

BEFORE THE  
COMMISSION ON PROFESSIONAL COMPETENCE  
STATE OF CALIFORNIA

In the Matter of the Dismissal of:

MICHAEL JONES (EN 586924),  
A Permanent Certificated Employee,  
  
Respondent.

OAH No. 2013050544

DECISION

The Commission on Professional Competence (Commission) heard this matter on November 12, 2013, and March 25, 26, and 27, 2014, in Los Angeles, California. The Commission consisted of Roger Kavigan, Jim Cartnal, and Howard W. Cohen, Administrative Law Judge (ALJ) with the Office of Administrative Hearings, State of California. ALJ Cohen presided.

Anahid Hoonanian, of Lozano Smith, Attorneys at Law, represented complainant Vivian K. Ekhian, Chief Human Resource Officer for the Los Angeles Unified School District (District).

Richard J. Schwab and Rosty G. Gore, of Trygstad, Schwab & Trygstad, Attorneys at Law, represented respondent Michael Jones, who was present.

Prior to the presentation of evidence, the parties brought several motions in limine. The ALJ considered and ruled on those motions as well as on motions made during the course of the hearing, as reflected on the record. One motion made at hearing by complainant, to move into evidence complainant's Exhibit 7, was taken under submission; the motion is denied on grounds of lack of authentication and lack of foundation.

Oral and documentary evidence was received and argument was heard. The record was closed and the matter was submitted for decision on March 27, 2014.

The Commission considered the entire record in executive session.

FACTUAL FINDINGS

1. On April 17, 2013, complainant filed and served on respondent a Notice of Intention to Dismiss and Statement of Charges. On May 7, 2013, respondent timely requested a hearing.

2. On May 21, 2013, complainant, acting in her official capacity, filed and served on respondent an Accusation and Statement of Charges. Respondent timely served a Notice of Defense.

3. On October 30, 2013, complainant, acting in her official capacity, filed and served on respondent an Amended Accusation and Statement of Charges.

4. Respondent is a permanent certificated employee of the District, presently on unpaid leave status.

*The District's Charges Against Respondent*

5. In the Amended Accusation and Statement of Charges against respondent, the District alleged that it has cause to dismiss respondent from his employment as a permanent certificated employee of the District for:

- a. Unprofessional conduct, under Education Code section 44932, subdivision (a)(1);<sup>1</sup>
- b. Immoral conduct, under sections 44932, subdivision (a)(1), and 44939;
- c. Evident unfitness for service, under section 44932, subdivision (a)(5);
- d. Willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing school district, under section 44939; and
- e. Persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of public schools by the State Board of Education or by the governing board of the school district employing him, under section 44932, subdivision (a)(7).

6. In the Amended Accusation and Statement of Charges, the District charged respondent with the following misconduct:

- a. Around August 13, 2011, respondent used a District computer to access the website, "vidii.hardsextube.com."
- b. Around October 10, 2011, respondent used a District computer to access the website, "files.youporn.com."
- c. From June 21, 2007, to March 2, 2012, respondent "maintained access to as many as three thousand one-hundred seventy-eight (3,178) images containing one or more of the following items" on his District-issued computer: photographs featuring

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<sup>1</sup> All statutory references are to the Education Code, unless otherwise specified.

provocative poses or attire, partial, full, or full-frontal nudity; photographs of nudes; photographs of nudes clutching their genitals; photographs of persons engaging in sexual intercourse; and photographs of persons performing various sex acts.

d. From April 17, 2009, to March 2, 2012, respondent used District computers in violation of the District's Acceptable Use Policy, causing images to appear on his District-issued computer that included photographs featuring provocative poses or attire, partial, full, or full-frontal nudity; photographs of nudes; photographs of nudes clutching their genitals; photographs of persons engaging in sexual intercourse; and photographs of persons performing various sex acts.

