

**BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

OAH Case No. 2014051108

ALYSE BREITBACH, a Permanent
Certificated Employee,

Respondent.

DECISION

The Commission on Professional Competence (Commission) heard the above-captioned matter in Los Angeles on April 7, 8, 9, and 13, 2015. The Commission members were Susie Livingston, Heriberto Garza, and Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH). Complainant was represented by Mampre R. Pomakian, Associate General Counsel, Los Angeles Unified School District (LAUSD or District). Respondent Alyse Breitbach appeared with her attorney, Lawrence B. Trygstad, of Trygstad, Schwab & Trygstad.

The matter was submitted for decision on April 13, 2015. The Commission hereby makes its factual findings, legal conclusions, and order.

INTRODUCTION AND STATEMENT OF THE CASE

In this proceeding the District seeks the termination of one of its tenured teachers, Respondent Alyse Breitbach. Four statutory grounds were asserted as justifying termination: unprofessional conduct (Ed. Code, § 44932, subd. (a)(1); immoral conduct (Ed. Code, §§ 44932, subd. (a)(1), 44939); evident unfitness for service (Ed. Code § 44932, subd. (a)(5)); and, persistent violation of state laws or regulations, or the district's regulations, for the governance of schools (§44932, subd. (a)(7)).¹

In the main, it is alleged that Respondent, on five occasions acted with bad-temper, spoke to children and colleagues in a negative way, and failed to supervise students properly. In one case she allegedly encouraged one student to try to remove a recalcitrant student from the classroom, leading to an injury.

¹ All further statutory references are to the Education Code.

Respondent did not deny all of the allegations, and she provided evidence regarding the facts and circumstances of the events referenced in the Accusation, and otherwise provided evidence in support of her retention by the District. While the District proved some of the factual allegations against her, the Commission finds and concludes, unanimously, that cause for termination has not been established.

FACTUAL FINDINGS

The Parties and Jurisdiction

1. Complainant Justo H. Avila executed the Accusation in this matter while acting in his official capacity as Interim Chief Human Resources Officer of the District.
2. The District commenced this proceeding on April 3, 2014, when Complainant executed a Statement of Charges against Respondent. That Statement of Charges was filed with the District's governing board, which thereafter determined to terminate Respondent.
3. On April 22, 2014, the District gave Respondent written notice of its intent to terminate her, and served Respondent with a copy of the Statement of Charges. Respondent made a timely request for hearing, which led to the issuance of the Accusation. She then filed a Notice of Defense, and this hearing ensued. All jurisdictional requirements have been met.
4. Respondent is a certificated teacher in the District's employ, credentialed to teach middle school students. During the time relevant to this proceeding—May 2012 and September 2012—Respondent was assigned to teach at Virgil Middle School (Virgil) in Los Angeles, California.

Findings on the Factual Allegations Made Against Respondent

The May 25, 2012, Incident

5. On May 25, 2012, Respondent was working in her third period class, and the bulk of the students were not behaving or properly participating in class. The class was a difficult one, with a number of students who had behavior problems, or other issues, matters acknowledged by Respondent's supervisors.² Respondent was trying to get the class under control, but was having trouble doing so. She decided to reconfigure the room, so that two students would be at a table, instead of four at a table. She told the students to move the tables, but they did not. Respondent then started moving the tables. While doing so, she struck a student, R [REDACTED] with one of the tables, while Respondent was moving it.

² The problems in the class are noted in a conference memo, exhibit 14, and corroborated by the written statements of another teacher, Vernon Humphries, in exhibit Z.

6. The Accusation implies, by alleging that Respondent struck R [REDACTED] with the table "without provocation," that Respondent acted in some deliberate way to harm R [REDACTED]. While there was evidence that Respondent was angry or frustrated with the class when she was moving the tables around, there was no evidence that she was angry with R [REDACTED], who was a child who wanted to learn. Respondent did not act with intent to harm anyone; the event was an accident, as acknowledged by one of her supervisors.³ Respondent was likely hurrying the process of moving the tables—again, the students had not been helpful in the matter—but she is not culpable of misconduct.

