

BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
OF THE STOCKTON UNIFIED SCHOOL DISTRICT
COUNTY OF SAN JOAQUIN
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

ELAINE SHANKMAN,

A Permanent Certificated Employee,

Respondent.

OAH No. 2009110226

DECISION

This matter was heard before a Commission on Professional Competence (Commission) of the Stockton Unified School District in Stockton, California, on May 18, 19, 20, and 24, 2010. Commission members were Erin Clark, Gladys Williams, and Dian M. Vorters, Administrative Law Judge (ALJ), Office of Administrative Hearings.

Ronald J. Scholar, Attorney at Law,¹ represented Stockton Unified School District (District). The District's Interim Assistant Superintendent, Human Resources Department, Robert C. Thompson, was present throughout the hearing.

Thomas J. Driscoll, Jr., Attorney at Law,² represented respondent Elaine Shankman who was present throughout the hearing.

Oral and documentary evidence was received and the parties presented oral closing arguments on May 24, 2010. The record remained open for the filing of written briefs on a procedural issue. The District filed its "Opposition to Respondent's Motion Pursuant to Education Code Section 44031" on June 10, 2010. This brief was marked and received into the record as Exhibit 27. Respondent filed her "Reply Memorandum In Support of Motion Pursuant to Education Code Section 44031" on July 12, 2010. This brief was marked and received into the record as Exhibit V. On June 2, 2010, the Commission reconvened and deliberated the charges

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set forth in the Accusation. On July 12, 2010, the record was closed and the matter was deemed submitted for decision.

ISSUES

Did the District prove by a preponderance of the evidence that respondent should be dismissed from her position as an elementary school teacher based upon three incidents of alleged immoral or unprofessional conduct, evident unfitness for service, and/or persistent violation of or refusal to obey school laws of the state or reasonable regulations of the school and/or district governing board under Education Code section 44932, subdivisions (a)(1), (a)(5), and/or (a)(7)?

FACTUAL FINDINGS

Procedural

1. Effective May 7, 2009, respondent was placed on paid administrative leave, pending further action by the District's Governing Board (Board) regarding her continued employment as a teacher at Hoover Elementary School (Hoover). In her letter of this date, Lily Cervantes, Executive Director of Legal Affairs, advised respondent that she would be on "paid work status" pending the outcome of the District's investigation.

2. On May 13, 2009, the District filed the Statement of Charges with the Board, asserting that respondent should be dismissed for the reasons identified.³ Respondent was provided with a five-page Statement of Charges on that same date. The Statement of Charges detailed specific acts or omissions by respondent occurring in March 2007 and March 2009, to support her dismissal based upon unprofessional conduct, evident unfitness for service, and/or persistent violation of or refusal to obey school laws or district regulations. (Factual Finding 7.)

3. On May 12, 2009, the Board passed Resolution No. 08-60, Resolution of the Governing Board of the Stockton Unified School District Relating to the Intention to Dismiss. The resolution authorized service of notice upon respondent of its intent to dismiss, with supporting documents, including a request for hearing form.

³ Education Code Section 44939 provides in pertinent part that, upon the filing of written charges "charging a permanent employee of the district with ... immoral conduct, ... willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing school district,... the governing board may, if it deems such action necessary, immediately suspend the employee from his 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. On May 13, 2009, District Superintendent Anthony Amato signed and served respondent with the District's Notice of Intention to Dismiss. Respondent timely filed her demand for hearing.

5. On August 11, 2009, Superintendent Amato filed a written Accusation against respondent, based upon and incorporating the Statement of Charges, which requested that the Commission dismiss respondent. On August 14, 2009, the District served respondent with its Notice of Accusation, Accusation, Statement to Respondent, and Notice of Defense.

6. Respondent timely filed her notice of defense. The matter was set for hearing.

May 13, 2009 Statement of Charges

7. On May 13, 2009, Mr. Amato, Superintendent, filed with the Board charges of unprofessional conduct, evident unfitness for service, and persistent violation of or refusal to obey school laws and/or reasonable regulations of the Governing Board, against respondent. The charges included a recent incident that occurred in March 2009, and two prior incidents that occurred in March 2007.

8. The incidents in March 2007 are alleged as follows in the Statement of Charges:

- (a) [Respondent] instigated a fist fight between two of her first grade students.
- (b) [Respondent] failed to notice one of her male first grade students sitting naked from the waist down in her classroom rubbing his penis.

9. The incident on March 12, 2009, involved a child getting her hand stuck in a pencil cup inside of her desk. The Statement of Charges alleged the following, in relevant part:

[Respondent] gave the student hand lotion to try and release the student's hand. The student was unable to free her hand.
[Respondent] turned off the classroom lights and left the student with her hand stuck in her desk unattended in the dark classroom while she took the remainder of her students to Art Class.

Teachers and staff in neighboring classrooms heard the student crying in [respondent's] dark, empty classroom and attempted to help the student free her hand. When they got the student's

hand released from the pencil holder, two other teachers took the student to the office for first aid treatment. The student's fingers were swollen and she was treated with an ice pack.

