

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

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

SHAMSHI ESPANA (EN 691561),  
A Permanent Certificated Employee,

Moving Party,

vs.

LOS ANGELES UNIFIED SCHOOL  
DISTRICT,

Responding Party.

OAH No. 2018010423

ORDER GRANTING MOTION FOR  
IMMEDIATE REVERSAL OF  
SUSPENSION

[Ed. Code, § 44939, subd. (c)(1)]

On February 1, 2018, a telephonic hearing on the motion filed by Shamshi Espana for immediate reversal of suspension (Motion) was held before Ji-Lan Zang, Administrative Law Judge (ALJ), Office of Administrative Hearings, in Los Angeles.

Melanie Luthern, Attorney at Law, represented moving party Shamshi Espana (Employee). Lynn I. Ibarra, Assistant General Counsel, represented responding party Los Angeles Unified School District (District).

District has suspended Employee without pay pending the outcome of its action to dismiss Employee.<sup>1</sup> The basis for the suspension under Education Code section 44939 is willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing school district. In the Motion, Employee seeks an order for the immediate reversal of her suspension. District opposes the Motion.

Having considered the moving, opposing, and reply papers filed by the parties, and the oral argument of counsel, the undersigned ALJ hereby finds and orders as follows:

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<sup>1</sup> The dismissal action bears OAH No. 2018010605.

### *Education Code Section 44939*

Education Code section 44939 authorizes the governing board of a school district, if it deems the action necessary, to immediately suspend a permanent employee from his or her duties, upon the filing of written charges with the governing board charging the employee with immoral conduct, conviction of a felony or any crime involving moral turpitude, incompetency due to mental disability, willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing district, or violation of section 51530<sup>2</sup> (teaching communism).

An employee who is suspended pursuant to section 44939 may serve and file with the Office of Administrative Hearings a motion for immediate reversal of suspension. The motion shall include “a memorandum of points and authorities setting forth law and argument supporting the employee’s contention that the statement of charges does not set forth a sufficient basis for immediate suspension.” (§ 44939, subd. (c)(1).) Review of the motion “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.*)

### *Statement of Charges*

District seeks to dismiss Employee from her assignment as a Special Education Science teacher at University High School (University). The statement of charges alleges causes for dismissal, pursuant to section 44932, for unprofessional conduct, unsatisfactory performance, evident unfitness for service, and persistent refusal to obey school laws and regulations.<sup>3</sup>

District’s dismissal action against Employee consists of allegations of her poor or unsatisfactory performance as a classroom teacher. Employee’s performance deficiencies for the 2014 to 2015 school year are alleged in paragraphs 1 to 12 of the statement of charges; and her performance deficiencies for the 2015 to 2016 school year are alleged in paragraphs 13 to 48. In general, Employee’s performance deficiencies relate to areas including, but not limited to, timely scheduling and completion of Individual Education Programs (IEP); adherence to IEP protocol; timely entry of student grades; lesson planning; establishing effective classroom routines and procedures; timely submission of weekly lesson plans to her administrator; effective use of instructional time; timely submission of her roll book; and teaching lessons that lacked rigor, structure, and demonstrated knowledge of content.

In the statement of charges, the sole basis alleged for Employee’s suspension under section 44939 is willful refusal to perform regular assignments without reasonable cause.

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<sup>2</sup> All further statutory references are to the Education Code unless otherwise indicated.

<sup>3</sup> A copy of the statement of charges is attached to the Motion as Exhibit A.

(SOC, ¶ 1, 4, 6, 9, 11, 12, 29, 30, 36, 37, 47.)<sup>4</sup> Specifically, the Statement of Charges alleged the following:

A. Employee failed to comply with policies and procedures relating to special education, in that she failed to submit a Summary of Performance for a student to her Special Education Coordinator for review during the period of January 13, 2014 to May 23, 2014; failed to timely complete an IEP for a student during the period of April 22, 2014 to June 6, 2014; failed to timely schedule an IEP on May 20, 2014; and failed to timely and properly complete a student's IEP during the period of March 2, 2015 to April 20, 2015. (SOC, ¶ 1, 4, 6, 12.)

B. Employee failed to timely enter student grades by the end of a 10-week grading window on October 10, 2014; and failed to timely submit her Fall term roll book on December 19, 2014. (SOC, ¶ 9, 11.)

C. Employee failed to comply with directives regarding her instruction methods and her weekly lesson plans.

- In particular, on January 13, February 8, and April 6, 2016, Employee failed to comply with a directive to “plan and deliver cognitively engaging learning activities to promote mastery of learning objectives, clearly communicate all expectations and directions for learning tasks[,] and [r]efrain from releasing students to work independently until they were capable of articulating [Employee’s] directions.” (SOC, ¶ 29, 36, 47.)
- On February 8, 2016, Employee failed to comply with a directive to submit weekly lesson plans. (SOC, ¶ 30.)
- On February 25, March 1, March 9, and April 6, 2016, Employee failed to comply with a directive to submit lesson plans to the assistant principal at University by 7:55 a.m., on the first day of every week beginning February 1, 2016, and have current lesson plans visible and available in the classroom at all times. (SOC, ¶ 37, 39, 47.)
- On February 8 and April 6, 2016, Employee failed to comply with a directive to deliver lessons that “clearly communicate the lesson objective, connect the lesson with past lessons or prior knowledge, and conclude with a summation of the day’s learning.” (SOC, ¶ 36, 47.)

