

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS AND A
COMMISSION ON PROFESSIONAL COMPETENCE
SIERRA SANDS UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Dismissal of:

PETER KONOPAK,
A Permanent Certificated Employee,

Respondent.

OAH No. 2015110258

DECISION

The Commission on Professional Competence heard this matter on March 9 through 11, 2016, in Ridgecrest, California. The Commission consisted of Vince J. Rosato, Charley Clark, and Matthew Goldsby, Administrative Law Judge with the Office of Administrative Hearings and Commission Chairperson (Commission).

Dean Adams, attorney at law, appeared and represented complainant David Ostash, Assistant Superintendent, Human Resources, with the Sierra Sands Unified School District (District).

Daniel B. Rojas and Eli Naduri-Weissman, attorneys at law, appeared and represented respondent Peter Konopak.

At the outset of the hearing, respondent made an oral motion to exclude evidence pertaining to respondent's arrest. After hearing oral argument, the motion was denied.

At the conclusion of the hearing, complainant's Request for Protective Order Sealing Confidential Records was taken under submission. The request was granted in part and the protected names list was sealed in an envelope with a copy of the Sealing Order affixed to the exterior of the envelope. The court reporter was instructed to use initials in the place of those names on the protected names list in the preparation of any transcript. The parties had previously redacted the last names of the protected parties on all documentary evidence presented during the hearing. Except as provided in this order, the request to seal exhibits was denied.

The parties submitted the matter for decision at the conclusion of the hearing on March 11, 2016.

FACTUAL FINDINGS

1. Complainant brought the Statement of Charges in his official capacity. Respondent timely submitted a Demand for Hearing.

2. Respondent is a permanent certificated employee of the District currently assigned as a fifth grade teacher at Las Flores Elementary School (Las Flores). The District first employed respondent in 1987 and observed and evaluated his performance on a regular basis throughout his employment. Respondent consistently performed to the satisfaction of the District and his evaluators consistently recommended reemployment. He has no record of employment discipline.

3. On May 18, 2015, respondent began distributing papers to his students in order to administer a benchmark assessment in mathematics. The students had previously completed the benchmark assessment electronically, but the results failed to process. When a student commented out loud that he thought there would be no further testing, respondent threw the papers he was holding onto the floor and said, "I lied."

4. Immediately after this incident, respondent noticed that his student AM was opening and closing his desk. Respondent had previously established a rule prohibiting eating in the classroom. Respondent had repeatedly reprimanded AM for eating in the classroom in violation of the established rule. Respondent credibly testified that he believed that AM was again violating the rule against eating. Respondent approached AM, put his hands on the corner edges of the desk lid, and slammed the desk down at least five successive times while reprimanding AM for eating in the classroom.

5. Respondent realized that these two successive outbursts were inappropriate and caused fear among his students. Respondent called the principal and asked her to come to the classroom. When she arrived, respondent said "I was supposed to be the adult in the room and I have not behaved as an adult." In the presence of the principal and the students, respondent apologized for his behavior. In his testimony, respondent acknowledged that "it's not what teachers do" and stated that he regretted his conduct.

6. At 9:01 p.m. on May 18, 2015, the parent of one of the students in respondent's classroom sent the District an email to complain about respondent (EM Complaint). The parent reported that respondent's emotional and physical outburst caused her son EM to become upset. She wrote "our son reported spending his entire morning recess in tears unable to calm down and return to the classroom. (Ex. 1.) This incident was "the last straw," following perceived unfair tracking system of her son's progress and reports of respondent's use of foul language in the classroom. EM reported that respondent frequently said "damn" and "pissed off" in the presence of his fifth grade students. The District's secretary gave assurances to the parents that the EM Complaint would be reviewed and investigated.

7. On May 19, 2015, all Las Flores fifth graders went on a field trip to Long Beach. Respondent organized the field trip and students raised money for the event by

selling candy bars. At 4:30 a.m., all participants boarded a bus in Ridgecrest, California, and drove approximately four hours to Long Beach, California. At approximately 10:00 a.m., the participants boarded a boat for a whale watching tour. Once out on the open sea, many students and parents became nauseous. Respondent helped sick participants get to the side of the boat, where they vomited overboard. Respondent got water to help the ill members freshen up, and he tried to comfort his students by telling them, “You are now officially sailors.”