10. The Statement of Charges further alleged that the District had previously directed respondent to comply with the plan of improvement as outlined in a March 2007, 45-Day Notice of Deficiencies. (Factual Finding 15.) As such, the District alleged that respondent's conduct constituted cause for dismissal pursuant to Education Code section 44932, subdivisions. (a)(1), (5), and (7).)

45-Day Notice of Deficiency for Unprofessional Conduct

11. On March 23, 2007, respondent was served with a Notice of Paid Administrative Leave, pending an investigation of inappropriate behavior with students. She was advised not to return to her teaching assignment, and not to have contact with students or staff without written authorization from the Human Resources Department. This correspondence was signed by M. Allyn Bulzomi, Assistant Superintendent, Human Resources.

12. On April 20, 2007, respondent was served with notice that her paid administrative leave ended effective immediately. She was advised she could return to her regular duties at Hoover on Monday, April 23, 2007.

13. On June 4, 2007, respondent was served with a 45-Day Notice of Deficiency for Unprofessional Conduct.⁴ The notice informed respondent that "At the end of 45 days from the date of this letter or thereafter, written charges may be filed with the Governing Board recommending that you be terminated or suspended from employment with the District for unprofessional conduct."

14. The 45-Day Notice listed two incidents of alleged unprofessional conduct. The Notice stated, in summary, that on or about March 23, 2007, two first-grade students engaged in a physical fight in respondent's presence to which she allegedly responded, "Why don't you just fight? Hey guys, do you want to see a fight?" or words to that effect. She reportedly did not break up the fight but stood watching them. Additionally, on or about March 27, 2007, respondent was reading to her class and a first-grade student was observed by another teacher "sitting in class

⁴ Education Code section 44938, subdivision (a) states: "The governing board of any school district shall not act upon any charges of unprofessional conduct unless at least 45 calendar days prior to the date of filing, the board or its authorized representative has given the employee against whom the charge is filed, written notice of the unprofessional conduct, specifying the nature thereof with such specific instances of behavior and with such particularity as to furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge. The written notice shall include the evaluation made pursuant to Article II (commencing with Section 44660) of Chapter 3, if applicable to the employee."

with his pants down and was rubbing his penis.” Respondent did not notice the conduct.⁵

Though two teachers were asked by the Hoover principal to document their observations, the district apparently did not attach any witness statements to respondent’s 45-Day Notice. It is unclear from the record, whether such writings were contained in respondent’s personnel file at that time, thereby making them subject to the notice provisions of Education Code section 44031.

15. The 45-Day Notice directed respondent to take remedial action to include compliance with a plan for improvement as follows:

1. Comply with all District rules, regulations, policies, and procedures;
2. Refrain from encouraging students to engage in physical or other disputes and take action to end such disputes in a safe and professional manner;
3. Be attentive to the actions of all of your students at all times you are teaching and/or supervising them; and
4. Treat students and co-workers with respect, sensitivity, and professionalism.

16. Pursuant to Education Code section 44938, subdivision (a), the 45-day notice must include the teacher’s written evaluation and assessment. The District enclosed a copy of respondent’s March 31, 2005 performance evaluation.⁶ The evaluation was conducted by Assistant Principal Joy Meeker who rated respondent’s performance in five standard areas.⁷ On a scale of one to four, with four being the highest score available, respondent’s highest score was a “3” (maturing beginning practice) in each area measured.

⁵ Police reports and testimony establish that the incidents did not take place on the dates alleged by the District in the 45-Day Notice to respondent. The incident involving the child touching his penis took place almost three weeks earlier on March 8, 2007. The fight took place on March 22, 2007.

⁶ Respondent’s two most recent evaluations were dated March 12, 2007, and May 9, 2007. It is unclear why the district attached a two-year-old performance evaluation in lieu of more recent evaluations.

⁷ The five standards measured in the performance evaluation were:

- I. Engaging and Supporting All Students in Learning;
- II. Creating/Maintaining and Effective Environment for Student Learning;
- III. Understanding and Organizing Subject Matter;
- IV. Planning Instruction and Designing Learning Experiences for All.
- V. Assessing Student Learning

Vice Principal Meeker's comments were favorable as regards to respondent's teaching skills. Respondent was noted to "carry ... strategies out thoughtfully, making some adjustments to respond to students' needs." She participated in professional development center classes to "stay current with research-based instructional strategies to implement in her classroom." Respondent had "developed a strong working relationship with the first grade teachers. She frequently partner[ed] with her next-door neighbors for art and science." Ms. Meeker's observation summary stated: "[Respondent] relates well to her students. She cannot walk across the playground without being hugged at least twice. Her students master the curriculum. She is an asset to our Hoover family."

17. The 45-Day Notice also informed respondent that she had the right to comment and have her written comments attached to the Notice and placed in her personnel file, to be maintained in the District Office. (Ed. Code, § 44031.) On June 11, 2007, respondent sent a response to Mr. Bulzomi by certified mail. Her comments were:

Pursuant to Education Code section 44031, I disagree with the version of events in your letter dated June 4th, 2007. If you are interested, I will be happy to discuss this with you; however I expect the next 45 days to pass by uneventfully. I continuously enjoy the rewarding experience as an educator to my students.