#### *Notices and Warnings Issued to Respondent*

7. South Gate High School (SGHS) Principal, German Cerda, sent respondent a memorandum dated January 16, 2013, in which he notified respondent that a meeting had been scheduled for January 24, 2013, to discuss Cerda's intention to issue respondent a notice of unsatisfactory acts and a notice of suspension without pay "because of the incidents that occurred on March 2, 2012." (Ex. 14.) Cerda offered respondent the opportunity to present new information and to bring a representative to the meeting.

8. Respondent denied the charges in writing. Cerda testified that, because respondent did not present exculpatory evidence at the meeting, Cerda decided to ask the Board to authorize respondent's dismissal.

9. On January 24, 2013, the District gave respondent a Notice of Unsatisfactory Act(s) and a Notice of Suspension (15 Days).

#### *Respondent's Background*

10. At all relevant times, respondent taught government, economics, and constitutional law at SGHS. Respondent has been employed by the District since 1987, and has been at SGHS since 1993. Respondent has been serving as the elected Dean of Discipline at SGHS since 2001, with responsibilities for discipline, campus safety, and supervision. He has also served as a chapter chair for United Teachers Los Angeles (UTLA), representing teachers in collective bargaining and in disciplinary actions taken by administration. Respondent has a B.S. degree in political science from Idaho State University. He has a single-subject credential in social studies.

11. No evidence was submitted of a prior history of discipline against respondent. His performance evaluations reflect that he has met or exceeded the standard of performance.

#### *Respondent's District-Issued Computers*

12. The school issued three District computers to respondent.

13. In fall 2006, the school issued respondent an HP notebook computer, which respondent used in the Dean's office for such items as pictures taken of graffiti at school and documentation of evidence for school police.

14. In September 2010 or 2011, the school issued respondent a Mac notebook computer, which respondent used in the classroom for lesson planning, grading, and research. This was the second Mac notebook the school had issued to respondent.

15. On a date not firmly established by the evidence, the school issued respondent an iPad, which respondent used at school to keep records of student attendance.

*Complainant's First Two Charging Allegations, That Around August 13, 2011, Respondent Used a District Computer to Access the Websites, "vidii.hardsextube.com" and "files.youporn.com."*

16. The District alleged but did not establish that, around August 13, 2011, respondent used his District-issued computer to access the websites, "vidii.hardsextube.com" and "files.youporn.com." The District established that data on the Mac notebook's hard drive, including some data that a user had attempted to erase from the hard drive, reflect sexually-explicit or pornographic images or a record of access to websites, including the two websites charged in these allegations, displaying such images. But the District offered insufficient evidence to establish that it was respondent who was responsible for the presence of that data on the hard drive.

17. Mario Cueto was the school's computer support technician at the times relevant to this matter. Cueto had two supervisors. One was Gerardo Llamas, who is currently an Assistant Principal but at the relevant time was an instructional specialist at SGHS who supervised technology support staff and evaluated teachers' technology needs. Cueto's other supervisor was Joseph Dileva, the assistant principal who oversaw technology at SGHS. Cueto was responsible for distributing computers to staff and collecting them again for summer break; he also maintained computer labs and classroom computers, ensured internet functionality, and assisted staff. When a computer was issued to a staff member, Cueto had the staff member fill out a sheet with pertinent information, including the computer's serial number. Abraham Martinez, who for four years, including the times relevant to this matter, was Cueto's assistant, testified that it was the school's practice to erase computer hard drives on school-issued computers when they were returned by teachers before school summer break, and to reissue the computers to teachers in the fall.

18. The evidence shows, however, that school computer support personnel did not effectively erase the Mac computer hard drive before reissuing it to respondent.

19. The District bought the Mac notebook in 2007 and issued it first to Cueto for two years, from 2007 to 2009. After Cueto returned the Mac notebook to the school, the school purportedly erased the hard drive and issued the computer to Jade Casarez Gutierrez, an English and drama teacher at the school. Casarez Gutierrez used the computer for at least one school year. After she returned the computer to the school, most likely just before the

2011/2012 school year, the school purportedly erased the hard drive and issued the computer to respondent in September 2011,<sup>2</sup> possibly at the same time it issued the iPad to respondent.