8. Respondent testified that EH got “very ill” on the boat. EH is a student in respondent’s classroom with known medical complications. On March 20, 2015, respondent observed that EH was flush and feverish. Respondent sent EH to the school secretary for observation. EH was taken directly to the hospital where he underwent surgery to remove his appendix. EH was absent from school for three weeks while he recovered from surgery and respondent arranged for the class to send EH a get-well card. The surgeon advised EH to avoid physical activity during his recovery. Surgical staples were subsequently removed from three incisions made in EH’s abdomen.

9. On the boat, EH suffered nausea and vomited. Once back on land, EH and the other ill boat riders recovered sufficiently to continue the field trip. The group went to the Long Beach Aquarium in the afternoon and then returned to Ridgecrest by bus, arriving at approximately 11:30 p.m.

10. The next day was May 20, 2015, the last full day of the school year. Near the end of the school day, EH was in the front of the classroom with his friend AG. They started play fighting, standing face to face, two feet apart, and waving their arms and fists towards each other in a mock boxing fashion. Within five seconds, respondent observed the boys, briskly walked to them, and stated, “We don’t hit here.”

11. There was a conflict in the evidence as to what happened next. In the Statement of Charges, the District alleges “[respondent] then closed [his] hand into a fist and punched EH in the stomach with an underarm swing, near an area of his stomach where EH had recently undergone surgery.” (Ex. 12.) The District presented the following evidence in support of its allegation:

(A) EH testified that respondent walked up to him, said “Don’t punch each other,” and then, with a clenched fist with his knuckles facing up, and punched him in the stomach with a straight downward jab. In E.H.’s opinion, the punch was not an accident or an act of trying to intervene. EH testified that he and AG were not touching each other as the play-fought. He testified that respondent was mad at the time and yelled at everybody after the punch. He testified that he did not believe he was breaking the rules and that he had never play fought before. With respect to the May 18 incident, he testified that he saw respondent “smash” AM’s hands in his desk, then clarified that he reached the conclusion based on AM’s reaction to the desk being slammed.

(B) AG testified that respondent walked up, said in a normal voice “no punching allowed,” then punched EH with his fist in an uppercut position with the knuckles

facing the floor. He testified that respondent used medium force and that EH “bent over and started crying.” He testified that respondent was in a playful mood when he punched EH. He testified that he saw respondent hit AM in the face when he slammed the desk two days earlier. He acknowledged that he and EH engaged in play-fighting before the incident.

(C) AM testified that he was sitting in the back of the room and saw respondent punch EH in a straight jab with a loose fist. He testified that the punch could have been an accident. AM could not recall respondent’s mood at the time of the incident.

(D) JG testified that he was standing next to EH and AG when respondent walked up to them, said “stop acting like you’re fighting,” and then punched EH with his fist in an uppercut position. He testified that respondent used medium power and that it appeared to hurt EH because EH was on the floor crying.

(E) Principal Susan Marvin testified that she interviewed the above students about the incident and took contemporaneous notes of their comments. According to her notes, students made the following observations: “[respondent] punched [EH] with a fist . . . [respondent] had a closed fist and pushed his arm forward, underarm . . . [JG] described it as a punch straight forward, with an underarm swing.” (Ex. 3.)

(F) Complainant testified that he interviewed students on June 1, 2015, while Principal Marvin took contemporaneous notes. According to those notes, students made the following observations: EH reported that respondent “looked me in the eye and told me not to punch people. And then he punched me. Straight on and with a fist . . . I tried to walk away and he punched me . . . He used a fist and punched me straight on.” (Ex 3.)

(G) Respondent did not refer either EH or AG to the principal’s office for misconduct. He did not immediately report the incident to Principal Marvin. Respondent had ample opportunity to explain that the physical contact was accidental, when Principal Marvin approached him the day of the incident, when complainant interviewed him with a union representative present, and when his attorney furnished a written statement in lieu of an in-person *Skelly* meeting. However, respondent did not characterize the incident as an accident until opening argument at the hearing more than nine months after the incident.

(H) When respondent saw that EH was crying, he offered EH to hit him back. Although respondent testified that he made the request as a means to gauge the force of the blow, the offer of reciprocity raises an inference that respondent’s strike was intentional.

12. Respondent denied the allegation that he punched EH. He admitted striking EH accidentally in his effort to intervene and separate the boys. The following evidence supports his denial of the allegation:

(A) Respondent testified that he saw EH hit AG in the stomach, that he believed the two boys were seriously in conflict, and that the altercation would escalate. Respondent demonstrated that he quickly thrust his right hand between EH and AG with his

fingers clenched in a loose fist, intending to separate the boys, and accidentally hit EH in the process.

(B) Respondent is 6 feet 2 inches tall and weighs 245 pounds. EH is 4 feet 7 inches tall and weighs 70 pounds.