18. The District did not solicit further discussion of the disputed events with respondent. The 45-days did, in fact, pass by uneventfully. Respondent remained in her post as a first grade teacher for two years until an incident in March 2009, involving a child getting her hand stuck in a pencil cup.

March 8, 2007 Action Walk Incident

19. Michelle Farnes is a teacher in the District. She has taught grades four through seven at Hoover. On March 8, 2007, she participated in an "action walk" with another Hoover teacher, Teresa Semillo. The purpose of action walks was to observe effective teaching strategies in the classroom. Respondent was seated on the edge of a low table (less than two feet high), at the front of the classroom reading from a "big book." A "big book" measures approximately 24 by 36 inches when closed. Books this size are commonly used in primary grade settings to facilitate instruction. Respondent was holding the book open and reading it by looking down over the top of the pages.

20. Ms. Farnes and Ms. Semillo entered the classroom together from a door at the front (north wall) and walked toward the back. The student desks were shaped in an "L" along the west and south classroom walls. Additional desks were arranged in the well or center of the classroom. A total of 18-20 students were present that day. Seated in the very last seat along the south wall (most eastern desk), Ms. Farnes

observed a student, B.V., hunched over his desk, pants down exposing his boxer shorts, with his hands rapidly moving under his shirt. During this time, he was “watching the teacher.” Ms. Farnes testified that the back of his pants may have been touching his seat. Ms. Farnes confirmed with Ms. Semillo that B.V. was touching himself. She then went to him, bent down, and quietly told him to stop. He did stop and resumed participation in the lesson. Ms. Farnes stated that the student sitting next to the boy did not hear her interaction with B.V. and apparently did not see the inappropriate conduct. She recalled that the children were “engaged” in respondent’s lesson. Ms. Semillo testified that it did not appear that anyone else in the room noticed that B.V. was touching his privates.

21. Ms. Farnes and Ms. Semillo left the classroom from a rear door in the south wall of the classroom. They were in respondent’s classroom for five to ten minutes. Neither Ms. Farnes nor Ms. Semillo spoke to respondent about the incident. Ms. Semillo reported the incident to Principal Janna Schumacher. Ms. Farnes reported the incident to Vice Principal Joy Meeker. On or about March 27, 2010, Ms. Schumacher asked both teachers to prepare a written statement of the incident. On March 27, 2010, Ms. Schumacher reported the incident to the Stockton Unified School District Police. The child involved, B.V., was seven years of age. The District Police took a report, however, neither respondent nor the child were interviewed. This matter was not prosecuted.

22. Respondent was aware of the fact that two teachers came into her classroom. She does not recall which teachers entered. She did not see B.V. touching himself. She did not see the teachers talking to B.V. She was holding the big book and could see her class over the top of the book. She read “up-side down” from the book for the lesson. She shared that first grade students do not sit still as in higher grades. They can remain focused on her while still moving themselves up in their chairs, crossing their arms, and leaning to the side.

23. Neither the teachers nor school administrators told respondent about the incident on March 8. She testified that had she been told that day, she would not have done anything different, because Ms. Farnes had taken care of the matter. Had she seen the incident, she would have talked to B.V. privately about proper behavior and also written a note to the school counselor. She first learned about the incident after she received her leave of absence notice on March 23, 2007. (Factual Finding 11.)

24. The circumstances do not support a finding that respondent knew or should have known that B.V. was touching himself beneath his desk. This incident did not then, and does not now arise to the level warranting discipline of respondent.

March 22, 2007 Playground Fight Incident

25. Christine Conklin is a first grade teacher at Hoover. On March 22, 2007, she was on yard duty with three to four other teachers including respondent.

Grades one, two and three recess together. There were approximately 200 students outside that day. When the bell rang at 1:10 p.m., all students were to freeze and wait for a teacher to blow a whistle. They were then to line up with their class in pre-designated areas. On this date, during the 1:00 p.m. to 1:10 p.m. recess, two first graders from respondent's class started fighting. The bell rang, Ms. Conklin blew her whistle, and then heard an adult voice say, "Do you want to fight? Why don't you two just fight?" Other children gathered around yelling, "fight, fight, fight ..." Ms. Conklin turned and saw respondent standing two to three feet away from the boys. Ms. Conklin stated she was "shocked" that respondent did not take any action to stop the fight.

26. Ms. Conklin stated that she walked toward the boys and separated them with her hands. She recalled using very little force and said it was "kind of easy to separate them." While still on the playground, Ms. Conklin recalled saying to respondent that this was "not okay and I was very sad by what I just saw." According to Ms. Conklin, respondent replied that the boys want to fight, they had been previously disciplined for fighting, and that administration would not do anything. Respondent then made the boys apologize to each other and walked her class inside. Ms. Conklin returned to her class and took them inside. That afternoon, Ms. Conklin reported the incident to Ms. Schumacher and wrote a memorandum of her observations. Ms. Conklin testified that she has previously observed respondent to be caring towards and have good interaction with her students.