20. On February 28, 2012, there was a scheduled meeting of faculty and administration. At the end of the meeting, respondent asked members of the administration, including Cerda, to leave so the teachers could discuss UTLA business. After the administrators left, respondent cautioned faculty about possible monitoring and confiscating of computers by school administrators. The next day, Cerda was questioned about this by several staff members, who expressed concern about possible administration intrusiveness.

21. On Friday, March 2, 2012, two days after the faculty meeting, Cerda instructed Dileva to accompany respondent to his classroom to confiscate the Mac notebook and the iPad and bring them back to the principal's office. Dileva did as instructed. Dileva knows of no other teacher's computers ever confiscated by Cerda to look for pornographic images; he testified that, from 2008 through 2012, no complaints had been made about respondent's use of District-issued computers. Cerda testified that respondent's role at the faculty meeting and as UTLA chapter chair had nothing to do with the confiscation of respondent's computers or the fact that no other teachers' computers were examined, but the District did not establish by admissible evidence the truth of any alternative explanation.<sup>3, 4</sup>

22. Cerda asked Llamas whether he knew how to recover deleted files. Llamas said he had software that could perform that operation and that he had used the software a few times. Cerda asked him to recover data from respondent's Mac notebook. While in

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<sup>2</sup> Other evidence suggests, though not conclusively, that the Mac notebook may have been issued to respondent in September 2010.

<sup>3</sup> Cerda testified that, after being questioned by staff members who had attended the UTLA meeting, he called Cueto and asked him about respondent's District-issued computers. Cerda testified that he then confiscated the computers due to statements Cueto allegedly made to him. Assistant Principal Dileva and Cueto's assistant, Martinez, testified that, in separate conversations they allegedly had with Cueto about those computers, Cueto had told them that respondent asked him to erase the hard-drives. Cerda's, Dileva's, and Martinez's testimony about Cueto's alleged statements is "administrative hearsay," which can be used to supplement or explain other evidence but cannot, by itself, support a factual finding. (Gov. Code, § 11513, subd. (d).) In this case, the administrative hearsay does not supplement or explain other, admissible, evidence. Rather, at hearing, Cueto, who appeared reluctant to testify, directly contradicted Cerda's, Dileva's, and Martinez's testimony about what he had told them, and respondent testified that he had never asked Cueto to erase the hard drives on his District-issued computers.

<sup>4</sup> Martinez also testified that, before respondent's computers were confiscated, Cueto showed him a pornographic image on a notebook computer. Martinez conceded that he has no personal knowledge of who had been issued the computer and that there was no written repair order for it.

Cerda's office, with Dileva present, Llamas removed the Mac notebook's hard drive, placed it in an external enclosure, and attached it to his own computer with a USB cable. He then ran the Data Rescue software. Llamas testified that he had also attached another external hard drive to his computer, and that he used the Data Rescue software to copy information from the Mac notebook hard drive onto the other external hard drive, without recording anything on his computer's internal hard drive. This testimony contradicts a report Llamas wrote to Cerda dated January 10, 2013, in which Llamas made no mention of another external hard drive. In that report, Llamas wrote that he copied the Mac notebook hard drive onto his laptop computer.<sup>5</sup> At hearing, Llamas testified that the report was incorrect.<sup>6</sup>

23. Llamas testified that the process used by Data Rescue was a read-only process. He admitted, however, that he used no write-blocker and no image hash to preserve, unaltered, the data on the Mac notebook's hard drive. He does not, he conceded, know what a write-blocker is, or what image hashing is, and testified that he is not a forensics expert. The forensic expert retained by the District, Matthew Albee (see Factual Finding 39), credibly testified that a write-blocker and an image hash are necessary precautions to ensure that data is not altered or added to.