(C) Immediately before the strike, respondent made the comment, “We don’t hit here,” a statement inconsistent with the act of punching.

(D) Immediately after the strike, according to Principal Marvin’s contemporaneous notes, students made the following observations: “[EH] grabbed his stomach and closed his eyes . . . [EH] started crying . . . [EH] went to the water fountain and was holding his stomach . . . [EH] went to his desk and put his head down and was crying . . . he put his head down on one arm with the other arm holding his stomach.”

(E) The conduct described in Factual Finding 12(C) and (D) is not consistent with a man of respondent’s size “punching” a boy of EH’s size. No evidence was presented to show that EH was propelled backwards, sustained any actual injury to his ribs or organs, or suffered any diaphragm spasm, commonly known as “getting the wind knocked out you” and commonly occurring after a sudden blunt force to the abdomen. Other than crying and holding his stomach, EH exhibited no physical signs of trauma that would be expected if a man of respondent’s size punched a boy of EH’s size with a full-force straight jab or uppercut.

(F) EH was more sensitive in the abdomen than the average 5th grade student, having undergone an appendectomy eight weeks before the incident, and vomited the day before the incident.

(G) On June 16, 2015, EH was examined by a medical doctor who was informed of the purported punch. After examining his abdomen, the doctor concluded “There is no pain, no tenderness, no peritoneal sign, no guarding . . . no objective findings on physical examination to suggest any pain, tenderness or discomfort . . . I do not detect anything abnormal on examination and he appears to have recovered nicely from his surgery.” (Ex. A.)

13. The common meaning of the verb “punch” is “to hit (someone or something) hard with your fist” or “to strike with a forward thrust especially of the fist.” (Merriam-Webster Online Dictionary (2015).) The Commission considers the verb to involve a willful act, done with the intent to cause harm. The evidence fails to establish that respondent punched EH in the plain meaning of the verb. Although four students testified that they observed respondent “punch” EH, their versions and demonstrations were inconsistent and respondent’s evidence outweighs the evidence in support of the allegation. Their observations of the AM desk slamming incident were inaccurate, giving rise to doubt about the accuracy of their observations of the EH incident. However, the Commission makes the following findings based on the evidence presented:

(A) Respondent willfully and wrongfully thrust his hand between EH and AG.

(B) Respondent hit EH in the abdomen with the back of his right hand, causing EH to suffer pain.

(C) Respondent would not have hit EH in the abdomen and caused EH to suffer pain if respondent had followed established District procedures to remediate conflict or horseplay.¹

14. After the class adjourned at 2:15 p.m. on May 20, 2015, respondent did not report the incident to the District because he was assigned after-class duty to escort students to the designated pick-up area. At 2:30 p.m., Principal Marvin began receiving reports from students, accusing respondent of punching EH.

15. After completing his after-class duty, respondent then went directly to a staff meeting, which lasted more than one hour. Principal Marvin was also attending the staff meeting, but respondent did not tell her about incident during the meeting because he believed the meeting was not the “appropriate venue to discuss it.”

16. After the staff meeting, respondent returned to his classroom and began to compose an email message to EH’s legal guardians. He wrote the following, but did not transmit the email message on May 20, 2015:²

Today a few minutes before the end of school, I hurt [EH]. I wrapped him on the stomach with my knuckles. After I did it he went to his desk and put his head down. After a minute when he did not put his head up I walked over to him to see if he was o.k. He was angry, and I apologized. I told him that I had seen him hitting another boy in the stomach, which he does often, and I reacted by putting my hand between him and the other boy. He did not accept my apology, and walked away.

¹ The District adopted and published the following Professional Standard: “Employee conduct should enhance the integrity of the District and advance the goals of the educational program.” (Ex. 14.) The District also adopted and published policies to provide “an orderly, caring, and nurturing environment in which all students can feel safe . . . and to promote nonviolent conflict resolution techniques.” (Ex. 15.)

² In response to complainant’s request during the hearing, respondent produced a printed copy of the draft email. The draft reflects that the email was sent on March 10, 2016, the second day of hearing, but respondent credibly testified that he mistakenly sent the message, intending only to print it, and that the message had been saved as a draft and unaltered since May 20, 2015.

17. At approximately 3:50 p.m. on May 20, 2015, while respondent was composing the above message, he stopped and stared at his computer while “the enormity [of the incident] came crushing down on [him].” Principal Marvin came to respondent’s classroom and asked whether he hit EH. Respondent did not explain the incident. Respondent asked “As my administrator, should I have my union rep?” Marvin discontinued all questioning, deferring the interview to the next day.