27. During the same recess, Ms. Semillo was walking from her classroom, located on the northeast edge of the blacktop, towards the playground when she heard several chants of "fight, fight." As she turned the corner, she saw a group of students and respondent with her hands on her hips. She saw Ms. Conklin walking toward the group. She responded by retrieving her students and taking them inside since there were already two adults present. She testified that she did not observe Ms. Conklin doing anything that appeared to her to stop the fight. She spoke to Ms. Conklin about the fight afterwards. She recalled that Ms. Conklin was upset regarding respondent's handling of the fight. On March 28, 2007, Ms. Semillo prepared a written statement about the incident, at the request of Ms. Schumacher.

28. Respondent testified that on March 22, 2007, first grade teachers were assigned yard duty. Respondent was assigned to the first recess from 9:45 a.m. to 10:00 a.m. She is not sure who was assigned to supervise the 1:00 to 1:10 p.m. recess. When the fight started, she was returning from the teachers' restrooms in the office, west of the playground. As she was walking towards the playground, she heard the bell signaling the end of recess. Some students approached her and said, "There is a fight. There is a fight." She testified that, "I saw my kids fighting. I put on blinders and went towards them." She recalled that Ms. Conklin was moving away from the scene with her class at that time. When respondent reached the boys respondent asked them, "What are you fighting about?" She used her hands to separate them repeating, "What is the fight about?"

29. Respondent denied instigating the fight or encouraging the boys to continue fighting. She admitted saying, “Do you want to fight? We’ll take this inside and talk about it.” She kept them with her on either side as she escorted her class back to their room. Once inside, the boys admitted that the fight was over “name calling.” Respondent then discussed with the boys “Kelso’s Choice.” She has a poster in her room that outlines better choices than using hands or fists. The boys discussed better choices than hitting. Respondent told the boys that they would probably be in school together through high school and would probably go to each others’ weddings. The boys shook hands, gave hugs, and went to their seats. Respondent was called to the office that afternoon and placed on administrative leave. (Factual Finding 11.)

30. The facts do not support a finding that respondent instigated and then encouraged the playground fight. She was in the restroom when the fight began. The playground was clearly chaotic and noisy. The children were more plausibly yelling “fight” to call the matter to someone’s attention as opposed to egging their six-year-old classmates on. Based on the totality of the circumstances, respondent’s query to the boys, “Do you want to fight?” was not stated as an open invitation but was clearly rhetorical in nature. Respondent was credible in her telling of the incident and was appropriate in her resolution of the matter.

March 12, 2009 Pencil Cup Incident

31. During the 2006 to 2007 school year, respondent arranged some of the student desks in groups of four to seven. She created pencil cups from cleaned tomato cans by wrapping the top edges and outside surface with contact paper. Each group of desks shared a community pencil cup. Respondent placed erasers and two to three pencils per student inside each cup.

32. A student named Star engaged in a pattern of getting her fingers stuck in the pencil cup. On four separate days over the course of the school year, she placed her fingers inside the cup and slid the cup into the well of her desk. Each time, her fingers became wedged between the rim of the pencil cup and the inside top of the desk just below her base knuckle bones.

33. On the first occasion respondent was informed by another student that Star’s hand was stuck. Star did not scream out. Respondent walked over and asked Star to let respondent help her get unstuck. The child responded, “No, no, no.” Respondent applied lotion and liquid soap for lubrication. Respondent did not try to pull the child’s hand free. She estimated that it took approximately five minutes for the child to get her hand out. During that time, respondent continued to teach the class. There was minimal disruption. Respondent gave the child paper towels to wipe off the lotion. There was no indication of bruising or swelling. The child did not cry. She was not upset. Respondent discussed “choices” with Star and whether it was a good idea to put her hand in the can.

34. On the second occasion, Star informed respondent that her hand was stuck again. Respondent observed two knuckles exposed, with the forefingers stuck inside the can in Star's desk. The child stated, "I want the lotion." Respondent applied lotion to the top of the fingers. Respondent continued to teach class and walk around the room. It took approximately five to ten minutes for Star to extract her fingers. There was no bruising or swelling, no redness, and no cuts to the child's fingers. Respondent gave the child paper towels and wiped the soap off. Respondent discussed choices with Star and explored whether it was a wise choice to do it again.

35. On the third occasion, either Star or another student informed respondent that Star's hand was stuck. The child's forefingers were wedged between the rim of the cup and the inside desk top. Most of her hand was exposed. Respondent applied soap and hand lotion. Star got herself extracted while respondent continued the lesson. It took approximately five to 12 minutes. The child was not crying, distressed, or physically hurt. Respondent gave the child a paper towel to wipe off the lotion and continued with her lesson. Respondent discussed with the child why she did it again asking her if it was a good choice. The child did not have a good response and shrugged her shoulders. At the end of the school day, respondent mentioned the current and previous incidents to another teacher, Christina Rusk.

36. During and after the first three incidents, respondent did not raise her voice to Star. Respondent was not angry nor did she exhibit anger. The child did not cry nor indicate she was afraid of respondent.

