

BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
STATE OF CALIFORNIA

In the Matter of the Accusation against:

CHERYL ANN MINKEL,
A Permanent Certificated Employee,

Respondent.

OAH No. 2009100553

DECISION

Administrative Law Judge Greer D. Knopf, Teacher Eleanor Juanita Evans, and Administrator Sandra Barnes, sitting together as the Commission on Professional Competence for the State of California, heard this matter in Lakeside, California on January 25, 2010.

Melanie A. Petersen and Leslie A. Reed, Fagen Friedman & Fulfrost, Attorneys at Law, represented the complainant Lakeside Union School District.

Fern M. Steiner, Law Offices of Tosdal, Smith, Steiner & Wax, represented respondent Cheryl Ann Minkel who was present at the hearing.

The record remained open for the Commission on Professional Competence panel (the panel) to conduct deliberations. The panel deliberated on March 2, 2010. The record closed and the matter was submitted on March 3, 2010.

FACTUAL FINDINGS

1. On September 21, 2009, the Lakeside Union School District (the District) issued a Notice of Intent to Immediately Suspend Without Pay; Intent to Dismiss; and Statement of Charges (the Notice). On September 25, 2009, and again on October 16, 2009, respondent served the District with a Request for Hearing and Special Notice of Special Defenses. Upon receipt of respondent's demand for a hearing, Stephen B. Halfaker, Superintendent for the Lakeside Union School District (the District) filed the Accusation dated January 8, 2010 against respondent Cheryl Ann Minkel (respondent). Respondent's previously served Request for Hearing and Special Notice of Special Defenses dated

October 15, 2009 denied the charges and requested a hearing in the matter. The accusation against respondent sets forth charges against respondent and seeks her dismissal as a certificated employee of the District pursuant to Education Code section 44932, subdivisions (a)(1) and (a)(5) for alleged immoral conduct and evident unfitness for service. The parties entered into a Stipulation to Jurisdictional Facts signed by the parties on January 19, 2010 and January 25, 2010.

2. Respondent is employed by the District as a permanent certificated employee. Respondent has worked for the District as a middle school teacher for just under 20 years. She worked as an English Language Arts teacher at Tierra Del Sol Middle School (Tierra or the school) in the District. During the 2008-2009 school year, she was still assigned to Tierra within the District. After June 2009, the District placed respondent on paid administrative leave until the end of the school year, and she is now on unpaid administrative leave pending the outcome of this proceeding.

3. At the start of the 2008-2009 school year, respondent went to school to prepare for the upcoming school year. On August 28, 2008 (the August 28th incident), respondent stopped at the District Office to speak with Stacy Coble (Coble), the District's Personnel Manager, to inquire about respondent's placement on the District's salary schedule. Respondent had submitted transcripts from her continued education so that she could be reclassified on the District's salary schedule and receive a higher salary. When respondent arrived at Coble's office, Coble told respondent that she had reviewed respondent's transcripts and respondent still needed an additional 1.66 units of credit in order to be reclassified to the higher salary of Class "F" on the salary schedule. Respondent lost her temper, becoming extremely angry and yelling at Coble with profanities. While standing in the open doorway of Coble's office, respondent yelled "This is a bunch of shit. This District is full of shit." Then respondent abruptly left the office.

4. Respondent returned to Coble's office about half an hour later. This time, respondent demanded to know the District's deadline for submitting any additional documentation for her to become eligible to move up on the salary schedule for the 2008-2009 school year. Respondent was yelling at Coble again. Respondent yelled at Coble repeatedly that the District was "full of shit" and then yelled that she worked for "an asshole" and that "she and the asshole would not be working together this school year." Coble told respondent numerous times that respondent was acting inappropriately and that she needed to calm down and get control of her behavior. Respondent's behavior at the District office was wholly inappropriate and was observed by other District employees.