18. On May 21, 2015, respondent appeared before complainant and Principal Marvin with a union representative. Respondent testified “At this point, I was scared out of my wits . . . and became emotional . . . I knew there would be serious repercussions . . . I didn’t know exactly what, but I knew it was going to be unpleasant.” Later that day, respondent went home to his wife and said “something has happened that I need to tell you about.” Respondent told his wife that he saw EH hit AG in the stomach and intervened, hitting EH in the process. Respondent’s wife had observed respondent become frustrated, but she had never seen him lose his temper to the point of losing control, and she had never seen him hit anyone of any age.

19. On May 21, 2015, respondent was arrested on charges including battery. He retained counsel and was advised “to say nothing.” The District Attorney for Kern County did not file or prosecute a criminal complaint.

20. On June 9, 2015, the District concluded its investigation of the EM Complaint. In his letter to EM’s parents, complainant concluded that respondent “should have taken additional steps to improve his performance on day-to-day decisions, professional discretion, and communication among students.” (Ex. 8.)

21. On July 16, 2015, the District issued a draft Notice of Intent to Dismiss and Immediately Suspend without Pay and Statement of Charges. The notice was mailed to respondent with a cover letter containing the following advisory: “You may request an informal ‘*Skelly*’ conference . . . to determine whether cause exists to terminate your employment.” (Ex. 9.)

22. On August 7, 2015, through his attorney, respondent submitted a letter in lieu of an in-person *Skelly* meeting. Respondent acknowledged slamming a child’s desk on May 18, 2015, and he expressed regret of his behavior. Respondent did not acknowledge throwing papers on the floor and denied that the May 18 incident was immoral conduct. He denied that he “closed his hand into a fist and punched EH in the stomach” on May 20, 2015, explaining that he “quickly intervened to prevent the two children from causing serious physical harm to one another.” (Ex. 9.)

23. On August 12, 2015, complainant replied to respondent’s letter dated August 7, 2015, expressing his intent to recommend to the Board of Education of the District (Board) that respondent be immediately suspended without pay and that respondent’s employment be terminated. On August 20, 2015, the Board held a regularly scheduled meeting and resolved to move forward with complainant’s recommendations.

24. On August 24, 2015, complainant hand delivered his letter to respondent, notifying him of the Board's action and respondent's right to a hearing.

25. A colleague, who has worked with respondent in the past and currently teaches a second grade class at Las Flores, testified about respondent's character. She specifically requested respondent to instruct five of her children when they reached the fifth grade because she "thought he was the best." She never heard any of her children report that respondent lost his temper. She never observed respondent lose his temper in the classroom. She considers respondent to be patient, firm, and caring.

26. A parent of two former students in respondent's classroom testified that she was allowed to observe the classroom anytime. She observed respondent with her son every Friday and never saw respondent lose his temper. She found that respondent helped her son gain focus and improve in his scholastic performance. She testified that respondent is "very honorable" and that she loved him as a teacher and a person.

27. Respondent testified that he wants to continue teaching, that he would act differently around children, and that he would never touch another child again under any circumstances. He testified that he would be willing to take anger management seminars if required as a condition to reinstatement, but he has not independently sought anger management or therapeutic counseling. In 2012, respondent requested conflict resolution training, but the course was fully enrolled by the time of the request. When the administrator sent respondent a reminder to sign up for a similar course offered at a later date, respondent replied, "I will let you know in the next 24 hours;" respondent took no action to follow up. Respondent testified that he plans to retire in two years.

LEGAL CONCLUSIONS

1. The District has the burden of proof in this matter, and the standard of proof is preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035.) Preponderance of the evidence means evidence that has more convincing force than that opposed to it. (*In re Shelley J.* (1998) 68 Cal.App.4th 322.)

2. The District is authorized to dismiss a permanent employee for immoral conduct or evident unfitness for service. (Educ. Code, § 44932, subd. (a).)

3. Immoral conduct is 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. Immoral conduct can be conduct that is willful, flagrant, or shameless, conduct showing moral indifference to the opinions of respectable members of the community, and 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.)

4. Evident unfitness for service 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.)

5. The Commission should look at the proven conduct in the aggregate. This applies also to its determination of unfitness for service. The *Woodland* court found that it was not necessary to determine if each and every act demonstrated unfitness for service. Rather, it was proper to examine the totality of the offensive conduct.