The May 31, 2012 Incident

7. On the afternoon of May 31, 2012, after school was out, Respondent was in her classroom with two students, R [REDACTED] and D [REDACTED]. She was allowing them to do some make-up work so that they could have an opportunity to walk the stage at graduation, which was days away. The make-up work had to be completed on the 31st.

8. Another student, W [REDACTED], came to the classroom. He wanted Respondent to give him back his cell phone,⁴ which Respondent had confiscated earlier in the day because the student had misused the device in class.

9. There was some discussion between Respondent and W [REDACTED] regarding the phone, the upshot being that Respondent was not going to give it back, and W [REDACTED] was not going to leave without it. Respondent then said to R [REDACTED] that she would give him extra credit points for showing W [REDACTED] out. At hearing, Respondent testified that she said it in a light hearted way, not intending that R [REDACTED] try to take W [REDACTED] out of the room, but R [REDACTED] responded by going over to W [REDACTED] and then offering W [REDACTED] \$2.00 to leave the classroom.

10. Respondent spoke up, telling R [REDACTED] not to give W [REDACTED] money. R [REDACTED] tried to physically remove W [REDACTED] from behind, apparently trying to pick him up and move him out of the classroom. Respondent was about 15 feet away from the two boys. As R [REDACTED] grabbed W [REDACTED] Respondent got to her feet to move toward the boys, and verbally tried to stop what was turning into a wrestling match. Before she could get to the boys, they fell backwards, and R [REDACTED] hit his head on a cabinet as he fell.

11. Respondent saw that R [REDACTED] was hurt, and she left the classroom to find the school nurse, or some other help. She found the assistant principal, who went back to her

³ Notwithstanding that acknowledgement, the subsequent conference memo (ex. 14) at times has the tone of a response to an act of corporal punishment or assaultive behavior by Respondent that is not justified by the evidence.

⁴ There are references in the record to W [REDACTED]'s cell phone, but also a reference to a cell phone cover. In either event, W [REDACTED] wanted it back.

classroom with her. An ambulance was summoned, and R [REDACTED] was taken to a local hospital for an examination. He did not suffer a serious injury.

12. During the hearing, Respondent testified that she was not really serious when she told R [REDACTED] to take W [REDACTED] out of the classroom, but he tried to do so, and the situation escalated rapidly. She had been across the room, away from the two boys, and was unable to immediately intervene. Respondent acknowledged that her statement to R [REDACTED], that he could earn extra credit for taking W [REDACTED] out of the classroom, was absolutely inappropriate, and she acknowledged her very poor judgment in this matter.

The September 7, 2012 Conference with Ms. Kasubuchi and R [REDACTED] S.

13. In early September 2012, student R [REDACTED] S. was assigned to Respondent's classroom. She was not satisfied with R [REDACTED]'s behavior in class, and spoke to him about it. That did not bring improvement. She decided to set up a mediation with R [REDACTED], and a counselor, Ms. Tammy Kasubuchi (Kasubuchi), in the hopes of improving the situation.

14. Respondent and Kasubuchi had differing memories of how the meeting was set up, and whether there was one attempt or two attempts to go forward. Respondent's testimony that there were two attempts to meet with R [REDACTED] is credited, in part because she stated that was what occurred during an office conference that took place approximately two weeks after the events of September 7, 2012. (See ex. 18, at p. 138.)⁵

15. Respondent approached Kasubuchi on or about September 6 and told the latter that she was having behavior problems with R [REDACTED], and wanted help in curbing his misbehavior. She had supported the idea of R [REDACTED] serving as class president, a leadership position in the classroom. Respondent was under the impression that Kasubuchi was going to have R [REDACTED] come to the latter's office on September 6, and so Respondent went there. She sat around for a few minutes, and she and Kasubuchi spoke, and it was established that R [REDACTED] had not been summoned. It was decided they would try again on September 7.

16. The next day, Respondent again went to Kasubuchi's office. R [REDACTED] did not appear right away. He was then contacted and asked to come to the counselor's office.