37. On March 12, 2009, the fourth occasion, respondent was lining up her class against the north wall from which they would proceed to art class. A student informed respondent that Star's hand was stuck again. As respondent approached Star, she saw no signs of distress. However, as the children started to follow respondent and focus on Star, Star's expression changed. Her mouth opened and tears started to well up in her eyes. Respondent directed the other students to line up against the wall.

38. Respondent bent down next to Star and asked her if she was alright. She said she had gotten her hand stuck. The tears started to dry up. Respondent asked Star if she wanted help, and Star said, "No, no, no ... get me the hand soap." By this time, her demeanor had changed, she was calm, and she allowed respondent to apply lotion as before. Respondent testified that she knew from prior experience that Star would be able on her own to extricate her hand from the desk. She did not want to put negative peer pressure on Star by keeping the students there. The children looked forward to art and respondent felt they might respond negatively toward Star if they were delayed.

39. Respondent stepped into the doorway between her room and Ms. Rusk's room, got her attention, and asked her if she could keep an eye on Star who was visible from the doorway.⁸ Respondent told Ms. Rusk she needed to take her students to art class and that Star had gotten her hand stuck again. Ms. Rusk's aide, "Ms. Betty," was also present for this exchange. Ms. Rusk agreed, respondent went back to her room, and told Star that when she got her hand out, to go into Ms. Rusk's room. Star was familiar with Ms. Rusk as a teacher. Respondent and Ms. Rusk co-taught science and social science and participated in other learning activities together.

40. Respondent walked the remaining students to their 25-minute art class in a separate portable. The art portable is approximately 38 to 40 feet from respondent's room. Respondent recalled that she left the lights on. She was definitive that she did not turn the lights off. Ms. Bates is the art teacher. Respondent remained with her students in Ms. Bates' room as was her practice. During art class, respondent assisted in handing out paper and supplies, dealt with behavioral problems, and helped with projects. She did not go back to her class because at the time she thought school policy prohibited her from leaving her students with the art or music teacher. She believed the reason was related to the type of credential they held.

41. Respondent appreciated the fact that students should not be left unattended in a classroom. It is her contention that she left Star supervised in the classroom. She testified that Ms. Rusk was in a position that she could see Star through the door. She believed that Star would be able to get her own hand out as in the past, and then go into Ms. Rusk's room.

42. Christina Rusk is a special education teacher in the District. On March 12, 2009, she was teaching in a classroom adjoining respondent's. She testified that while she was teaching at the board, respondent stepped to the doorway between their rooms. Ms. Rusk recalled respondent explaining that "she needed to get ready to take her kids to art, a student had gotten her hand stuck in her desk, she had applied lotion, and could the student sit in the doorway between our rooms and could I keep an eye on her." Ms. Rusk recalled telling respondent to "just make sure you keep the door open so I can keep an eye on her." Ms. Rusk believes that respondent moved Star's desk over "maybe a couple of inches" but does not recall how far.

Mr. Rusk does not recall if the lights were on in respondent's room but she noted that it was lighter in there than in her own classroom. Respondent's room does not have blinds on the windows which face the sun. While standing at the board in her own classroom, Ms. Rusk could see Star's back and a little of her face if she leaned upward. When she went to check on Star, the child was not crying and did not appear to be in distress. Ms. Rusk recalled putting her hand on the child's back and

⁸ Respondent's classroom is one of three portable rooms that are connected at common walls and accessible through interior doors. Each room also has an exterior door leading to the outside. The three teachers in these rooms were respondent, Christina Rusk, and Jesse Whitehead.

asking how she was doing. The child stated, "Fine." Ms. Rusk then returned to her classroom and about ten minutes into that session, her teaching assistant, Jacklyn Farley returned from her break. Approximately three minutes after that, Ms. Rusk asked Ms. Farley to check on Star. Ms. Rusk did not hear Star crying until after Ms. Farley went to respondent's room. She walked to the doorway and observed Ms. Farley talking to Star and reaching inside the desk. She observed Star with tears in her eyes. She believed that Ms. Farley had touched Star's hand or body in such a way as to cause Star to cry.

Ms. Farley was gone for approximately eight to ten minutes when Jesse Whitehead (the teacher in the third tri-portable) entered respondent's room with a boy throwing a tantrum. After hearing the commotion, Ms. Rusk asked Ms. Farley to return to Ms. Rusk's classroom so that Ms. Rusk could work with the boy. The boy "had tears, he was angry, his hands were fisted up, he was mumbling." Ms. Semillo, who was assisting in Mr. Whitehead's room, asked Ms. Rusk what had happened. Ms. Rusk informed her that respondent had taken her class to art. Ms. Semillo started getting upset and said, "She left her here?" Ms. Rusk responded that she was supposed to be watching Star.