6. In this case, within a period of three days, respondent exhibited three violent outbursts, including throwing papers on the classroom floor, slamming a child’s desk while reprimanding the child, and hitting a boy in the abdomen causing pain. Although each incident of misconduct may not, in and of itself, demonstrate unfitness for service, the totality of the offensive conduct exhibits a fixed character trait unsuitable for teaching. The undesirable trait was not remediable by the District’s previously adopted and published standards and policies designed to prohibit the offensive conduct.

7. The evidence does not establish that respondent intended to injure EH. Accordingly, respondent did not engage in corporal punishment under Education Code section 49001, subdivision (a). Nonetheless, by thrusting his hand near EH’s abdomen, knowing EH had recently undergone surgery in that area of his body, respondent engaged in a willful act in a careless manner, and in flagrant disregard of EH’s well-being. The pattern of violent outbursts was hostile to the welfare of his students and contrary to good morals.

8. Although the totality of respondent’s conduct may justify his dismissal, the Commission must examine whether respondent is unfit to teach under the factors set forth in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214. In that case, the school district discovered that a teacher “engaged in a limited, non-criminal physical relationship [with a colleague] . . . of a homosexual nature.” The California Supreme Court held that a school district cannot abstractly characterize conduct as immoral or unprofessional, but must show that retaining a teacher poses a significant danger of harm to students, school employees, or others who may be affected by the teacher’s conduct. The misconduct must have some rational connection to the teacher’s ability to teach, expressed more specifically as follows:

In determining whether the teacher’s conduct thus indicates unfitness to teach the board may consider such matters as the likelihood that the conduct may have adversely affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness or blameworthiness of the motives

resulting in the conduct, the likelihood of the recurrence of the questioned conduct, and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. (*Morrison v. State Bd. of Education, supra*, 1 Cal.3d at p. 229.)

9. Examined in the context of the *Morrison* factors, the facts of this case weigh in favor of dismissal as follows:

(A) Violent outbursts are likely to adversely affect students, parents, and fellow teachers. The District has a compelling interest to protect students from violent outbursts by teachers (and others).

(B) The degree of adversity that may arise from violent teacher outbursts is potentially severe. Although no evidence was presented to show that respondent's conduct caused any actual or substantial injury, he caused EH to suffer physical pain and other students to suffer emotional upset and fear.

(C) The three incidents of violent outbursts were proximate in time and reveal a progressive decline in respondent's ability to manage his anger and frustration.

(D) Respondent teaches fifth graders, small children who are more vulnerable to violent outbursts than would be the case if respondent were credentialed to teach high school students.

(E) Respondent presented evidence of extenuating circumstances. He has worked to the satisfaction of the District for 28 years without any record of employment discipline. He presented compelling evidence to show that parents trusted respondent and specifically requested respondent to teach their children. A reasonable inference is drawn that respondent was fatigued on the day of the EH incident, having spent 19 hours the prior day leading a field trip to Long Beach. In aggravation, a parent complained to the District about respondent's conduct at the time of the series of outbursts.

(F) In spite of his long history of proper behavior, respondent engaged in a series of violent acts. Accordingly, respondent's past good behavior is not sufficiently compelling evidence that he is not likely to engage in violence again. Respondent has taken no voluntary action since the period of the violent outbursts to seek counseling or treatment so as to prevent a recurrence. Although respondent testified that he plans to retire in two years, he is not obligated to retire and his continuing employment poses the potential risk of injury in the event of any recurrence.

(G) Dismissing respondent may cause other teachers to become overly cautious with students and refrain from touching students for legitimate purposes. However, any such chilling effect does not rationally relate to any constitutional rights of respondent or his colleagues.

10. A Commission on Professional Competence has broad discretion in determining what constitutes unfitness to teach and immoral conduct, and whether dismissal or suspension is the appropriate sanction. (*California Teachers Ass'n v. State of California* (1999) 84 Cal.Rptr.2d 425, 20 Cal.4th 327, 975 P.2d 622.)

11. The District established by a preponderance of the evidence that cause exists to terminate respondent's employment as a permanent employee for immoral conduct and evident unfitness for service under Education Code section 44932, subdivision (a)(1) and (6).

ORDER

Respondent Peter Konopak is dismissed as a permanent employee of the District.

DATED: **April 20, 2016**

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Matthew Goldsby
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MATTHEW GOLDSBY, Chairperson
Commission on Professional Competence

DATED: **April 19, 2016**

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Vince J. Rosato
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VINCE J. ROSATO, Member
Commission on Professional Competence

DATED: **April 19, 2016**

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Charley Clark
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CHARLEY CLARK, Member
Commission on Professional Competence