

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

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

CARLOS LARGAESPADA,
A Permanent Certificated Employee,

Moving Party,

and

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

Responding Party.

OAH No. 2018100593

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

[Ed. Code, § 44939, subd. (c)(1)]

On November 9, 2018, a telephonic hearing on the motion filed by Carlos Largaespada for immediate reversal of suspension (Motion) was held by Erlinda G. Shrenger, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), from Los Angeles.

Tamara M. Smith, Equality Law LLP, represented moving party Carlos Largaespada (Employee).

Mampre R. Pomakian, Associate General Counsel, represented responding party Los Angeles Unified School District (District).

The District has suspended Employee without pay pending the outcome of its action to dismiss Employee.¹ 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 his suspension. The District opposes the Motion.

¹ The dismissal action bears OAH case number 2018100601. The grounds for dismissal alleged by the District against Employee are unprofessional conduct; unsatisfactory performance; evident unfitness for service; and persistent violation of school laws and regulations. (Ed. Code, § 44932, subd. (a)(2), (5), (6), and (8).)

Having considered the moving, opposing, and reply papers filed by the parties, Employee's request for official notice and the District's opposition thereto,² the Accusation filed with OAH, and the oral argument of counsel, the undersigned ALJ hereby finds and orders as follows:

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 (teaching communism).³

An employee who is suspended pursuant to section 44939 may serve and file with OAH 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." (Educ. Code, § 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." (*Id.*)

Although well-pleaded facts must be accepted as true for purposes of the Motion, the ALJ need not accept "contentions, deductions or conclusions of fact or law." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) With regard to the alleged misconduct of a public employee, the term "willful" carries a volitional coloration which excludes the notion of accidental or even negligent conduct." (*Coomes v. State Personnel Bd.* (1963) 215 Cal.App.2d 770, 775.)

Discussion

The District contends Employee is subject to immediate suspension pursuant to section 44939, on the basis of willful refusal to perform regular assignments without reasonable cause, because, despite being provided assistance, guidance, and directives to improve his performance as an elementary school teacher, Employee failed to improve his performance. However, the well-pleaded facts in the Accusation do not reflect a "willful refusal" to perform but, instead, indicate that Employee performed his assignment as a third

² The ALJ denied Employee's request for taking official notice of orders issued by ALJs in three other cases (OAH Nos. 2017070832, 2017090844, and 2018051146) and legislative history materials pertaining to Assembly Bill 449, on relevance grounds.

³ All further statutory references are to the Education Code unless otherwise indicated.

grade teacher, but did so unsatisfactorily in the District's view. While the Accusation alleges multiple instances of Employee's failure to comply with directives, the allegations do not reflect that Employee's failure was intentional or deliberate. The conclusory allegations in the Accusation that Employee's failure to follow directives or improve his performance demonstrated a "willful refusal" to perform his assignments are not binding on the ALJ and need not be accepted. When viewed in its totality, the Accusation indicates that Employee's alleged misconduct was not the result of a willful, volitional refusal to perform his regular assignment.

The District's argument that Employee's failure to follow directives constitutes a "willful refusal" to support an immediate suspension under section 44939 is contrary to the statutory scheme of the Education Code, where causes for dismissal are set forth in section 44932, but the limited grounds for immediate suspension are set forth separately in section 44939. Absent compliance with the requirements of section 44939, the Education Code does not contemplate immediate suspension based on a teacher's unsatisfactory performance or repeated failures to comply with directives or procedures. For example, under section 44938, subdivision (b), an employing district may not take action against an employee charged with unsatisfactory performance 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." (Ed. Code, § 44938, subd. (b)(1).) There is a similar notice requirement when an employee is charged with unprofessional conduct. (Ed. Code, § 44938, subd. (a).)

Based on the foregoing, and the reasons stated on the record, the ALJ finds that the facts alleged in the Accusation, 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 the 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: November 17, 2018

DocuSigned by:
Erlinda Shrenger
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ERLINDA G. SHRENGER
Administrative Law Judge
Office of Administrative Hearing