17. When R [REDACTED] arrived, Kasubuchi began to have a conversation with him. He did not know why Kasubuchi had summoned him. She asked him about his summer, and asked him about his classes. During the hearing, she explained that she was trying to ascertain if there were any problems at home that might be impacting his behavior. Kasubuchi did not give such an explanation to Respondent prior to R [REDACTED]'s arrival; prior to the student's arrival, she did nothing to explain to Respondent how she wanted to handle the matter. Once R [REDACTED] arrived, Kasubuchi did not set the stage for the "mediation" with an explanation to the student and Respondent about why they were meeting, and how they

⁵ The page citation is to the Bates stamp number, as is the case with most of the citations that follow.

might work together on the problem.⁶ At the same time, she had not taken steps to arrange the space so that Respondent was part of the discussion; the latter was seated over by the door, away from the counselor and student. Because of her location, she was not clearly involved in the matter.

18. Kasubuchi began to talk to R[REDACTED] about his classes. He had stated that he was talking out in one of his classes, which was one of the reasons Respondent had wanted to involve Kasubuchi; the counselor told R[REDACTED] that he had been raising his hand in class for many years. At some point, Respondent spoke up and stated that she would like to be acknowledged. (Kasubuchi testified that Respondent stated that she—Respondent—felt she was not in the room.)⁷ Although Kasubuchi could tell that Respondent was upset, she began to talk to R[REDACTED] about his concerns, rather than responding to Respondent's need to feel part of the process. Respondent was frustrated, and said she was glad that someone, meaning Kasubuchi, had a good relationship with R[REDACTED]. At this point, Respondent had raised her voice. (Kasubuchi testified that Respondent stated to the counselor, "If you want to have a personal conversation with R[REDACTED] maybe I should leave," or words to that effect.) Respondent stated she had other things to do, such as parents to call, and she got up to leave.

19. A verbal exchange then followed wherein Respondent asked Kasubuchi if she had ever been a teacher, and when the counselor said she had, Respondent then asked if Kasubuchi had ever taught middle school. Kasubuchi was offended by such questions.

20. Respondent left the meeting. R[REDACTED] ultimately told Kasubuchi that he would like to transfer out of Respondent's class.

21. R[REDACTED] was made uncomfortable by the conflict between the two adults but he suffered no ill effect or harm. Kasubuchi was offended by Respondent's questions and comments, and the fact that Respondent had become loud and agitated.

22. (A) Respondent should not have raised her voice when she became frustrated by Kasubuchi's handling of the "mediation," and she should not have questioned the counselor regarding her teaching experience. Further, it was improper for her to behave that way in the presence of a student.

(B) In mitigation, it is found that although the counselor was supposed to be mediating a problem between Respondent and her student, she had not set the stage properly. She failed to tell R[REDACTED] why she wanted to see him, and she failed to talk to Respondent about how she was going to conduct the meeting. Recognizing that Respondent was upset because she felt she wasn't even in the room, let alone in the discussion, Kasubuchi did not remedy that problem, which tended to further alienate Respondent's role in the process.

⁶ Robert testified that Kasubuchi didn't say why the three were meeting.

⁷ This statement by Respondent was confirmed by R[REDACTED] in his written statement made shortly after the meeting. (Ex. 30, p. 044.)

Kasubuchi, who testified she had received mediation training at the University of LaVerne, but does not have a certificate in mediation, created a situation where there was a chance of conflict, and she increased that chance by ignoring Respondent's feelings.

The events of October 19, 2012

23. Two allegations are made regarding Respondent's behavior on October 19, 2012, and both involve Respondent's presence in the classroom, and alleged failure to supervise students. Some of the allegations are sustained, and some are not.

24. In the more serious incident, Respondent was in the rear doorway of her classroom, speaking to a special education teaching assistant, Ms. Charlotte Watley (Watley). The assistant was tasked with working with some of Respondent's students, often in a one-on-one capacity. Watley would sometimes work one-on-one in a classroom adjacent to Respondent's classroom.

25. While Respondent and Watley were talking, two students, J [REDACTED] and S [REDACTED], who were sitting across from each other, were tapping each other, thereby bothering each other. Their interactions escalated, with J [REDACTED] threatening to slap S [REDACTED]. He thought she was joking, but she did slap him, in the face. He retaliated by punching her. By his own admission, S [REDACTED] punched the girl two or three times. Respondent did not perceive the beginning of the conflict, but once she realized what was happening, she took steps to end it.

