and the student seemed "a little distraught," but told Mr. Tovar he was "good" and he was "just going to class."

25. Mr. Tovar emailed Mr. Zeman about the incident, and Mr. Zeman told him the student had forgotten his homework for the week and Mr. Zeman was at a loss for what to do.

26. Mr. Zeman in his testimony concerning this incident, stated he was not yelling at the student. He said the student had been coming to class without his homework, and Mr. Zeman had contacted his father. His father had his hands full because the student's mother had died four years previously from cancer. Mr. Zeman wanted the student to come to class prepared. He denied he berated the student, and he said the student was not upset. Mr. Zeman also said windows above the doors were open so it was not hard to hear what was going on in the classroom. He said that the student's father did not complain about the incident.

27. In evaluating this incident, the Commission has considered the testimony of both Mr. Tovar and Mr. Zeman. The Commission notes that the conclusion that someone is "yelling" as opposed to speaking "loudly" can be largely subjective. Mr. Zeman acknowledged that his tone is "loud," and he is known for his loud tone. The guidance Mr. Tovar stated he gave to Mr. Zeman highlights the subjective nature of assessing whether a person was yelling or was just loudly talking. When testifying, Mr. Tovar stated he advised Mr. Zeman that a teacher should use a "warm demander" tone when upbraiding a student for behavior. But even when using this "warm demander" tone, it is easy to see that a person may conclude that a teacher is yelling at the student. With this noted, the Commission finds with regards to this allegation that the District did not prove Mr. Zeman humiliated the student when he demanded he get his folder from his backpack or that Mr. Zeman engaged in any conduct violative of the Education Code or District Policy 7045.

28. As further alleged in the Suspension Charges, Mr. Tovar observed a second incident involving Mr. Zeman on March 4, 2020, when Mr. Tovar was walking by Mr. Zeman's classroom and saw Mr. Zeman leave his classroom unattended to visit a colleague on the playground. When asked why he left the classroom, Mr. Zeman said that he left the classroom to ask a colleague about "technology." Mr. Tovar testified Mr. Zeman left for one to two minutes.

29. Mr. Zeman called Kelly Murphy, a fellow teacher at Marvin who teaches the second grade. Her classroom was next to Mr. Zeman's on March 4, 2020. She has been a teacher at Marvin for 25 years.

Ms. Murphy gave the following testimony regarding the March 4, 2020, allegation: On this date Mr. Zeman asked her to "watch his class" while he went to get technical support for the "Promethean board"³ he was using in his classroom. The date and Mr. Zeman's request stand out to her because Mr. Tovar talked to her about it that day. Ms. Murphy said it was "no big deal to her" and she was "surprised that Mr. Tovar" even talked to her about this incident. She said that Mr. Zeman left his class for no more than "30 seconds" and it is not accurate "to say he left his class unattended." She stressed that he did not leave his class unattended. Mr. Zeman was coming back when she went to check on his class.

Ms. Murphy stated that for 15 years teachers at Marvin use a "buddy up" system with each other so they can take restroom breaks. She said she and Mr. Zeman

³ The "Promethean" screen is a display screen used by teachers to display various instructional materials they present in their classrooms.

watched each other's classrooms when needed so they can take breaks. Mr. Tovar had not changed this practice.

30. Mr. Zeman offered this testimony regarding the March 4, 2020, incident: He needed to get the help of fellow teacher Ms. Solis because of problems he was having with the "Promethean Board." Ms. Solis's classroom was no more than 50 feet from his classroom. Mr. Zeman did not leave his classroom unattended. He asked Ms. Murphy who was his "buddy teacher" to watch his class and she agreed. Mr. Tovar asked him why he left the classroom, and Mr. Zeman told him that he needed to go to Ms. Solis's class to get help with this "Promethean Board." He left the class for maybe 30 seconds. The time was so brief that Ms. Murphy was coming to the ramp as he was returning.

31. The Commission has considered the relevant documentary and testimonial evidence regarding this allegation and the relevant applicable sections of the Education Code and District Administrative Policy 7045. The Commission finds Mr. Zeman did not leave his classroom unattended on March 4, 2020. He asked Ms. Murphy to watch his class for a brief time while he sought help regarding technology he was using to instruct his class. Mr. Zeman's conduct on March 4, 2020, does not represent a violation of the Education Code and/or District Administrative Policy 7045.

