

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

**In the Matter of the Motion for Immediate Reversal of
Suspension of:**

NIAMH CONNER,

Moving Party,

and

TWIN RIVERS UNIFIED SCHOOL DISTRICT,

Responding Party.

OAH No. 2023040151

**ORDER GRANTING MOTION FOR IMMEDIATE REVERSAL OF
SUSPENSION**

Thomas Heller, Administrative Law Judge, Office of Administrative Hearings,
State of California, heard this matter telephonically on April 21, 2023.

Donald A. Velez, Esq., Haight Brown & Bonesteel LLP, represented moving party
Niamh Conner (Conner).

William F. Schuetz, Jr., Esq., Dannis Woliver Kelley, represented responding party Twin Rivers Unified School District (District).

BACKGROUND

On March 29, 2023, the Chief Human Resources Officer of the District filed a Statement of Charges recommending that the District's Board of Trustees (Board) give notice to Conner of its intention to immediately suspend her without pay and thereafter dismiss her from employment. The Board gave the notice to Conner, who demanded a hearing on the dismissal and moved for immediate reversal of the suspension under Education Code section 44939, subdivision (c)(1). The District filed an opposition to the motion to which Conner replied, and counsel for both parties presented oral argument at the motion hearing.

The District's opposition includes a declaration of counsel attaching an order and statement of charges from a different administrative case about a different teacher in another school district. Conner objects to the declaration and items from the other case as irrelevant and extrajudicial materials not contained in the Statement of Charges. Conner's objection is sustained; the declaration and items from the other case are inappropriate to consider on this motion.

Conner asserts that the facts as alleged in the Statement of Charges, even if true, are insufficient to constitute a basis for immediate suspension without pay. The Statement of Charges alleges Conner, a permanent certificated employee most recently assigned as the principal of a District elementary school, "engaged in immoral and unethical conduct, contrary to the District standards and California law, when she: [¶] a. Initiated a sexual relationship with a non-management subordinate employee

[identified as "TW"]; [¶] b. Scheduled and engaged in sexual conduct in a classroom on the school campus where she served as the senior administrator; [¶] c. Admitted a classified non-exempt employee to school property after his work shift for the sole purpose of sexual intercourse; [¶] d. Failed to ensure that other staff, students, or persons would not inadvertently witness the sexual activity on campus; [¶] e. Discussed the sexual relationship with other District staff; and [¶] f. Confronted TW publicly and on District property about their sexual relationship." (Statement of Charges, pp. 4-5.) The Statement of Charges also alleges this conduct demonstrates evident unfitness for service and a persistent violation of or refusal to obey the rules governing Conner's employment.

According to the Statement of Charges, Conner had sex with TW in a classroom in the fall of 2021 on at least two separate occasions. Conner scheduled the sexual activity for Friday evenings after TW ended his work shift at the District, and she did not take precautions to ensure no one else was on campus at the time. On March 25, 2022, during the instructional day, Conner confronted TW outside on the school campus because he was allegedly telling staff about their sexual relationship.

The District asserts the allegations are sufficient to support Conner's immediate suspension without pay for immoral conduct under Education Code section 44939. Whether the facts alleged also demonstrate evidence unfitness for service and a persistent violation of or refusal to obey the rules governing Conner's employment is not an issue on the motion. Conner asserts the factual allegations, even if true, are insufficient to constitute immoral conduct indicating Conner is unfit to teach when assessed under the factors enumerated in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229 (*Morrison*). The District argues the *Morrison* factors do not apply to an immediate suspension.

LEGAL STANDARDS

The governing board of a school district may immediately suspend a permanent certificated employee who has been charged with "immoral conduct, conviction of a felony or of any crime involving moral turpitude, with incompetency due to mental disability, with willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing school district," or advocating communism. (Ed. Code, § 44939, subd. (b).) A suspended employee may serve and file with the Office of Administrative Hearings a motion for immediate reversal of suspension. (Ed. Code, § 44939, subd. (c)(1).) An administrative law judge reviews the motion, and the review "shall be limited to a determination as to whether the facts as alleged in the statement of charges, if true, are sufficient to constitute a basis for immediate suspension under this section." (*Ibid.*) Although material facts properly pleaded must be accepted as true, the administrative law judge need not accept contentions, deductions, or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Immoral conduct is conduct "'hostile to the welfare of the general public and contrary to good morals. Immorality has not been confined to sexual matters, but includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, dissoluteness; or as wilful, flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare.'" (*Board of Education of San Francisco Unified School Dist. v. Weiland* (1960) 179 Cal.App.2d 808, 811, quoting *Orloff v. Los Angeles Turf Club* (1951) 36 Cal.2d 734, 740.)

For purposes of teacher discipline, conduct cannot be characterized as immoral unless it indicates a teacher is unfit to teach. (*Morrison, supra*, 1 Cal.3d at p. 229.) "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." (*Id.*, footnotes omitted.) Not all of these factors need be examined, only the pertinent ones. (*West Valley – Mission Community College Dist. v. Concepcion* (1993) 16 Cal.App.4th 1766, 1777.)

ANALYSIS

The properly pleaded material facts, if true, are insufficient to constitute a basis for immediate suspension for immoral conduct under Education Code section 44939. Considering the *Morrison* factors, Conner's alleged conduct does not necessarily indicate she is unfit to teach. The Statement of Charges does not allege facts about any likely adverse effect of Conner's sexual relationship with TW on students or fellow teachers, or the degree of adversity anticipated. While other staff learned of the relationship itself, there are no facts alleged about the publicity or notoriety given to the most serious allegations of scheduling and having sexual intercourse at the school. "Various cases have emphasized the significance of the public nature of a teacher's

misconduct, or the notoriety and publicity accorded it.' [Citation.]" (*Crawford v. Commission on Professional Competence of Jurupa Unified School District* (2020) 53 Cal.App.5th 327, 339 (*Crawford*)). The Statement of Charges is silent on whether the most serious misconduct alleged became publicly known. Furthermore, that alleged misconduct was in the fall of 2021, and Conner's continued employment until her suspension in March 2023 calls into question whether the charges justify that suspension pending a dismissal hearing.

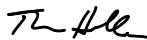
The District asserts the *Morrison* factors do not apply to an immediate suspension; instead, they are only relevant to the ultimate decision on dismissal. But the District cites no legal authority for its assertion, and without applying the *Morrison* factors, "whether conduct is 'immoral' becomes little more than an abstract moral judgment. . . ." (*Crawford, supra*, 53 Cal.App.5th at p. 339, citation omitted.) "Terms such as 'immoral or unprofessional conduct' or 'moral turpitude' stretch over so wide a range that they embrace an unlimited area of conduct. In using them the Legislature surely did not mean to endow the employing agency with the power to dismiss any employee whose personal, private conduct incurred its disapproval." (*Morrison, supra*, 1 Cal.3d at p. 224–225.) If an employing agency does not have that power as to a dismissal, it is difficult to see why an employing agency would have it as to a suspension.

An immediate suspension for immoral conduct requires more than an abstract moral judgment. Considering the *Morrison* factors, the facts alleged in the Statement of Charges do not necessarily demonstrate Conner engaged in immoral conduct for purposes of teacher discipline. Therefore, Conner is entitled to immediate reversal of her suspension.

ORDER

The motion for immediate reversal of suspension is granted. The District shall make Conner whole for any lost wages, benefits, and compensation within 14 days after service of this order. (Ed. Code, § 44939, subd. (c)(5).)

DATE: 05/05/2023


Thomas Heller (May 5, 2023 14:15 PDT)

THOMAS HELLER

Administrative Law Judge

Office of Administrative Hearings