24. Copying the hard drive took several hours. Cerda also asked Llamas to look at the browser history on the Mac notebook hard drive; Llamas found nothing there. Llamas then placed the Mac notebook hard drive back in that computer, burned the contents of the copied data onto DVDs, and erased the copy that was on the external hard drive or Llamas's laptop's hard drive, depending on which version of Llamas's account of events is accurate.

25. Llamas and Cerda testified that, during the copying procedure, they saw pornographic images appear on the Mac notebook's screen; Llamas also saw photos of Casarez Gutierrez's August 21, 2010, wedding, and Dileva saw travel photos. The hard drive was eventually found also to have video footage of Casarez Gutierrez's wedding and a downloaded image of at least one of her bank statements, from February 2010.<sup>7</sup>

26. Llamas could not identify when the pornographic images were stored on the Mac notebook; he could not tell whether they might have been stored there as long ago as 2007, or who stored them. This and other evidence, including some of the forensic evidence presented by the District's expert witness, establishes that images and data, accessed and stored by other, prior possessors of the Mac notebook, were present on the Mac notebook's hard drive when it was issued to respondent. District witnesses could not confirm that there was no adult material on the hard drive when it was issued to respondent.

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<sup>5</sup> The report also made no mention of the Mac notebook serial number.

<sup>6</sup> Dileva witnessed the procedure but could not support Llamas' testimony; he testified that he does not know what an external hard drive is.

<sup>7</sup> Cerda testified that nothing had been found on the iPad.

27. In addition to the fact that images and data stored by prior users were still on the hard drive of at least one of the computers issued to respondent, there was a significant possibility, based on the evidence admitted at hearing, that data on the hard drives of respondent's computers were compromised after the District confiscated them, both through a failure to take appropriate precautions against writing data onto those hard drives while examining them, and through the District's inadequate chain-of-custody practices.

28. Cerda secured the Mac notebook in his office in a metal gun safe once Llamas had finished his procedure. Cerda called the Los Angeles School Police Department (LASPD); LASPD Detective Hector Longoria, who had received verbal instructions to do so, arrived that day, a Friday, between 3:00 and 4:00 p.m., and picked up the iPad and the Mac notebook, as well as the DVDs made by Llamas. Detective Longoria did not give Cerda a receipt for the computers or DVDs, nor did he otherwise document the transfer of custody of those items or the computers' serial numbers.<sup>8</sup> Detective Longoria took the computers to the office he shared with three other detectives; he deposited the Mac notebook and the iPad on the desk of one of those detectives, LASPD Detective Ray Jordan, and notified Detective Jordan of that fact by telephone. Detective Longoria believed the office to be secure; visitors and custodial staff are allowed in the office only when detectives are present.

29. On the following Wednesday, March 7, 2012, five days after Detective Longoria had deposited the computers on Detective Jordan's desk, Detective Jordan picked up the Mac notebook and the iPad and delivered them to Shiwanda Wynn in the District's Employee Relations Investigation Unit. Detective Jordan did not testify that he also brought the DVDs to Wynn. Detective Jordan did not obtain from Wynn a receipt for the computers, nor did he otherwise document their serial numbers or the transfer of custody. He testified that, in 2012, the LASPD did not document the transfer and receipt of evidence; it does so now in order to be able to show the chain of custody.

30. Cerda instructed respondent to bring the HP notebook to campus on Monday, March 7, 2012, and surrender it to him. Respondent did so, and Cerda placed the computer in his safe. Cerda contacted Detective Longoria and so informed him. Two days later, on the morning of March 9, LASPD Officer Tommy Chung collected the computer, put it in his trunk, went about his daily patrol assignments and, at the end of the day, placed the computer on Detective Longoria's chair, without a note. Officer Chung did not give Cerda a receipt or otherwise document transfer of custody of the HP notebook; he was given no paperwork and no written instructions about where to take the computer, and he did not log picking up the computer from Cerda. He testified that it is normal protocol to have paperwork for taking evidence into custody, though he did not do so in this case. On March 15, six days after Officer Chung left the HP notebook on Detective Longoria's chair, Detective Jordan picked it up and delivered it to Wynn, again without documentation.