26. Respondent spoke to the students about the matter. S [REDACTED] was crying, because he was upset, but he told Respondent he was not hurt. He did not believe J [REDACTED] was hurt either. Respondent did not send either student to the nurse's office, though J [REDACTED] went to the nurse later in the day, during sixth period. Respondent did not report the altercation to an administrator. She did spend time talking to the class about the incident.

27. It was not established, as alleged, that the altercation took place while Respondent was out of the classroom. Watley's credible testimony established that Respondent was in the doorway, and that this was a typical way that a teacher would communicate with another adult while class was otherwise in session. Testimony from another teacher established that this was also how teachers would speak with administrators who might come by the classroom. It was necessary for Respondent and Watley to speak in

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this way because they were talking about the performance of some of the students, and such conversations needed to be confidential, and therefore away from immediate earshot of students.⁸

28. On that same day, as the fourth period began, Respondent was not in her classroom for a few moments. She was observed by Mr. Garcia, Assistant Principal, and Mr. Thompson, a coordinator, to be about five yards away from the door of her classroom, in the hallway. Respondent was there because she had stepped out of her classroom to make sure that the doors to the adjacent classroom—the room typically used by Watley—were locked. No untoward incidents occurred while Respondent was in the hallway and not in her room. However, she should not have left her students unattended, even for a brief time.

Other Matters

29. Respondent had office conferences with her supervisors; they followed the incidents above. She was allegedly issued a Notice of Unsatisfactory Acts in February 2013 and a second in April 2013. (Accusation, ex. 6, p. 3.) However, the Notices were not received in evidence, nor were the Stull evaluations that should accompany them pursuant to section 44938. There is no evidence of improper conduct after February and April 2013. The office conference memos are denominated as memos, and typically state, at the end of the document, that further problems with Respondent might lead to disciplinary steps, including the issuance of a Notice of Unsatisfactory Acts. (E.g., ex. 14, at p. 065.)

30. Respondent has been responsive to direction given to her by her supervisors. For example, after R [REDACTED] was struck by the table that Respondent was moving, the Assistant Principal, Mojgan Moazzez, advised Respondent to take an anger management class, which she did.

31. By her training and education, Respondent is a very qualified teacher. She was a Fullbright Scholar, and with that scholarship taught for a year in Turkey. She wanted an assignment such as Virgil, and was committed to doing well by her students. Respondent was assigned to leadership roles at Virgil. She was ESL/English Department Chair, and a member of the Advanced Global Learning Academy Team. Character witnesses who appeared on her behalf credibly testified that Respondent was hard-working, dedicated to her profession and calling, caring of her students and caring that they receive a solid education. They also established that she always stood ready to assist the other teachers on the campus in any way she could, so that the educational needs of the students would be met.

⁸ Written statements obtained from some of the students differ regarding Respondent's location, some putting her "outside" the door while talking to another teacher. Notably, one student wrote that Respondent "was talking to another teacher in the door." (Ex. 37.) One student who placed Respondent outside the room confirmed she was speaking to Watley, identified as "Ms. Charlot." (Ex. 34.)

32. (A) Respondent had received positive Stull evaluations for many years prior to the events of May and September 2012. In many ways, the evaluations confirm the testimony of Respondent's character witnesses, including those who wrote letters or declarations in her support.

(B) For example, in March 2009, Respondent received an evaluation that stated that she met standard performance in every area. All comments were positive. The 2009 evaluation stated that Respondent "is well planned and set rigorous goals for her students. Her planning is evidenced by differentiation of instruction and the use of multiple learning strategies to foster student engagement." (Ex. I, p. 1.) The evaluator also commented that Respondent "sets high professional standards for herself as evidenced in her planning and instruction" and that "she shows a commitment to her students and their learning." She had not been tardy once. (*Id.*, p. 2.)

(C) Respondent's June 2011 evaluation was also exemplary. As in 2009, Respondent met standards in every category, and the comments provided by the evaluator were quite positive. She was noted to provide "structure yet freedom" for students to engage in problem solving, and described as "always well-prepared for her lessons." In the general area of classroom performance, the comment pronounced her "a superior teacher." (Ex. DD, p. 1.) Regarding professional development, Respondent was described as "very active in sharing newly acquired strategies and information regarding children with her team. She proactively organizes the team to utilize the same rules, strategies, and is encouraged to continue to draw upon the strength of the team." (*Id.*, p. 2.)

