

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

In the Matter of the Dismissal of:

OAH Case No. 2013060023

JAVIER RODRIGUEZ, A Permanent  
Certificated Employee,

Respondent.

**DECISION**

The Commission on Professional Competence (Commission) heard the above-captioned matter in Delano, California on November 12 through 14, 2013. The Commission members were Karen Schuett, Heather Richter, and Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH).

Delano Union School District (District) was represented by Edward Reitkopf, Atkinson, Andelson, Loya, Ruud & Romo. Respondent Javier Rodriguez (Respondent) appeared with his attorney, James McBreaty, Tuttle and Taylor.

In this proceeding, the District seeks to terminate Respondent as a teacher, pursuant to provisions of the Education Code. Each party having offered evidence and argument, and the case having been submitted for decision on November 14, 2014, the Commission hereby makes its factual findings, legal conclusions, and order.

**FACTUAL FINDINGS**

*The Parties and Jurisdiction*

1. (A) Complainant Robert Aguilar filed the Accusation in the above-captioned matter in his official capacity as Superintendent of the Delano Union School District (District). Complainant signed the Accusation on May 24, 2013.

(B) On May 7, 2013, the Governing Board of the District adopted, by resolution, a written Statement of Charges (SOC), which alleged that cause existed to suspend and dismiss Respondent. The SOC gave Respondent notice that he would be dismissed within 30 days of the SOC unless he requested a hearing. The Accusation incorporates, by reference, the SOC.

2. Respondent is a permanent certificated employee of the District. At the time the SOC was adopted, he was assigned to teach in the second grade. Respondent made a timely request for hearing in response to the SOC, and after the Accusation was filed, he submitted a Notice of Defense, denying the charges. All jurisdictional requirements have been met.

*Findings on the Charges Alleged Against Respondent*

3. Respondent has been a teacher with the District since 1996, assigned to elementary schools. It appears he became a permanent teacher in 2006.<sup>1</sup> At the time of the events in question, he was teaching a second grade class at Harvest Elementary School.

4. (A) It was not established, as alleged, that Respondent whispered “I love you” to female students in his classroom, while class was in session.

(B) Two students testified to such statements. One asserted that he made the statement 10 times in one day, which did not appear credible to the Commission. The other witness testified to one such statement. It is concluded that the student witnesses may have misapprehended Respondent's statements, as the District's investigation found that one girl reported that Respondent said “I love your work.”

5. When meeting with District administrators about this matter, Respondent denied making those statements, and he did so during the hearing. It was not established that he was dishonest in his statements.

6. It was not established, as alleged, that Respondent rubbed the back of one of his female students, or that he touched any student in an inappropriate manner.

7. (A) It was established that on one occasion when an earthquake drill was held, Respondent went under his desk, and that several children, including one girl, went under that desk as well. During that time, Respondent did not touch any of the children. It was not established that this was inappropriate behavior on his part. As noted by his supervisor, the teachers are to model the behavior of getting under a desk if there is an earthquake.

(B) When the alarm sounded for an earthquake drill, students and teachers were to immediately take cover, under a desk. Respondent had an “L” shaped desk that was large enough to cover him, and the children, without bringing him into contact with them. Although it was alleged that Respondent crawled under the desk with students during more than one earthquake drill, the evidence only established one such incident.

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<sup>1</sup> This is inferred from the series of evaluation forms that make up exhibits H through O.

8. It was established that at least one female student called Respondent “grandpa” to his face. He had not encouraged her to do so. On the day that the student called him grandpa, he later spoke by telephone to the child's parent about the matter, and she did not object to her daughter referring to him in that way. On some other occasions, other children referred to him by that title.

### *Other Findings*

9. (A) Respondent has been a teacher in the District for 18 years. His most recent supervisor described him as an average teacher. Copies of written evaluations were received in evidence. In January 2001, when the District used a four-tier evaluation system (1: Unsatisfactory, does not meet standards; 2: needs improvement; 3: satisfactory, meets standards; or 4: strong, exceeds standards), Respondent received 3's and 4's.

(B) After 2001, the District used a three-tier evaluation system (1: unsatisfactory, does not meet standards; 2: Needs improvement; or 3: satisfactory, meets standards). Thus, whether or not Respondent has exceeded standards since 2001 cannot be determined. However, Respondent received written evaluations in November 2001, February 2002, October 2002, February 2003, October 2003, February 2004, February 2006, and February 2009, and in every instance, save one, he received a score of 3. The one exception was in October 2002, when he was given a 2 in the criteria “meets timelines appropriately.” (Ex. L.) Thereafter, through February 2011, he was deemed to meet standards as to timeliness.

(C) In February 2011, Respondent was again evaluated, and he received a score of 2 in five criteria; the balance of the scores were 3's. Respondent wrote a memorandum to his supervisor, protesting the scores.

10. (A) A number of character witnesses testified on Respondent's behalf, including two teachers, one of whom helped train Respondent. The character witnesses described Respondent as honest, responsible, and dedicated to teaching and to improving his community. One of the teachers who testified for Respondent is a Bishop in the Church of Latter Day Saints, and established that Respondent has, for a significant period of time, been deeply involved in the church, and that has included teaching young children. That witness, Mr. Mayberry, made clear that there has not been even a hint of impropriety by Respondent, who has operated on Sunday's in a context similar to the elementary school classroom.

(B) The other teacher witness has known Respondent, having worked with him at two different sites. Now retired, she testified that he had a reputation at Harvest Elementary as a good teacher, one that she would tell parents to request. She had complete confidence in his honesty and integrity.