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<sup>8</sup> There was no further testimony about the DVDs. (But see Factual Finding 31.)

31. There was no evidence that the disks Llamas testified he created were transferred by the District police to District forensic laboratory personnel. The parties stipulated only that Shohreh Taheri, working in the District laboratory on some date not established by the evidence, printed sexually explicit or pornographic images from a DVD given to her by the District's Office of General Counsel. There was no evidence as to the source of that DVD or evidence linking it to Llamas's DVDs.<sup>9</sup>

32. District forensic personnel did not examine the computers, or copy or scan their hard drives, until August 5, 2012, five months after Officer Jordan had delivered them. Alexander Shekoyan, who began working for the District in 1995 and became a computer technician for the District's Human Resources Division in 2008, blamed the five-month delay on the press of business in the forensic laboratory. He admitted that he could not say with certainty that no one had accessed or tampered with the computers during that lengthy interval.

33. Shekoyan's testimony was muddled and ultimately not credible. He repeatedly confused the Mac notebook and the HP notebook, and his written reports about both, and which computers he scanned on which of three different scan dates. For example, Shekoyan testified that he scanned the HP hard drive on August 5, 2012, and found that the website [viddii.hardsextube.com](http://viddii.hardsextube.com) had been accessed on the HP; his written report, however, states that he found that website and the [files.youporn.com](http://files.youporn.com) website when scanning the Mac notebook, not the HP.

34. Shekoyan's report reflects that the [vidii.hardsextube.com](http://vidii.hardsextube.com) and [files.youporn.com](http://files.youporn.com) websites had been accessed on August 13 and October 10, 2011, respectively, and that respondent's name appears in the bookmark pathway for those sites. But Albee, the District's expert witness, whom the Commission found to be credible, issued a report showing all websites accessed on the Mac notebook that reflected the date and time they had been accessed; neither [vidii.hardsextube.com](http://vidii.hardsextube.com) nor [files.youporn.com](http://files.youporn.com) appears in the report, on August 13, 2011, October 10, 2011, or any other date.

35. Shekoyan testified that he scanned the HP hard drive on August 5, 2012, and found it to be corrupted, severely restricting his access to large portions of it. He made no mention, however, of a corrupt hard drive in his written forensic report. Albee did not find that the hard drive was corrupted. Even Shekoyan, in January 2013, five months after his first scan and 10 months after the computer had been delivered to the lab, did not find that the drive was corrupted when he again scanned the HP hard drive using different software.

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<sup>9</sup> One of the District's internal forensic reports refers to "South Gate 4dvd with IMAC." (Ex. 12, p. 2.) No witness at the hearing offered an interpretation of that notation, or testified whether it referred to DVDs taken into custody with the Mac notebook or with any other computer. Nor did Llamas testify that he made any DVD copies of data from an iMac, which is a desktop computer; he only testified that he created DVD copies of the Mac notebook hard drive. The District did not issue an iMAC computer to respondent.



36. There was a third scan date, October 5, 2012, when from the written reports it appears that Shekoyan scanned at least the iPad and the HP, finding no pornographic images on either device.

37. In view of all of the uncertainties detailed in Factual Findings 10 through 36, including uncertainties about the content of the hard drives when the computers were issued to respondent,<sup>10</sup> a chain of custody with too many missing links and opportunities for inadvertent error or even mischief, and the possibility that less-than-expert inspectors of the hard drives corrupted the content of those drives, the evidence on this record did not establish that around August 13, 2011, respondent used a District computer to access the websites “vidii.hardsextube.com” and “files.youporn.com.”