43. In March 2009, Jacklyn Farley was a special education assistant at Hoover. She was assigned to Ms. Rusk's room to work with different students. Ms. Farley testified that Ms. Rusk asked her to check on Star. Ms. Farley entered respondent's classroom and found Star sitting at a group of desks located behind the doorway leading between the two classrooms. Ms. Farley also noted that the door to Mr. Whitehead's classroom was open and standing next to Star's desk she could clearly see both Mr. Whitehead and Ms. Semillo. Ms. Farley approached Star and tried to lift up on the desk. This did not work and the child cried. Ms. Farley then contacted Ms. Semillo and Mr. Whitehead for help. Ms. Semillo came into the room and called for help using the intercom next to the dry erase board in respondent's classroom. At that point, Ms. Farley returned to Ms. Rusk's room. Ms. Farley did not recall if the lights were on but noted that there was natural light coming from the windows.

44. Jesse Whitehead was a first grade teacher at Hoover during the 2008 to 2009 school year. He taught in an adjoining classroom to respondent's room. He testified that on March 12, 2009, Ms. Semillo was in the back of his classroom pulling children out for focused instruction. When he entered respondent's room, he recalled that the lights were off and he observed Ms. Farley and a student at a desk crying and upset. He called Ms. Semillo to take his class and she instructed him to continue teaching so that she could handle the incident with Star. During his testimony, Mr. Whitehead did not mention the tantrumming child that he brought into respondent's room. He stated that he went into respondent's room to ask her "something about a schedule or something else." He stated that it was "not uncommon for us to go back and forth between the rooms to interact."

45. On March 12, 2009, Ms. Semillo was performing student assessments in Mr. Whitehead's classroom. She testified that a boy in Mr. Whitehead's classroom was yelling, screaming, throwing things, and falling on the ground. When Mr. Whitehead entered respondent's room with the boy, he observed Star and asked Ms. Semillo to help. According to Ms. Semillo, after she entered respondent's room, both Ms. Rusk and Ms. Farley came in to learn what was going on. Ms. Semillo recalled telling Ms. Farley that "Star is stuck in her desk." Ms. Semillo stayed to help and told Ms. Farley she could go back to her room. Ms. Semillo then pushed the intercom button to request a custodian. No custodian came. Ms. Semillo did not recall if the lights in respondent's room were on or off.

Ms. Semillo returned to Star and "tried anything I could to help get her hand out." According to Ms. Semillo, Star's left hand pointer and index fingers were stuck inside the upper rim of the pencil cup and trapped by the top of the desk. Ms. Semillo observed that there was lotion on the child's fingers. Ms. Semillo tried to pull up on top of the desk. She tried to move the cup to work the fingers out and the child screamed. After her hand was out, Ms. Semillo walked Star to the office and put an ice pack on her hand because her fingers appeared to be "red." Star also complained that her fingers hurt. There were no cuts or bruises on Star's hand.

46. Autumn Bates is the visual and performing arts (VAPA or art) teacher at Hoover. She testified that when respondent came to art class on March 12, 2009, the class was a student short. Ms. Bates recalls respondent explaining that one student had gotten her hand stuck and when she was free, she would be able to come. She told Ms. Bates not to worry as the matter was being taken care of. Respondent declined Ms. Bates' offer to use the intercom or go back to her classroom. Ms. Bates confirmed that teachers are not allowed to leave their class in art and use the period to prep for other classes or take breaks. During art class, respondent sat in the back of the room and redirected students.

47. The principal, Ms. Schumacher, testified that school policy requires teachers to stay and help with their students during art and computer classes. Teachers were told not to leave children at the computer lab because that person was not credentialed. Ms. Bates is a credentialed teacher, so she does not need to be supervised. Also, Kindergarten through sixth grade teachers cannot use this period for "prep time." Teachers may leave to go to the restroom or attend to an emergency. Respondent would have been allowed to return to her classroom to attend to her student. Also, teachers may use the intercom system to request assistance in the classrooms. The intercom button on the wall reaches the administrators and secretaries.

Ms. Schumacher spoke to and exchanged electronic mail with respondent after the incident. Ms. Schumacher contacted the District police after the incident. She admitted that this was not generally how she handled teacher discipline issues. She was aware of the fact that respondent had left other teachers to supervise Star, but felt

that this was inadequate due to the child's hand being stuck. Respondent had no history of leaving children unattended. Respondent had never been on a "needs to improve plan" of teacher development. Ms. Schumacher did not recommend to the Board that respondent be dismissed. She does not know who made this recommendation.

48. It is uncontested that respondent left a student in the classroom in order to take her other students to art class. Respondent's options included waiting until Star had extracted her hand, with the other students at best hovering and anxious to leave, or at worst upset at the delay, or cancellation of art that day. She could have asked another teacher to supervise Star while the child relaxed enough to extract her hand as before. She could have returned to her class to supervise Star while Star worked to extract her hand. She could have used the intercom to call for the assistance of an administrator or janitor.

Respondent made a reasoned decision, under pressure, to remove the other children who by their presence, were negatively affecting Star. Respondent arranged for the connecting door to an adjoining classroom to be left open. She arranged for a colleague who was familiar with Star to supervise the child. Respondent was credible in her stated belief that school policy did not allow her to leave her class in art due to the "no prep period" policy. She reasonably believed it would take Star 10 to 15 minutes to extricate her hand as before, after applying lotion and liquid soap. There is no evidence that she left the child in a dark room. There is no evidence she left the child in anger or to punish her. The evidence is that Star began crying when Ms. Farley attempted to manipulate the desktop and pencil cup. Other efforts to force extraction also distressed Star.