Mr. Zeman's Testimony

32. Mr. Zeman testimony is summarized as follows: He has been teaching at the District since 1997 and at Marvin Elementary since the 1999 or 2000 school year. He started teaching in Illinois and has a total of 40 years of teaching experience. He is still enthusiastic about teaching children, loves working with children, seeing them getting interesting in subjects, seeing that "light come on," and seeing them grow. At

73 years old, he is getting to the end of his teaching career, and he has not enjoyed teaching so much the last years due to his interaction with the District's administration during this time.

As a teacher, Mr. Zeman has always received positive evaluations. He submitted Summary Evaluation Reports dated June 2008, May 1, 2010, and April 28, 2017. In these reports two principals at Marvin rated him as "effective" as a teacher, the highest rating under six categories. One of his former principals described him as an "intense" and "demanding" teacher. As an indication of his qualities as a teacher since October 3, 2012, Mr. Zeman is evaluated on a five-year evaluation cycle. Mr. Zeman earned this distinction because he has been deemed a "highly qualified" teacher under the No Child Left Behind legislation.

Mr. Zeman's favorite grade to teach is the fourth grade, but he has taught all grade levels. He regards himself as a demanding teacher, demands a lot from his students and gets a lot out of them. He finds fourth graders able to do a lot of things and work independently on their own. At Marvin most students are on track and able to do exciting things; read novels and relate to characters specifically and deal with more challenging topics.

Over the course of his 23-year career at Marvin, he has gotten along with principals and noted that he would like to have a good relationship with Mr. Tovar. He added that he is willing to make changes contrary to the District's assertion in opening comments that he is not amenable to change. He also said he would be willing to work with Mr. Tovar.

33. Mr. Zeman's testimony regarding the specific allegations in the Suspension Charges has been incorporated above.

Testimony of Individuals on Mr. Zeman's Behalf

34. Mr. Zeman called Aldo Osuna, Marilyn Henetz and Vanetta Morkunas as character witnesses.

Mr. Osuna's testimony is summarized as follows: He is a parent and two of his children, and two of his sister's children have been Mr. Zeman's students. Last year one of his children was in Mr. Zeman's class; his youngest is now in second grade.

Mr. Osuna's children have had only positive experiences with Mr. Zeman; he said "they love him." His nephew had problems at school; and his sister "choiced" to have him attend Marvin. Mr. Zeman figured out a way to work with his nephew; he tried different things, and his nephew "totally turned around as a student."

Mr. Osuna asked the school to assign Mr. Zeman for his son and daughter. He is very happy that his youngest son has him now in second grade; his son loves him; his daughter is now in the tenth grade and remembers Mr. Zeman fondly with only positive things to say about her experience with him.

Mr. Osuna said that Mr. Zeman does not "yell" at students. He heard he is a tough teacher from other parents. But he is fair, and Mr. Osuna doesn't have any complaints. He described Mr. Zeman as "a great teacher over a long-time span," and he recommends him to everyone. He said that Mr. Zeman taught his kids how to take notes and prepared them for middle school. Their experience with him has been great.

12. Ms. Henetz's testimony is summarized as follows:

She worked as a teacher in a combination second-third grade class and retired in 2014. She worked with Mr. Zeman at Marvin and observed his teaching practices; he

was the “staff developer”; the staff developer helps train teachers; the best teachers apply and are tasked with doing this.

As staff developer, Mr. Zeman was assigned to work on the second grade level development because tests scores had dropped; he went to classes and showed the teachers how to improve. Ms. Henetz was very impressed with him.

Ms. Henetz can’t speak highly enough about what Mr. Zeman did in class. She worked with a staff developer previously, but Mr. Zeman developed rapport with the students and put thought into lessons.

Ms. Henetz said that Mr. Zeman was “very firm” with teachers and students. She observed him “yell” adding quickly “we all yell.” She said he has a big voice; he would “boom something” out as she put it. She never saw anything that would lead her to believe he is unable to handle students in a calm manner.

14. Ms. Morkunas is the parent of four of Mr. Zeman’s former students. Mr. Zeman taught her last child in 2017. All of her children got a lot out of Mr. Zeman’s class. She saw Mr. Zeman interact with students at Halloween and on field trips where she was a chaperone. Her oldest daughter is now 24 years old and told her that Mr. Zeman prepared her well for both middle school and high school. Her son loved Mr. Zeman because Mr. Zeman was able to handle the classroom, and her son wasn’t able to get distracted.