*Complainant's Third Charging Allegation, That From June 21, 2007, to March 2, 2012, Respondent Maintained Access to 3,178 Sexually Explicit or Pornographic Images on his District-Issued Computer*

38. The District alleged but did not establish that, from June 21, 2007, to March 2, 2012, respondent maintained access to as many as 3,178 sexually explicit or pornographic images on his District-issued computer.

39. Albee, the District's expert witness, is a full time special agent at the state Franchise Tax Board, where he investigates tax fraud and runs the computer forensics lab, processing evidence in criminal cases using court-tested, industry standard methods. Albee also works for Data Chasers, Inc., where he has been a Project Manager for 13 years, collecting and processing evidence primarily for civil cases. Albee teaches classes for foreign government law enforcement personnel on the subject of gathering and processing digital evidence and recovering deleted data, and has testified as an expert witness in computer forensics six or seven times. He became a computer forensic certified examiner in 2001, he has expertise in using Encase, a leading tool for computer forensic exams, and he has been certified as a small computer evidence recovery specialist.

40. In October 2013, Albee obtained from the District an HP notebook, a Mac notebook, and an iPad. Albee did not testify or report that he was given any DVDs to examine. Data Chasers, Inc., then scanned the devices.

41. Albee testified that there were about 300 images on the Mac notebook and about 100 images on the HP, nothing approaching the 3,178 alleged by the District.

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<sup>10</sup> See also Factual Findings 44 and 45. As to data that Casarez Gutierrez stored on the hard drive of a computer subsequently issued to respondent, the Commission in no way means to imply that the use of District computers to store wedding photos and bank statements is comparable, in terms of the gravity of any offense or policy violation, to the use of District computers to access or store pornographic images.

42. The District also alleged that respondent “maintained access to” adult and pornographic images on the District-issued computers. Both the Mac notebook and the HP notebook had pornographic images on their hard drives but, while this may suggest activity by the same user, the record does not sufficiently establish activity by respondent. All of the images Albee found were in unallocated areas of the hard drive, meaning that the images had been deleted prior to Albee’s obtaining possession of the computers. There is no indication as to when they were accessed, viewed, and deleted. Only computer technicians and experts testifying in this case were able to find those images, so without evidence of when the images were deleted and by whom, the allegation that respondent “maintained” access to adult or pornographic images on his hard drives was not established. Even if respondent had been the person who stored the images, which was not proven, by the time the drives were tested, he apparently could not have retrieved them himself. There was no evidence offered to show that the images would have been accessible to students.<sup>11</sup>

43. There was no testimony connecting website links Albee found on the hard drives to the images he found, although descriptions of website links might describe the some of the images found on the drives. Nevertheless, assuming the District’s allegation of respondent maintaining access to images on the hard drives includes maintaining a record of and links to websites where such images are available, the Commission considered Albee’s report identifying numerous pornographic websites accessed on the Mac notebook.

44. Most of the reported access dates are from August 9 through 13 and October 13 through 16, 2011. Respondent was issued the computer in September 2010 or 2011, so the October 2011 access dates did occur during a period when respondent was in possession of the Mac notebook. The evidence allowed for the possibility, however, that the August dates were during a period when the computer had been checked back in to the technical support department prior to reissuance for the fall semester. Of greater moment is the fact that two of the reported access dates are March 5, 2010, and May 15, 2010, by all accounts prior to the time respondent took possession of the computer. On the earlier of those two dates, a pornographic website, [www.xtube.com](http://www.xtube.com), was accessed, and the report shows that it was accessed again in August and October 2011.