(C) Near the end of the 2011 evaluation, under the subject of overall evaluation, the evaluator wrote: "Commendations: Ms. Breitbach is passionate about lesson study. She has worked tirelessly to build accountability with in [sic] the English Department. She contributed significantly to building ESL teaching capacity." (*Id.*)

LEGAL CONCLUSIONS

Legal Conclusions of General Application:

1. The Commission has jurisdiction to proceed in this matter, pursuant to Education Code section 44944, and Factual Findings 1 through 4.

2. "Unprofessional conduct" as used in section 44932, subdivision (a)(1), may be defined as conduct which violates the rules or ethical code of a profession or is such conduct that is unbecoming of a member of a profession in good standing. (*Board of Education v. Swan* (1953) 41 Cal.2d 546, 553.) However, the conduct in question, to amount to unprofessional conduct, must indicate unfitness to teach. (*Perez v. Commission on Professional Competence* (1983) 149 Cal.App.3d 1167, 1174.)

3. "Evident unfitness for service" as used in section 44932, subdivision (a)(5), properly means "clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies." Unlike "unprofessional conduct," "evident unfitness for service" connotes a fixed character trait, presumably not remediable merely on receipt of notice that one's conduct fails to meet the expectations of the employing school district. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, at 1444.)

4. "Immoral conduct," of which Respondent has been accused, is not confined to sexual matters. It has been defined to mean that which is hostile to the welfare of the general public and contrary to good morals. It includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, and dissoluteness. Or, it can be conduct that is willful, flagrant, or shameless, conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare. (*Board of Education of the San Francisco Unified School District v. Weiland* (1960) 179 Cal. App.2d 808, 811 (*Weiland*); *San Diego Unified School Dist. v. Commission on Professional Competence* (2011) 194 Cal.App.4th 1454, 1466.)

5. In order for a teacher to be terminated under section 44932, subdivision (a)(7), for persistent disobedience of applicable rules and regulations, it must be established that there has been continuous and constant refusal to obey, or behavior motivated by an attitude of continuing insubordination; a single instance of disobedience is insufficient. (*Governing Bd. of the Oakdale Union School Dist. v. Seaman* (1972) 28 Cal.App.3d 77, 81-82.)

6. Even where unprofessional conduct, immoral conduct, evident unfitness for service, or refusal to follow rules and regulations is or are established, it must also be established that such conduct renders the Respondent unfit to teach. (*Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229-230 (*Morrison*); *Fontana, supra*, 45 Cal.3d 208; *Woodland Joint Unified School District v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444-1445; See *Bourland v. Commission on Professional Competence* (1985) 174 Cal.App.3d 317, 321.)

7. (A) It is settled that the trier of fact may "accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted." (*Stevens v. Parke Davis & Co.* (1973) 9 Cal.3d 51, 67.) The trier of fact may also "reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material." (*Id.*, at 67-68, quoting from *Neverov v. Caldwell* (1958) 161 Cal.App.2d 762, 767.) Further, the fact finder may reject the testimony of a witness, even an expert, although not contradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.) And, the testimony of "one credible witness may constitute substantial evidence," including a single expert witness. (*Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, at 1052.)

(B) The rejection of testimony does not create evidence contrary to that which is deemed untrustworthy. That is, disbelief does not create affirmative evidence to the contrary of that which is discarded. That the trier of fact may disbelieve the testimony of a witness who testifies to the negative of an issue does not of itself furnish any evidence in support of the affirmative of that issue, and does not warrant a finding in the affirmative thereof unless there is other evidence in the case to support such affirmative. (*Hutchinson v. Contractors' State License Bd.* (1956) 143 Cal.App.2d 628, 632-633, quoting *Marovich v. Central California Traction Co.* (1923) 191 Cal.295, 304.)

Legal Conclusions Pertaining to the Specific Allegations of the Accusation:

8. While two of Respondent's acts might be deemed unprofessional conduct, i.e., telling one student to get another out of the classroom, or engaging in an argument with a counselor in front of a student, Complainant cannot establish that Respondent may be terminated for unprofessional conduct. This is because Complainant has not established that Respondent was served with a proper Notice of Unprofessional Conduct and then provided with an opportunity to cure her unprofessional conduct after receiving such a notice. (Factual Finding 29.) This is fatal to the unprofessional conduct claim. (*Tarquin v. Commission on Professional Competence* (1978) 84 Cal.App.3d 251; *Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1446.) Further, there is no evidence of unprofessional conduct occurring after February 25, 2013.