5. Subsequently, respondent went to the District office and apologized to Coble for her inappropriate behavior. The apology was sincere, but respondent testified at the hearing that she still believed that the incident was partially Coble's fault for making respondent angry in the first place by saying respondent needed more credit hours to move up on the pay schedule. Respondent explained at the hearing that she was also upset that day because she had arrived at school to find all her classroom belongings had been moved to a new classroom and left in disarray. Respondent overreacted to finding her items moved.

During her testimony she cried uncontrollably about the fact that her belongings had been moved. Respondent's reaction to finding her classroom belongings moved for her (i.e., the outbursts directed at Coble) was nonetheless unreasonable and was completely out of proportion to the event.

6. In June 2009, respondent was suffering from rheumatoid arthritis. This condition caused respondent a significant amount of pain. Respondent was under a physician's care and was taking a number of different prescription medications to treat her condition and to control her pain. There was no medical evidence presented to establish exactly what medication was prescribed and in what dosage the medications were prescribed. Respondent testified that she regularly took over-the-counter Ibuprofen as well as the controlled substances Vicodin and Percocet for pain.

7. On June 16, 2009 (the June 16th incident), respondent drove to school and reported to work while she was visibly impaired because she was under the influence of excessive amounts of medication. Teachers saw respondent walking into school that morning. Respondent was stumbling and staggering while trying to negotiate the walkway into school. Respondent was struggling to walk in a straight line and was unable to keep her balance, at one point walking right into a dumpster near the door to the school and almost falling down as she walked towards the school office door. Staff at school saw respondent struggling to open the door to the office and then stagger into the office. Students were also arriving at school that day and were in and around the area where respondent was observed. At least one teacher was so concerned about respondent's visible impairment on school grounds that he went to the school office to report it. He was particularly concerned that students not see respondent in this condition. He knew that students often have a tendency to gossip about teachers. He later found other teachers in the quadrangle area on campus discussing respondent's behavior that morning.

8. Once respondent was in the office, there were eventually four other teachers and some staff present that saw respondent continue to exhibit behavior indicative of being under the influence of either alcohol or drugs. Respondent slurred her speech, she had bloodshot eyes, she was speaking loudly and she was acting inappropriately exuberant and sometimes agitated. One staff member thought she smelled alcohol on respondent's breath, but was not sure. When staff asked respondent about her condition, respondent stated that she had taken three or four Codeine pills. One of the teachers present told respondent that she should go home and not teach that day. The office secretary instructed respondent that she was calling a substitute to cover respondent's classes for the day and that respondent needed to go home. Respondent kept stating that she was fine to teach and did not need a substitute.

9. Then the assistant principal spoke to respondent and told her she needed to go home and that they would find her a ride home since she should not be driving. Respondent again insisted she was fine to teach that day, but finally said she would go home only after she went to her classroom to leave lesson plans. The assistant principal told respondent that lesson plans were not necessary, but respondent insisted that she needed to go to her

classroom. The assistant principal eventually allowed respondent to quickly go to her classroom because he did not think there would be any students there yet. Respondent went to her classroom and on the way there saw many of her students. Once in her room, respondent decided she should go ahead and write down roll in her records based on the students she had seen in the hallways. Then students started to come into the classroom. The school secretary came to respondent's room and found respondent still there walking around the room with some students already there. A few of the students asked the secretary what was wrong with Mrs. Minkel. Respondent finally left without teaching that day, but only after numerous teachers and students had seen her and had an opportunity to observe her intoxicated behavior.

10. Respondent was in no condition to be at school that day let alone teach children. A teacher needs to be able to handle all sorts of potential problems on the spot and needs to be able to use common sense and good judgment in the event of an emergency. Coming to school to teach her classes while she was impaired put children at serious risk. Initially, she drove to school under the influence and put the community and the children walking near the school in danger by being on the road in that condition. In addition, a teacher needs to be able to make decisions and keep control of her classroom in order to make sure that every child has the best chance to learn on any given day. A teacher needs to provide a safe stable environment in which children can learn. If a teacher is impaired as a result of excessive drug use that jeopardizes the teacher's ability to teach as well as the teacher's credibility with the students. The fact that respondent was so visibly under the influence when she arrived at school while students and other faculty were arriving for the school day, surely interferes with her ability to teach and to serve as a role model at school. Teachers have a strong influence over children and must serve as a positive role model for impressionable students who can be keenly aware of anyone who appears to be under the influence of substances. Students talk about their teachers and any word that a teacher had been at school while under the influence of drugs or alcohol would spread quickly among the students and then to the parents and the community.