### *Statutory Construction*

Section 44939 limits the grounds for immediate suspension of a teacher to instances of “willful refusal” to perform regular assignments without reasonable cause. District contends that under the statute, “willful refusal” occurs “when a teacher is on notice of an

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<sup>4</sup> References to specific paragraphs of the statement of charges are indicated by “SOC” followed by the paragraph number.

assignment (including under federal and state and law requirements for special education), is directed to perform the assignment, and does not do so”. (Ex. A, p. 3.) (Ex. 1, p. 10.) District further contends that “refusal to obey” a law or regulation under section 44932, subdivision (a)(8), which sets forth causes for dismissal, is equivalent to “willful refusal” under section 44939. (*Id.*) These arguments are not persuasive, in that District’s position disregards the element of willfulness required by section 44939.

The fundamental rule in construing a statute is to determine the Legislature’s intent. (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798. ) To determine that intent, “‘The court turns first to the words themselves for the answer.’” (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 724, quoting *People v. Knowles* (1950) 35 Cal.2d 175, 182.) However, the concept of willfulness, as used in both penal and civil contexts, is nuanced. Penal Code section 7 states that “[t]he word ‘willfully’, when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or to make the omission in question.” Notwithstanding this definition, willfulness has also been interpreted to imply to more than the intentional doing of a negligent act. (*J. C. Penney Casualty Ins. Co. v. M. K.* (1991) 52 Cal.3d 1009, 1020–1021.) While willfulness may not require a guilty intent on the part of the perpetrator, it nevertheless applies to acts that are “conscious, intentional and deliberate.” (*Goodhew v. Industrial Acc. Commission* (1958) 157 Cal.App.2d 252, 257.) As the court noted in *Goodhew*, “[t]he word ‘willful’ is used in different statutes with various shades of meaning.” (*Id.* at p. 256.) There is no “universal formula” that defines the word “willful” and its meaning must be determined “in the context of the particular statute being considered.” (*Kwan v. Mercedes-Benz of North America, Inc.* (1994) 23 Cal.App.4th 174, 183.)

Turning then to the statutory framework, it is readily apparent that the Education Code establishes two separate schemes for dismissals under section 44932, and for immediate suspension under section 44939. Section 44932 enumerates 11 separate causes for teacher dismissals, including immoral conduct, unprofessional conduct, and alcoholism, among others. However, under section 44939, a teacher may be immediately suspended based only on the five grounds which are described above. Specifically, many of the causes for dismissal under section 44932, such as dishonesty, unfitness to teach, and unsatisfactory performance, cannot form the grounds for immediate suspension under section 44939.

The Education Code also sets forth different procedural requirements for dismissals and immediate suspension. For example, under section 44938, subdivision (b), an employing district may not take action against an employee charged with unsatisfactory performance pursuant to section 44932 without first having given at least 90 days’ written notice to the employee of the unsatisfactory performance with such specificity and particularity so as to “furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge.” (§ 44938, subd. (b).) There is a similar notice requirement when an employee is charged with unprofessional conduct pursuant to section 44932. (§ 44938, subd. (a).) Under section 44939, the employing district may immediately suspend the employee, but the employee may also file a motion for immediate reversal within 30 days of service of

the initial pleading. (§ 44939, subds. (a), (b), (c).) This remedy is unique to immediate suspension cases.

Thus, the Education Code, in creating the separate grounds and procedures for cases involving dismissals generally and those involving immediate suspension, contemplates a clear distinction between two types of cases. Moreover, in narrowing the substantive grounds for immediate suspension and in creating additional due process protections for the employee under section 44939, the Legislature evidenced intent to set a higher threshold for the employing district to justify immediately suspending a teacher without pay. In this context, District's argument that "refusal to obey" under section 44932 constitutes "willful refusal" under section 44939 would render the substantive and procedural distinctions between the two statutes meaningless. Consequently, this interpretation must be avoided.

Furthermore, although both section 44932, subdivision (a)(8) and section 44939, subdivision (b) use the word "refusal", the language of the statutes are dissimilar. Under section 44932, subdivision (a)(8), a teacher may be dismissed for "[p]ersistent 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 or by the governing board of the school district employing him or her." Under section 44939, subdivision (b), a teacher may be immediately suspended only for "willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing school district." The use of the word "willful" rather than "persistent" indicates that while repeated and persistent performance issues may establish grounds for dismissing a teacher under section 44932, they are not grounds for immediate suspension under section 44939.