45. When questioned, Albee offered no explanation for the appearance of the earlier access dates on the Mac notebook hard drive. This unexplained incongruity in the access dates and the evidence that a pornographic website was accessed prior to the computer’s issuance to respondent, combined with the uncertainty about when the computer was in respondent’s possession and about the integrity of the data on the hard drives (see Factual Findings 10 through 37) makes doubtful any conclusion that can be drawn about who accessed any of the websites and when they did so. Respondent denied ever using any

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<sup>11</sup> There was some testimony about limited student use of respondent’s Mac notebook in class, but no evidence that any student saw or could have seen any adult or pornographic image on respondent’s computers. No students testified in this matter.

District-issued computer to access the websites, "vidii.hardsextube.com," "files.youporn.com," or any websites posting sexually-explicit or pornographic images.<sup>12</sup>

46. Albee did not demonstrate that it was respondent who was accessing the computer. Albee's HP data show that the computer user logged on as "lausd\_user" in all instances but one, when the login was as "Administrator." There was no evidence that respondent had privileges allowing him to log in as an administrator. As for the websites accessed from the Mac notebook, no user login information is provided in Albee's report. Some sites reported by Albee reflect the use of Skype; the District did not introduce evidence that respondent ever had a Skype account, and respondent denies that he did.

47. In light of the questionable evidence in support of its charges, the District argued that everything on the computers' hard drives was respondent's responsibility because respondent had control of the computers. But as has been established, the computers issued to respondent contained data stored there by prior users, and the absence of a clear chain of custody and the possible tainting of the data raises too many serious questions for the District's position to be persuasive. There are too many uncertainties as to whether respondent accessed pornographic images and maintained them on the computers to find that the District met its burden on this charge.

*Complainant's Fourth Charging Allegation, That From April 17, 2009, to March 2, 2012, Respondent Used District Computers in Violation of the District's Acceptable Use Policy, Causing Sexually Explicit and Pornographic Images to Appear on His District-Issued Computer*

48. The District alleged but did not establish that, from April 17, 2009, to March 2, 2012, respondent used District computers in violation of the District's Acceptable Use Policy, causing sexually explicit and pornographic images to appear on his District-issued computer.

49. Respondent knew or should have known the provisions of the AUP, and was bound by the policy's Attachment B, which is applicable by its terms to District employees.

50. It would violate the AUP for a staff member to access pornographic websites on District-issued computers, whether on or off the District's network.<sup>13</sup> But the Commission

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<sup>12</sup> Shekoyan's August 2012 report shows 0 bytes for vidii.hardsextube.com and for files.youporn.com, indicating that those site links had been deleted; without further evidence of when the deletions occurred, the Commission cannot find that they were "maintained" on the hard drive.

<sup>13</sup> This is a broad reading of the AUP, which in places is confusingly restrictive, such as where it lists examples of "inappropriate activity" but refers only to activity on the District web site. (Ex. 30, p. 5.) The AUP as a whole, however, reasonably supports an interpretation that the prohibited activity is not limited to activity on the website.

unanimously finds that complainant did not establish that it was respondent who accessed the websites. (Factual Findings 10-46.)

51. On February 12, 2013, respondent met with James P. Noble, Ed. D., Operations Administrator, Educational Service Center South. In a February 19, 2013, letter to Noble commemorating that meeting, respondent denied all of the District's charges and represented that he has always followed the AUP.

## LEGAL CONCLUSIONS

### *Jurisdiction*

1. The Commission has jurisdiction to proceed in this matter under section 44944. (Factual Findings 1 through 4.)

### *Burden of Proof*

2. The District has the burden of proof in this matter, since it is seeking to dismiss respondent from employment as a certificated employee. The District must prove its case by a preponderance of the evidence. (*Gardiner v. Commission on Prof. Competence* (1985) 164 Cal.App.3d 1035, 1040.)

### *Statutory Grounds for Dismissal*

3. The governing board of a school district may dismiss a permanent certificated employee if one or more of the causes enumerated in section 44932, subdivision (a), are established. In the Amended Accusation and Statement of Charges, the District alleged five of those causes: unprofessional conduct, immoral conduct, evident unfitness for service, willful refusal to perform regular assignments without reasonable cause, and persistent violation of school laws or regulations. (Factual Finding 5.)