11. On June 18, 2009, respondent met with Sam Mershon (Mershon), Assistant Superintendent, regarding the June 16th incident. Lakeside Teachers Association representative, Andy Cecceralli, attended the meeting with respondent. Mershon asked respondent to explain her conduct on June 16, 2009. Respondent stated that she had "over done it" by taking an excessive amount of Vicodin before coming to work that morning. Respondent informed Mershon that she had been suffering from painful arthritis and had been taking pain medication for her condition. Respondent admitted that several teachers and other staff had told her that she was slurring her words and needed to go home, but respondent still believed she was capable of teaching her students that day even though she clearly was not. Apparently, respondent believed it was somehow acceptable to come to school in the state she was in and still teach her classes. She seemed unconcerned about her condition that morning and how it might impact the children she teaches. Mershon informed respondent that it was unacceptable for respondent to report to work under the influence of drugs in an overmedicated condition. He further informed respondent that the District would be taking disciplinary action against her.

12. On one previous occasion two years earlier, a fire had been started in the trash can in respondent's classroom without respondent noticing it. However, there was no evidence presented to establish the allegations that students had reported that respondent had fallen asleep in class or that she wears sunglasses in class or that students have left class or thrown objects at respondent to try to wake her up.

13. Respondent testified at the hearing regarding the events of June 16, 2009. She explained that on June 15, 2009, she had been suffering with a great deal of pain from her arthritis and she had taken too much pain medication. Throughout that day and night she believes she had taken ten Vicodin as well as some Tylenol PM and Ibuprofen. If she took more than that she could not recall it. Respondent stated that the next morning on June 16, 2009, before respondent left for school, respondent stated that she took two more Vicodin and one Percocet. There was no evidence to establish what respondent's prescribed dosage was for any of these medications, but respondent did admit that she had taken too much medication that night and the next morning. The testimony that she had taken two more Vicodin and a Percocet was inconsistent with what she told staff the morning of June 16th when she stated she had taken three or four Codeine pills. In spite of the excessive number of pills respondent took on June 15 and 16, she did not demonstrate any insight into the fact that she may have built up an unhealthy tolerance for and/or dependence on these drugs. She stated she does not believe she has built up any tolerance to her pain medication. She still takes Vicodin as needed for pain along with her many other non-pain relieving medications. Respondent also testified inconsistently first that she no longer drinks alcohol because it adversely affects her other medication, but then later testified that the last time she had consumed alcohol was two days prior to the hearing. Respondent still believes she was able to teach the morning of June 16th in her visibly intoxicated overly medicated condition. Given all of these circumstances, it is unlikely that she will make any meaningful changes in her drug taking behaviors in the near future.

14. In addition, respondent's testimony was generally not very reliable, sincere, convincing, or consistent with the other evidence. Respondent's recall of what happened that day is not reliable since she was under the influence of so much medication that her ability to accurately perceive and recollect the events would be significantly hindered. Respondent's demeanor while testifying further undermined her credibility. She cried constantly and seemingly uncontrollably during her testimony on direct examination, but during cross-examination she abruptly stopped crying, regained her composure and became repeatedly non-responsive to questions, angry, and argumentative. In addition, during the testimony of the District's witnesses, respondent sat at counsel table rolling her eyes and making negative facial expressions. Although the panel is mindful of how difficult respondent's medical condition must be, overall respondent did not make a good impression on the panel. She was her own worst witness. She also expressed no remorse or regret for her actions of June 16 and only limited remorse for her behavior on August 28th. Respondent did not demonstrate that she has learned any lesson from these incidents and she does not seem to understand that she is a role model and must always conduct herself in public with that in mind.