9. It was not established that Respondent is evidently unfit for service within the meaning of section 44932, subdivision (a)(5), as further defined in Legal Conclusion 3. It was not established that she has fixed character traits that make her unsuitable for teaching. The record establishes many years of good service to the District and its students. (Factual Finding 32.) And, her temperament was described as positive by witnesses who have worked with her. (Factual Finding 31.) In this case, there was one incident when Respondent lost her composure—the incident with the counselor—and one where frustration may have played a part. Two such incidents do not establish a defect in temperament, and given the testimony and statements of teachers familiar with her, and her evaluations, these two matters appear aberrant.

10. It was not established that Respondent engaged in immoral conduct within the meaning of sections 44932, subdivision (a)(1) and 44939, and the cases cited in Legal Conclusion 4. Even the most serious incident—asking R [REDACTED] to get W [REDACTED] out of the classroom—did not involve immoral conduct, only poor judgment. The same can be said for the incident involving Ms. Kasubuchi.

11. It was not established that Respondent has engaged in persistent disobedience of applicable rules and regulations, in part because it was not established that Respondent's behavior was motivated by an attitude of continuing insubordination, nor has there been a continuous refusal to follow rules and regulations. In sum, three or four incidents spread across parts of two semesters, in a career spanning several years, do not establish persistent

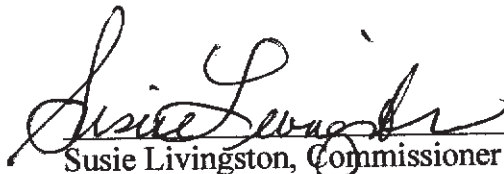
disobedience. At the same time, her attitude toward her supervisors during office conferences, and during the hearing, indicates that Respondent does not have an insubordinate attitude.

12. The Commission agrees unanimously that grounds for termination have not been established, and that consideration of the *Morrison* factors is therefore not necessary. This is not to say that the Commission condones all of Respondent's acts. Plainly, she used very poor judgment in her interaction with R [REDACTED] and W [REDACTED], and allowing herself to lose her composure with Kasubuchi is disappointing, notwithstanding the mitigating circumstances. The Commission does not deem these two incidents, and a brief absence from her classroom to be sufficient cause to terminate Respondent, especially in light of her positive attributes and contributions to Virgil and its students.

ORDER

The Accusation against Respondent Alyse Breitbach is hereby dismissed, and she shall not be terminated as a certificated employee of the Los Angeles Unified School District.

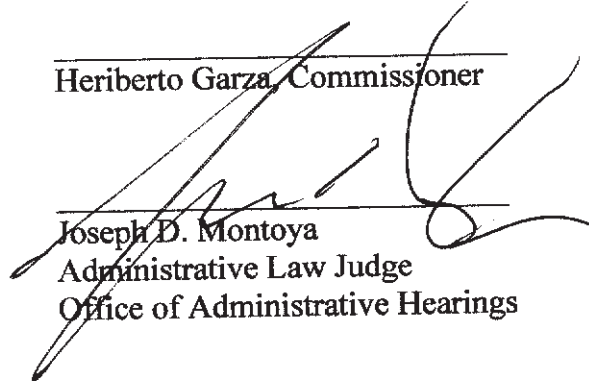
Date: July 14, 2015


Susie Livingston, Commissioner

Date: _____


Heriberto Garza, Commissioner

Date: 7/21/15


Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings

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12. - The Commission agrees unanimously that grounds for termination have not been established, and that consideration of the *Morrison* factors is therefore not necessary. This is not to say that the Commission condones all of Respondent's acts. Plainly, she used very poor judgment in her interaction with Richy and Winston, and allowing herself to lose her composure with Kasubuchi is disappointing, notwithstanding the mitigating circumstances. The Commission does not deem these two incidents, and a brief absence from her classroom to be sufficient cause to terminate Respondent, especially in light of her positive attributes and contributions to Virgil and its students.

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