She said that Mr. Zeman could be harsh, but parents recognized his qualities as a teacher. She never saw him yell, but she agreed he has a loud voice and speaks loudly. She said he was not mean.

Parties' Closing Arguments

35. In its closing argument, the District asked that the five-day suspension be affirmed based on the record and consistent with the progressive discipline that was imposed upon Mr. Zeman. The District stressed that Mr. Zeman told Mr. Tovar that he was not sorry for his conduct.

Mr. Zeman argued that cause does not exist to support a suspension. He argued further that given his willingness to work with administration to correct any perceived deficits, no purpose would be served in imposing the suspension even if cause existed. Mr. Zeman cited the testimony of parents who have had numerous children in his class, and Mr. Zeman's distinction as a "highly qualified" teacher.

LEGAL CONCLUSIONS

Applicable Education Code Sections

1. Education Code section 44932 provides the grounds for imposing discipline against a permanent employee.⁴ Pursuant to Subdivision (a)(2), a permanent employee may be disciplined for unprofessional conduct and, under Subdivision (a)(8), a permanent employee may be disciplined for persistent violation of or refusal to obey

⁴ Section 44932 provides the various grounds for "dismissal" of a permanent employee. Other sections in the same article (Sections 44934 to 44937) reference a "dismissal or suspension" proceeding and cross-reference Section 44932. Reading these statutes together the language "the grounds for dismissal" in Section 44932 is construed to include "grounds for suspension".

the school laws of the state or reasonable regulations prescribed for the government of the public schools by the state board or by the governing board of the school district employing him or District polices.

2. Education Code section 44944 establishes the right to a hearing, the process for selecting the three-member Commission on Professional Competence, and sets forth the Commissions' authority regarding its final decision.

3. Education Code sections 44934 and 44938 outline the procedures the District must follow before acting on any charges brought against a permanent employee.

Applicable District Administrative Policy

4. District Policy section 7045 is entitled the "Code of Ethics of the Teaching Profession." Subdivision (C)(2)(b)(2) requires that a teacher "[prepare] the subject carefully, [present] it without distortion and---within the limits of time and the curriculum--- [give] all points of view a fair hearing."

District Policy section 7045, subdivision (C)(2)(b)(4), requires that a teacher "[honors] the integrity of students and influences them through constructive criticism rather than by ridicule and harassment."

District Policy section 7045, subdivision (C)(2)(c)(1), provides that a teacher "[h]as an obligation to support the profession and the institution and not to misrepresent them in public discussion. When being critical in public the educator has an obligation not to distort the facts. When speaking or writing about policies the educator must take adequate precautions to distinguish the educator's private views from the official position of the institution."

District Policy section 7045, subdivision (C)(2)(d)(1), requires the teacher “[to accord] just and equitable treatment of to all members of the profession in the exercise of their professional rights and responsibilities.”

District Policy section 7045, subdivision (C)(2)(e), states that “the code is a set of ideals which the teaching profession expects its members to follow. Any violation is unprofessional.” To constitute unprofessional conduct and cause for discipline including suspension, “such violations shall be only those which involve jeopardy to student welfare evidence malice [*sic*] serious incompetency or bad judgment; or show a consistent pattern of misconduct.”

Burden and Standard of Proof

5. The “burden of proof” means the obligation of a party, to convince the trier of fact that the existence of a fact sought to be proved is more probable than its nonexistence. (*Redevelopment Agency v. Norm’s Slauson* (1985) 173 Cal.App.3d 1121, 1128.) The District has the burden of proof to establish cause to dismiss its employee.

6. The standard of proof in a teacher disciplinary proceeding is a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1039-1040.) A preponderance of the evidence means that the evidence on one side of an issue outweighs, preponderates over, and is more than, the evidence on the other side of the issue, not necessarily in number of witnesses or quantity, but in the convincing effect the evidence has on those to whom it is addressed. In other words, the term refers to evidence that has more convincing force than that opposed to it. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

Relevant Judicial Authority

7. The seminal case for teacher dismissals is *Morrison v. State Board of Education* (1969) 1 Cal.3d 214. There the Supreme Court held that where persistent refusal to obey regulations or policies is raised in teacher dismissal cases, the applicable standard is whether the person is fit to teach. The factors outlined in *Morrison* must be analyzed to determine, as a threshold matter, whether the cited conduct indicates unfitness for service. (*Id.* at p.229.)