LEGAL CONCLUSIONS

1. A permanent employee may be dismissed for cause only after a dismissal hearing. (Ed. Code, §§ 44932, 44934, and 44944.)

Under Education Code section 44944, subdivision (b), the dismissal hearing must be conducted by a three-member Commission on Professional Competence. Two members of the Commission must be non-district teachers, one chosen by the respondent and one by the District, and the third member of the Commission must be an administrative law judge from the Office of Administrative Hearings.

When a school board recommends dismissal for cause, the Commission may only vote for or against it. The Commission may not dispose of a charge seeking dismissal by imposing probation or any alternative sanction. (Ed. Code, § 44944, subds. (c)(1)-(3).)

2. The standard of proof in a teacher dismissal proceeding is a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1039-1040.) This standard of proof requires a party to convince the trier of fact that the existence of a fact is more probable than not. (*Redevelopment Agency v. Norm's Slauson* (1985) 173 Cal.App.3d 1121, 1128.)

3. Education Code section 44932 provides in part:

“(a) No permanent employee shall be dismissed except for one or more of the following causes:

(1) Immoral or unprofessional conduct.

...

(5) Evident unfitness for service.”

4. Immoral or unprofessional conduct under Education Code section 44932, subdivision (a)(1) is conduct that indicates a teacher is unfit to teach. (*Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229.) In *Morrison*, the California Supreme Court sets forth several factors to consider in determining whether a teacher's conduct indicates an unfitness to teach or unprofessional conduct. Those factors include: (1) The likelihood the conduct may have adversely affected students or fellow teachers; (2) the degree such adverse affect could have been anticipated; (3) the proximity or remoteness in time of the conduct; (4) the type of teaching certificate held by the teacher; (5) any extenuating or aggravating circumstances surrounding the conduct; (6) the praiseworthiness or blameworthiness of the motives for the conduct; (7) the likelihood of the recurrence of the conduct, and (8) the

extent to which disciplinary action would have an adverse impact or chilling effect on the constitutional rights of the teacher or other teachers.

5. Applying the *Morrison* factors herein, there was sufficient evidence presented to establish that respondent's conduct on June 16, 2009 indicates an unfitness to teach. There is a likelihood that respondent's conduct adversely affected students and fellow teachers since students, teachers, and other staff were able to see respondent staggering into school and in her classroom and slurring her speech in the school office when she came to school under the influence of too much medication. Teachers and students observed respondent in this condition so there was notoriety associated with the incident. Respondent certainly should have been able to anticipate that there would be a high degree of adverse affect from coming to school under the influence of an excessive amount of drugs, regardless of whether or not the drugs were prescribed controlled substances. Respondent's conduct on June 16, 2009 occurred in the last school year and less than one year ago so the conduct is very recent in time. There was also a great deal of evidence of aggravating circumstances surrounding respondent's conduct on June 16th such as: driving while under the influence, arguing about going home, insisting she was able to teach in the face of several teachers and colleagues plus her assistant principal telling her she was not in any condition to teach, delaying her departure from school, and allowing students to see her in that condition before she finally left school. The only evidence of mitigation was that she was suffering from a painful disease and taking prescribed medication when the June 18th incident occurred; however, the evidence was not convincing that respondent was taking her medication as prescribed. Respondent's motive here in coming to school under the influence was on the one hand blameworthy in that she should have known better than to come to school in that condition. On the other hand, she believed she needed to come to school for her students which may have been misguided, but was the action of a dedicated teacher if believed. There is a high likelihood that this type of behavior could reoccur since respondent demonstrated no insight or understanding of how bad her condition and conduct were that day and what a profoundly negative impact such conduct can have on students. She still believes she could have taught on June 16th in that condition even though she admitted she was over medicated. Respondent does not understand that she made a very serious mistake on June 16th and she therefore has not learned anything from the incident and it is likely to reoccur. There was no evidence presented to establish that this disciplinary action would have any adverse impact or chilling effect on the constitutional rights of teachers.