In light of the foregoing, the most reasonable interpretation of willfulness under section 44939 is that it implies more than the repeated doing of negligent acts. Employee, in her Motion, contends that "[w]illful refusal suggests that [Employee] made the affirmative decision to engage in insubordination." (Motion, p. 10.) This argument is compelling. As the California Supreme Court stated in *Board of Educ. of City of Los Angeles v. Swan* (1953) 41 Cal.2d 546, 552, "[t]he willful refusal of a teacher to obey the reasonable rules and regulations of the employing board of education is insubordination." Willfulness, therefore, requires an intentional and affirmative decision on the part of the teacher to refuse assignments and to engage in insubordination.

This interpretation of the statute is consistent with prior case law requiring strict construction of teacher dismissal statutes. (*Board of Trustees of Placerville Union School Dist. v. Porini* (1968) 263 Cal.App.2d 784, 789.) Strict construction is warranted because teacher dismissal statutes "ha[ve] as a possible object the termination of employment of a permanent teacher. [A teacher's] right of continued employment is a valuable right." (*Ibid.*) Immediate suspension is an even more severe measure, in that the suspension of a teacher without pay pending the outcome of dismissal hearing involves the immediate deprivation of a valuable right. Under these circumstances, section 44939 must be strictly construed to set a higher threshold for establishing a case involving immediate suspension than that involving dismissal generally. Thus, absent compliance with the requirements of section 44939, the

Education Code does not contemplate immediate suspension based on a teacher's repeated failures to comply with directives or procedures.

### *Analysis*

The Motion tests whether the alleged facts, if true, are “sufficient to constitute a basis for immediate suspension.” (Ed. Code, § 44939.) In the statement of charges, the word “willful refusal” is used in numerous instances. However, the mere quoting of the statutory language is conclusory and insufficient to survive a motion for immediate reversal of suspension. (*Curcini v. County of Alameda* (2008) 164 Cal.App.4th 629, 649; *Bley v. Board of Dental Examiners of State of California* (1932) 120 Cal.App. 426, 429–431.) The allegations of Employee's refusal to comply with the directives, as contained in the statement of charges, do not show a “willful refusal” to perform her regular assignment as a special education teacher.

For example, with respect to allegation that Employee failed to comply with policies and procedures relating to special education, there was no allegation that Employee did not perform or refused to perform her duties. She did offer a reason to District for failing to submit a student's Summary of Performance to her Special Education Coordinator, but District found her “excuse for not doing so was without reasonable cause.” (SOC, ¶1a.) The statement of charges does not specify what Employee's “excuse” or justification was, and therefore does not contain sufficient facts demonstrating that Employee's refusal was willful or without reasonable cause. In other instances, where the statement of charges alleges that Employee was not timely in either completing or scheduling IEP's, there was no showing that Employee's failures were, in fact, intentional or deliberate. The pleading merely assumes that, because Employee has six years of experience as a special education teacher, she must have knowingly failed to perform these duties.

Similarly, allegations of Employee's unsatisfactory performance and insufficient or non-compliance with other directives and policies and procedures do not manifest a “willful refusal” to perform her duties; she did perform her duties, but she did so unsatisfactorily as detailed by the facts alleged in the statement of charges. At worst, some of the allegations show that Employee was repeatedly negligent in failing to turn in her assignments on time. For example, Employee did eventually submit her roll book, albeit late and after several directives for her turn it in. Employee also turned in the weekly lesson plans to the Assistant Principal, although the plans were submitted two to three days late. Additionally, the statement of charges failed to allege, with sufficient specificity, how Employee failed to comply with directives to deliver lessons that contain engaging learning activities and clearly communicate lesson objective. It appears that Employee did deliver the lessons, but her delivery was inadequate in District's view.

Moreover, District alleges that the last incident during which Employee “willfully refused” an assignment occurred on April 6, 2016, which is approximately one year and eight months before the Employee was placed on unpaid suspension in December 2017. Therefore, it can be inferred that between April 6, 2016, to December 2017, Employee had

been compliant with District's rules, regulations, and directives. The fact that Employee apparently did not have any compliance issues during this period before her immediate suspension demonstrates a lack of intent to engage in willful refusal or insubordination.

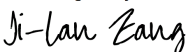
Because the statement of charges does not allege sufficient facts demonstrating an intentional or affirmative decision on Employee's part to refuse performing her duties as a teacher, grounds for her immediate suspension have not been established. The ALJ finds that the facts alleged in the statement of charges, if true, are not sufficient to establish a basis for Employee's immediate suspension under section 44939. The Motion shall be granted.

*Disposition*

The Motion is granted. In accordance with Education Code section 44939, subdivision (c)(5), this Order shall become effective within five days of service of the Order, and District shall make Employee whole for any lost wages, benefits, and compensation within 14 days after service of this Order.

IT IS SO ORDERED.

DATED: February 15, 2018

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JI-LAN ZANG  
Administrative Law Judge  
Office of Administrative Hearing