(C) Giving consideration to the potential biases of Respondent's character witnesses, and especially his wife, the Commission finds the testimony of those witnesses to be credible; this is an evaluation of the demeanor of the witnesses, as well as the content of

their testimony. Based on that testimony, it appears that Respondent is a caring individual, quite unlikely to pose a threat to any children.

11. Complainant's expert, Susan Napolitano, Ph.D., is a licensed psychologist, practicing clinical and forensic psychology. She has substantial experience in the treatment and evaluation of children. In her opinion, if the charges were true—that Respondent whispered “I love you” to young children—such conduct would constitute a gross violation of adult-child boundaries. She further opined that such conduct could be consistent with an effort to “groom” a child for subsequent abuse. Such extreme misconduct has not been established in this case.

12. Respondent asserted that the District had proceeded in this matter because he had become a representative for the union that represents teachers in the District, or because he is at or near the top of the pay scale for elementary school teachers. There is no evidence that the District proceeded with such improper motives. Instead, the record establishes that the District had adequate cause to pursue the matter, so that the claims could be tested in a hearing.

#### *The Morrison Factors*

13. Where there is conduct that might justify termination of a teacher, an examination must be made of whether or not that conduct indicates that the Respondent in question is unfit to teach. This requirement was first set forth in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229. There the Supreme Court held that factors that may be examined to determine fitness include the likelihood that the conduct may have adversely affected students or fellow teachers; the degree of such adversity anticipated; and, the proximity or remoteness in time of the conduct. Other factors may include the type of certificate held by the teacher; extenuating or aggravating circumstances; the praiseworthiness or blameworthiness of the motives resulting in the conduct; the likelihood that the conduct in question will recur; and, the extent that discipline will cause an adverse or chilling impact on the constitutional rights of the teacher involved, or other teachers.

14. (A) *Adverse consequences on students and teachers, and the degree thereof:* There was evidence that one of the two students was uneasy due to Respondent's statements, while the other was not. There was no evidence that there was any deleterious consequences for the children that got under Respondent's desk during the earthquake drill, or from one or more referring to him as “grandpa.” There was no evidence of adverse consequences for teachers.

(B) *Proximity in time:* This conduct occurred in the period 2011 to 2013. Thus, the conduct is recent.

(C) *Type of certificate held by Respondent:* Respondent's credential was not established by the record, but it is inferred that he holds all credentials and qualifications necessary to teach elementary students in California.

(D) *Likelihood of recurrence*: Respondent's conduct, which at most flows from poor judgment, appears unlikely to recur, especially with proper directives regarding maintenance of boundaries.

(E) *Implication of constitutional rights*: No constitutional rights, of either the Respondent or other teachers, are implicated if Respondent is terminated for the conduct described in this decision.

(F) *Extenuating or aggravating circumstances*: There are no extenuating or aggravating circumstances to consider.

## 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 and 2.

2. “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.)

3. “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.)

4. 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.)

5. “Dishonesty” needs no especial definition, as it is an ordinary term known to the members of the Commission. However, within the context of these proceedings, not every

act of dishonesty will constitute grounds for discipline. (*Fontana Unified School District v. Burman* (1988) 45 Cal.3d 208 (*Fontana*).)<sup>2</sup>

6. Even where immoral conduct, evident unfitness for service, dishonesty, or refusal to follow rules and regulations 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; *Fontana, supra*, 45 Cal.3d 208; *Woodland Joint Unified School District v. Commission on Professional Competence (Zuber)* (1992) 4 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 Specific To This Proceeding*

8. It was not established that Respondent engaged in immoral conduct, based on Factual Findings 3 through 11, and Legal Conclusion 3.

9. It was not established that Respondent engaged in persistent violations of the District's rules and regulations, based on Factual Findings 3 through 11, and Legal Conclusion 4. While the District does have Professional Standards Pertaining to Conduct

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<sup>2</sup> As stated in *Fontana*, “Dishonest conduct may range from the smallest fib to the most flagrant lie. Not every impropriety will constitute immoral or unprofessional conduct, and not every falsehood will constitute ‘dishonesty’ as a ground for discipline.” (*Fontana, supra*, 45 Cal.3d at 220, fn. 12.)

with Students, which include maintenance of proper boundaries, to the extent that any occurred, they were not of the persistent and continuous type that would establish cause to terminate.

10. It was not established that Respondent is evidently unfit to teach, based on Factual Findings 3 through 11, and Legal Conclusion 2.

11. It was not established that Respondent was dishonest, based on Factual Findings 3 through 11, and Legal Conclusion 5.

12. The Commission observes that while Respondent's conduct did not rise to the level where he acted immorally, it does appear that at times he was somewhat too familiar with the children he taught. What may be appropriate when he interacts with his grandchildren is not necessarily appropriate in and around the classroom. And, while teachers may sometimes speak to their students in an affectionate manner, the greatest circumspection must be used so as to avoid confusion and the crossing of appropriate boundaries. Respondent should be so counseled and directed.

#### ORDER

The Accusation is dismissed. Respondent Javier Rodriguez will not be dismissed from his position as a certificated employee of the Delano Union School District

Date: \_\_\_\_\_

\_\_\_\_\_  
Joseph D. Montoya  
Administrative Law Judge  
Office of Administrative Hearings

Date: \_\_\_\_\_

\_\_\_\_\_  
Heather Richter

Date: \_\_\_\_\_

\_\_\_\_\_  
Karen Schuett