6. Terms such as immoral conduct and unprofessional conduct are so general that they must be given meaning in relation to the particular profession involved. (*Morrison, supra*, at p. 220.) In other words, a teacher may have committed an immoral act, but unless it indicates her unfitness to teach, it is not an appropriate basis for her discharge. (*Morrison, supra*, at p. 225.) The determinative test of a charge of immoral or unprofessional conduct is therefore fitness to teach and it is a question of ultimate fact. (*Board of Education v. Jack M.* (1977) 10 Cal.3d 691, 696, 698, fn.3; *Board of Education v. Commission on Professional Competence* (1980) 102 Cal.App.3d 555, 560-561.) Cause was established herein to dismiss respondent from her position as a certificated employee of the District pursuant to Education Code section 44932, subdivision (a)(1) in that the District established that respondent

engaged in immoral conduct as determined after evaluation of the *Morrison* factors such that she is unfit to teach in the District, as set forth in Findings 1-14.

7. The *Morrison* criteria also apply where “evident unfitness for service” is at issue under Education Code section 44932, subdivision (a)(5). The criteria must be analyzed to determine, as a threshold matter, whether the cited conduct indicates unfitness for service. (*Morrison, supra*, at p. 229.) “Fitness to teach” is a question of ultimate fact. (*Board of Education v. Commission on Professional Competence* (1980) 102 Cal.App.3d 555, 560-561.) If it is determined that a teacher is unfit to teach, then the next step is to determine whether the unfitness is “evident”; i.e., whether the offensive conduct was caused by a defect in temperament. (*Woodland Joint Unified School District v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1445.)

8. Applying the *Morrison* factors herein to the August 28th incident, there was sufficient evidence presented to establish that respondent’s conduct on that date in combination with the later incident on June 16, 2009 indicates an unfitness to teach. There is a likelihood that respondent’s conduct in August 2008 adversely affected other District staff that was in the District office when respondent engaged in her rude outbursts. Other staff observed respondent yelling profanity at Coble and staff will generally talk about an incident like this, although there was no specific evidence of actual discussion about the incident. Respondent should have anticipated that there would be significant adverse affects from her temper tantrum at the District office. Respondent’s conduct on August 28th occurred at the beginning of the last school year so the conduct is not remote in time. There was some evidence of mitigation since respondent apologized to Coble for the use of her profanity, but respondent still seems to blame Coble and other staff in part for the incident. There was evidence of aggravating factors since respondent continually tried to justify and excuse her bad behavior by blaming it on how she felt she was mistreated by the District when her classroom was unexpectedly moved and left in disarray. Respondent’s motive here in yelling and swearing at a District employee was certainly not praiseworthy in that she should know better than to conduct herself in that manner and this issue concerned the personal matter of her salary. There is a strong likelihood that this type of behavior could recur since respondent seems to have no control over her emotions and has demonstrated a tendency to overreact inappropriately with little provocation. There was no evidence presented that respondent is in any kind of therapy or seeking any help whatsoever to assist her in dealing with these problems that appear to overwhelm her. She demonstrated no genuine understanding that she overreacted on August 28th or that she has learned anything from the incident. There was no evidence presented to establish that this disciplinary action would have any adverse impact or chilling effect on the constitutional rights of teachers. There was sufficient evidence presented that established that respondent has demonstrated evident unfitness for service based on her conduct on August 28, 2008 combined with her conduct on June 16, 2009, as set forth in Findings 1-14.

9. Except as otherwise set forth in this Decision, any and all remaining charges and defenses asserted in this matter are determined not to be established by sufficient evidence or law.

ORDER

The Accusation filed by the Lakeside Union School District against respondent Cheryl Ann Minkel is hereby sustained, and respondent Cheryl Ann Minkel is hereby dismissed from her employment as a permanent certificated employee of the Lakeside Union School District.

On March __, 2010, Administrative Law Judge Greer D. Knopf signed the decision on behalf of the Commission on Professional Competence, whose vote in the matter was unanimous.

DATED: _____

GREER D. KNOPF
Administrative Law Judge
Office of Administrative Hearings
For the Commission on Professional Competence