The question is whether, as a result of the choices she made, respondent's retention "poses a significant danger of harm to either students, school employees, or others who might be affected by [her] actions as a teacher." (*Morrison v. State Bd. of Ed.* (1969) 1 Cal.3d 214, 235.) Though respondent could have made different choices, her conduct does not constitute a risk of harm to children and staff such that dismissal is warranted.

Respondent's Teacher Performance Evaluations

49. *Stull Act Evaluations:* Under the Stull Act (Ed. Code, § 44600 et seq.), the governing board of a school district must establish a uniform system of evaluation and assessment of the performance of its certificated employees. Education Code section 44662, subdivision (b), provides that school districts must evaluate and assess the certificated employee's performance as it reasonably relates to: (1) the progress of pupils toward academic standards, (2) the instructional techniques and strategies used by the employee, (3) the employee's adherence to curricular objectives, and (4) the establishment and maintenance of a suitable learning environment, within the scope of the employee's responsibilities.

As a general rule, permanent certificated employees must be evaluated by a district “at least every other year.” (Ed. Code, § 44664, subd. (a)(1).) A permanent certificated employee who has received an “unsatisfactory evaluation” must be annually evaluated by his school district, and the district must provide the employee with recommendations as to areas of improvement in performance, “until the employee achieves a positive evaluation or is separated from the district.” (Ed. Code, § 44664, subd. (b).)

50. Although the District attached respondent’s March 31, 2005 “Final Evaluation” to her June 4, 2007 45-day notice, two more recent evaluations took place on March 12 and May 9, 2007. (Factual Finding 16.) Respondent submitted her last four evaluations as evidence of her quality of teaching as follows:

a. Observation Conference Checklist dated March 12, 2007. Respondent was reviewed by Assistant Principal Joy Meeker. In four of the five standards respondent received the highest score of “4.” In Standard II which measured her ability to create and maintain an effective environment for student learning, she received a score of “3.” It was noted that the ambient noise from the other pods was very distracting and several students were very defiant and disrespectful and interrupted her instruction. Respondent was noted to possess remarkable patience. The “Observation Summary” stated:

“[Respondent] is well loved by her current and former students. She has a manner that relates well to this group developmentally. She respects all students’ families and understands their diverse backgrounds. She maintains positive interactions with her students’ parents. Her odd sense of humor is appreciated by her students. [Respondent] uses a wide variety of idioms that the students relate to their classroom behavior. She is a wonderful teacher.”

Under Developing as a Professional Educator, it was noted that “[Respondent] works closely with her “podmates” to improve teaching and learning. They support each other in many ways, including behavioral issues.”

Under Specific Plan for Improvement, there are no remarks.

b. Final Evaluation dated May 9, 2007. Respondent was reviewed by Ms. Meeker. The comments were essentially identical to those made by Ms. Meeker in the March 12, 2007 Observation Conference Checklist.

c. Observation Conference Checklist dated August 25, 2008. Respondent was reviewed by Principal Schumacher. In four of the five standards respondent received the highest score of “4.” In Standard IV, which measured her ability to plan instruction and design learning experiences, she received a score of “3.” All comments were generally favorable.

Under Specific Plan for Improvement, there are no remarks.

d. Final Evaluation dated February 27, 2009. Respondent was reviewed by Principal Schumacher. In four of the five standards respondent received the highest score of “4.” In Standard IV, which measured her ability to plan instruction and design learning experiences, she received a score of “3.” Under Standard II, which measured her ability to create and maintain an effective environment for student learning, Ms. Schumacher noted that,

“In spite of a very wiggly class, students appeared to understand and enjoy each reading activity. ... She always brought them back to focus on the discussion at hand.”

Under Specific Plan for Improvement, there are no remarks.

51. At hearing, the District provided no explanation for why they attached a two-year-old Final Evaluation dated March 31, 2005, to respondent’s 45-Day Notice of Deficiency dated June 4, 2007, when a more recent Final Evaluation was available. It is noted that all of respondent’s subsequent evaluations contained the highest competency rating of “4” in several Standards areas.⁹ All of the evaluations are praiseworthy including those occurring after the alleged March 2007 incidents. None give notice to respondent of deficient performance respecting student supervision.

The notice requirement of Education Code section 44938, subdivision (a), is jurisdictional in nature. Since all of respondent’s evaluations were generally positive, no prejudice attaches to the district’s failure to attach her most recent evaluation dated May 9, 2007. The district’s conduct is, however, concerning and relevant to its handling and assessment of the matter as a whole.

52. It is also unclear why respondent was placed on administrative leave from March 23 to April 20, 2007, returned to receive a very positive Final Evaluation on May 9, 2007, and then served with a 45-Day Notice of Deficiency on June 4, 2007. It appears that she did exercise her right to comment by forwarding a letter to Assistant Superintendent Bulzomi, on June 11, 2007.¹⁰ (Factual Findings 17 and 18.)