8. A violation of Education Code section 44932, subdivisions (a)(2), and (a)(8), must be established by reference to the *Morrison* factors. If unfitness to teach is shown, then the District must further establish that the employee's refusal to follow the laws or regulations was "persistent," i.e., "stubborn and continuing." (*San Dieguito Union High School District v. Commission on Professional Competence* (1985) 174 Cal.App.3d 1176, 1183.) Isolated incidents or incidents involving an issue unresolved over a period of time are not generally considered "persistent." (*Bourland v. Commission on Professional Competence* (1985) 174 Cal.App.3d 317.)

9. The word "persistent" is defined by lexicographers as "refusing to relent; continuing, especially in the face of opposition . . . stubborn; persevering . . . constantly repeated." (*Governing Board of the Oakdale Union School District v. Seaman* (1972) 28 Cal.App.3d 77, 82.) Education Codes section 44932, subdivision (8), pertains to unintentional as well as intentional transgressions, and hence the Legislature has decreed that a single violation is not sufficient to warrant dismissal, apparently to allow for correction; "it is the persistent disregard" of school rules that the subdivision is designed to regulate. (*Id.* at p.84.)

Morrison Factors

10. In *Morrison, supra*, the Supreme Court suggested seven factors to consider when evaluating whether the school employee should be dismissed: (1) the likelihood that the conduct adversely affected students or fellow teachers and the degree of such adversity; (2) the proximity or remoteness in time of the conduct; (3) the type of teaching certificate held by the teacher; (4) the existence of extenuating or aggravating circumstances and publicity, if any, surrounding the conduct; (5) the praiseworthiness or blameworthiness of the motives resulting in the conduct; (6) the likelihood of recurrence of the questioned conduct; and (7) the extent that the discipline may adversely impact or have a chilling effect on the constitutional rights of the teacher.

11. The *Morrison* factors may be applied to the charges in the aggregate. When a camel's back is broken, the trier of fact need not weigh each straw in its load to see which one could have done the deed. A trier of fact is entitled to consider the totality of the offensive conduct. (*Woodland Joint Unified School District v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1456-1457.)

12. Only the pertinent *Morrison* factors need to be analyzed. (*Broney v. California Commission on Teacher Credentialing* (2010) 184 Cal.App.4th 462, 476.)

Other Disciplinary Considerations

13. An administrator's loss of confidence in the educator and doubt regarding the educator's ability to serve as a role model for students are factors that may be considered. (*San Diego Unified School District v. Commission on Professional Competence* (2011) 194 Cal.App.4th 1454, 1460.)

14. The Commission is vested with discretion not to dismiss an employee even if grounds for discipline exist. (*Fontana Unified School District v. Burman* (1988) 45 Cal.3d 209.)

Evaluation of the Charges and Disposition

15. The District failed to prove by a preponderance of the evidence that Mr. Zeman violated Education Code sections 44932, subdivisions (a)(2), or (a)(8), or District Policy 7045 and its applicable subdivision based on the findings the Commission made earlier in this decision. As the Commission has found, the District did not prove that Mr. Zeman engaged in unprofessional conduct, or persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the state board or by the governing board of the school district employing him or District policies. The District further failed to prove that Mr. Zeman violated District Administrative Policy 7045 and its applicable subdivisions.

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ORDER

Mr. Zeman's appeal of his suspension from employment with the San Diego Unified School District is granted. The Suspension Charges filed May 5, 2020 against him are dismissed.

DATE: 01/28/2021

Kimberly A. Binning-Chevlin

KIMBERLY A. BINNING-CHEVLIN

Commission Member

01/29/2021

Thomas P. Lawrence
Thomas P. Lawrence (Jan 29, 2021 10:42 PST)

THOMAS LAWRENCE

Commission Member

01/28/2021

Abraham M. Levy
Abraham M. Levy (Jan 28, 2021 15:11 PST)

ABRAHAM M. LEVY

Administrative Law Judge

Office of Administrative Hearings

Commission Member