4. The District's Amended Accusation and Statement of Charges charged respondent with various acts supporting the five statutory grounds for dismissal. (Factual Finding 6.) The Commission examined each charged act to determine whether it was proven; if proven, the Commission would consider whether the charged acts violated one or more of the statutory bases for dismissal, as alleged.

5. The Commission determined that the District did not meet its burden of proving that any of the charged acts occurred.

6. Cause for dismissal of respondent Michael Jones does not exist under section 44932, subdivision (a)(1), based on unprofessional conduct, as set forth in Factual Findings 10 through 51 and Legal Conclusions 3 through 5.

7. Cause for dismissal of respondent Michael Jones does not exist under sections 44932, subdivision (a)(1), and 44939, based on immoral conduct, as set forth in Factual Findings 10 through 51 and Legal Conclusions 3 through 5.

8. Cause for dismissal of respondent Michael Jones does not exist under section 44932, subdivision (a)(5), based on evident unfitness for service, as set forth in Factual Findings 10 through 51 and Legal Conclusions 3 through 5.

9. Cause for dismissal of respondent Michael Jones does not exist under section 44939, based on willful refusal to perform regular assignments without reasonable cause, as set forth in Factual Findings 10 through 51 and Legal Conclusions 3 through 5.

10. Cause for dismissal of respondent Michael Jones does not exist under section 44932, subdivision (a)(7), based on 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 her, as set forth in Factual Findings 10 through 51 and Legal Conclusions 3 through 5.

11. Since no cause for discipline exists, complainant having failed to prove any of the factual allegations in the Amended Accusation and Statement of Charges, the factors set forth in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214 need not be considered.<sup>14</sup>

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<sup>14</sup> Respondent argued that if the District had proven that he used District-issued computers to access and store pornographic website links and images, there would be insufficient grounds to dismiss him because any images and links were inaccessible to students. Although there is no evidence of student exposure or the likelihood of student exposure to the material on respondent's computers (Factual Finding 42 and fn. 11), the Commission does not reach this issue. Cause to discipline respondent is lacking in this case due to the District's failure to establish that respondent accessed and stored sexually explicit or pornographic material on District-issued computers, as alleged.

ORDER

The Accusation and Statement of Charges against respondent Michael Jones is dismissed.

DATED: May 21, 2014



HOWARD W. COHEN  
Administrative Law Judge  
Office of Administrative Hearings

I concur with the Decision and Order set forth above:

DATED: \_\_\_\_\_, 2014

\_\_\_\_\_  
ROGER KAVIGAN  
Commission Member

I concur with the Decision and Order set forth above:

DATED: \_\_\_\_\_, 2014

\_\_\_\_\_  
JIM CARTNAL  
Commission Member

ORDER

The Accusation and Statement of Charges against respondent Michael Jones is dismissed.

DATED: May 21, 2014

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HOWARD W. COHEN  
Administrative Law Judge  
Office of Administrative Hearings

I concur with the Decision and Order set forth above:

DATED: 5/30/, 2014



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ROGER KAVIGAN  
Commission Member

I concur with the Decision and Order set forth above:

DATED: \_\_\_\_\_, 2014

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JIM CARTNAL  
Commission Member

ORDER

The Accusation and Statement of Charges against respondent Michael Jones is dismissed.

DATED: May 21, 2014

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HOWARD W. COHEN  
Administrative Law Judge  
Office of Administrative Hearings

I concur with the Decision and Order set forth above:

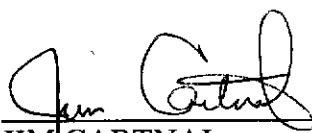
DATED: \_\_\_\_\_, 2014

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ROGER KAVIGAN  
Commission Member

I concur with the Decision and Order set forth above:

DATED: 5/28, 2014



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JIM CARTNAL  
Commission Member