⁹ Education Code section 44938, requires the district to include the evaluation to the 45-day notice of unprofessional conduct. The purpose of section 44938 is to give the teacher at least 45 days within which to correct her conduct. (*El Dorado Union High School v. Comm. on Professional Competence* (1985) 171 Cal.App.3d 324, 333.)

¹⁰ Education Code section 44031, requires that permanent employees be given notice and an opportunity to review and comment on information of a derogatory nature before such information can be entered into the employee’s personnel records. It is unclear when the investigation of the two March 2007 incidents was placed in respondent’s personnel file. What is clear is that she was placed on paid administrative leave pending investigation of the matters.

53. For the reasons stated above, the totality of circumstances do not support respondent's dismissal. Any other assertions put forth by the parties at the hearing and not addressed above are found to be without merit and are rejected.

LEGAL CONCLUSIONS

1. A school district which seeks to dismiss a permanent certificated employee from its employment bears the burden of proof and the standard of proof is by a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035; *Bevli v. Brisco* (1989) 211 Cal.App.3d 986.)

2. Section 44932, subdivision (a), provides in pertinent part that no permanent employee shall be dismissed by a school district except for one or more of the following causes, including for (1) immoral or unprofessional conduct, (5) evident unfitness for service, and/or, (7) persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him or her.

3. Although "unprofessional conduct" is identified in Education Code section 44932 as one of the eleven specific grounds for which a permanent employee may be dismissed, it appears to have a broader import than the others. The phrase refers generally to conduct demonstrating unfitness to teach. (*Fontana Unified School District v. Burman* (1988) 45 Cal.3d 208,216.)

4. In *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 235, the California Supreme Court held that "an individual can be removed from the teaching profession only upon a showing that his retention in the profession poses a significant danger of harm to either students, school employees, or others who might be affected by his actions as a teacher." The *Morrison* court recommended seven criteria be considered relevant in determining whether a teacher's conduct indicates that he or she is not fit to teach:

- a. The likelihood that the conduct may have adversely affected students or fellow teachers,
- b. The degree of such adversity anticipated,
- c. The proximity or remoteness in time of the conduct,
- d. The type of teaching certificate held by the party involved,

- e. The extenuating or aggravating circumstances, if any, surrounding the conduct,
- f. The praiseworthiness or blameworthiness of the motives resulting in the conduct,
- g. The likelihood of the recurrence of the questioned conduct, and
- h. 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.

(*Id.* at pp. 229-230.)

5. Evident unfitness for service means “clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies ... [The term] connotes a fixed character trait, presumably not remediable merely on receipt of notice that one’s conduct fails to meet the expectations of the employing school district.” (*Woodland Joint Unified school District v. Commission of Professional Competence* (1992) 2 Cal.App.4th 1429.)

6. In order for a teacher to be terminated under Education Code section 44932, subdivision (a)(7), for violations of law or rules, the violations must be “persistent” or motivated by an attitude of continuous insubordination.” (*Gov. Bd. of Oakdale Union School District v. Seaman* (1972) 28 Cal.App.3d 77, 81.)

7. As set forth in the Factual Findings and Legal Conclusions as a whole, respondent has not engaged in “immoral or unprofessional conduct” within the meaning of section 44932, subdivision (a)(1).

8. As set forth in the Factual Findings and Legal Conclusions as a whole, respondent’s conduct does not constitute “evident unfitness for service” within the meaning of section 44932, subdivision (a)(5).

9. As set forth in the Factual Findings and Legal Conclusions as a whole, respondent has not engaged in “persistent violation of or refusal to obey the school laws of the state or reasonable regulations” of the District within the meaning of section 44932, subdivision (a)(7).

10. The Commission has considered the *Morrison* factors in light of the record as a whole. When these factors are analyzed, respondent’s conduct does not pose a significant danger of harm to either students, school employees, or others who might be affected by her actions as a teacher. Based on the facts and circumstances of each incident and respondent’s consistent pattern of praiseworthy evaluations, the District did not establish that respondent is “unfit” to teach, unprofessional, or that her

conduct amounted to a persistent violation of or refusal to obey school laws or reasonable regulations. The misconduct alleged is either unsupported by the evidence and/or not serious enough to support dismissal. (Factual Findings 18, 24, 30, and 48.) (*Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208, 219.)

11. Consequently, the District did not sustained its burden of proving, by a preponderance of the evidence, respondent's unfitness to teach, for which it suspended her with pay on May 7, 2009. Respondent shall not be dismissed as an elementary school teacher from the Stockton Unified School District, pursuant to Education Code sections 44932, subdivisions (a)(1), (a)(5), and (a)(7) and 44944, subdivision (c)(1)(C).

ORDER

Elaine Shankman, respondent, is not dismissed as a permanent certificated employee of the Stockton Unified School District.

DATED: _____

ERIN CLARK, Member
Commission on Professional Competence

DATED: _____

GLADYS WILLIAMS, Member
Commission on Professional Competence

DATED: _____

DIAN M. VORTERS, Chair
Commission on Professional Competence