

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

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

KYLA BERMAN, (EN 782078), Moving Party

A Permanent Certificated Employee

and

LOS ANGELES UNIFIED SCHOOL DISTRICT, Responding Party

OAH No. 2020010144

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

Laurie R. Pearlman, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter telephonically from Los Angeles, California on January 24, 2020.

Mitzi Marquez-Avila, Attorney at Law, represented moving party Kyla Berman (Respondent or Berman).

Susan Hyman, Assistant General Counsel II, represented responding party Los Angeles Unified School District (LAUSD or District).

BACKGROUND

The District's Statement of Charges (SOC) against Respondent alleges that: (1) On March 7, 2019, Berman fraudulently, and without the assigned teacher's permission, changed high school student John Doe's grades in six classes, violating LAUSD rules and regulations; (2) On April 25, 2019, John Doe's transcript with inaccurate grades was transmitted to one or more universities; (3) On April 30, 2019, District officials met with and gave Berman directives; and (4) thereafter, Berman "willfully refused to comply with the directives issued to her on April 30, 2019."

The District alleges that: while employed as a Teacher and Athletic Director at Narbonne High School (Narbonne), Berman abused her position by repeatedly entering false grades for John Doe, who was a star football player in his senior year of high school. Berman's intervention substantially raised the student's grade point average so that he was academically eligible to play in Narbonne's top-rated football program. Similarly, Berman retroactively entered false grades in classes that John Doe had taken the prior year, in 2018, also with the impact of substantially raising his grade point average. Shortly thereafter, John Doe's transcripts including the false grades were sent to a major university where he had committed to play Division I football. After Berman's misconduct was revealed, John Doe declined to enroll and play football at the university.

The District issued discipline to Berman, including a Notice of Unsatisfactory Act and a Notice of Suspension. On December 3, 2019, the District's Board of Education (Board) determined that Berman had committed immoral conduct and willfully refused to perform her assignments, justifying her immediate suspension and dismissal.

The SOC contains several grounds for dismissal, as follows: (1) immoral conduct, (2) dishonesty, (3) evident unfitness for service, (4) 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, and (5) willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing district. (Ed. Code §§ 44932, 44939.)

The District served Berman with a Notice of Immediate Unpaid Suspension, pursuant to Education Code section 44939, for immoral conduct and willful refusal to perform regular assignments without reasonable cause. Berman demanded a hearing on the dismissal and filed a motion for immediate reversal of the suspension (MIRS) under Education Code section 44939, subdivision (c)(1). The District filed opposition to the motion, and counsel for both parties presented oral argument at the motion hearing.

Respondent's Contentions

Berman asserts that the facts as alleged in the SOC, even if true, are insufficient to constitute a basis for immediate suspension without pay. Berman contends that the SOC is devoid of supporting facts which demonstrate culpable knowledge or intent, elements which she argues are necessarily required for fraud, immoral conduct, and willfulness.

Berman argues that there are no facts in the SOC which, if true, demonstrate that she acted immorally, rather than negligently or by mistake. She asserts that the SOC falls short of pleading either fraud or immoral conduct, contending that there are no factual allegations indicating that she knew the grade changes were unauthorized

and/or against policy, or that she acted with a motive to deceive or defraud, or reaped any personal benefit from the alleged grade changes.

Berman also contends that a permanent certified teacher cannot be dismissed for immoral conduct unless the alleged conduct demonstrates unfitness to teach. She argues that the District's well-pleaded SOC is devoid of any facts demonstrating that she is unfit to be an athletic director.

Finally, Berman asserts that the District pleads no facts suggesting that she willfully refused to follow the April 30, 2019 directives, even if the facts alleged establish that she failed to comply with the directives. Berman argues that without any facts suggesting a willful state of mind or volitional refusal to perform as directed, the District's charge against her fails on its face.

The District's Contentions

The District asserts that its SOC alleges sufficient facts constituting immoral conduct and willful refusal as causes for dismissal and immediate suspension, pursuant to Education Code section 44939. The District contends that the SOC is not required to specify all of the details surrounding, and evidence supporting, the charges asserted therein. As supported by case law and statutory authority, the SOC need only provide the employee with sufficient notice to the end that the Respondent will be able to prepare a defense. (Gov. Code, § 11503, subd. (a); Ed. Code, § 44934; *Wright v. Munro* (1956) 144 Cal. App. 2d 843, 848.)

The District contends that it need not plead Berman's intent to establish that she acted deliberately or willfully. It argues that this notion not only contradicts the MIRS standard by requiring the District to present evidence outside of the pleadings to establish intent, but also contradicts established precedent regarding pleading

requirements. The District contends that a detailed showing of affirmative intent is not required in any pleading, even at the highest level of our judicial system.

The United States Supreme Court has articulated the pleading standard in a demurrer, even when the allegations include discrimination. In *Ashcroft v. Iqbal* (2009) 556 U.S. 662, 697 [129 S.Ct. 1937], the U.S. Supreme Court upheld its previous ruling that a plaintiff alleging discrimination must plead "enough facts to state a claim for relief that is plausible on its face." It must only provide allegations describing a reasonable inference of discriminatory motivation, or intent.

The District asserts that Berman refused to perform an act which was required to be done by refusing to follow the directives given to her by her administrators. Case law in other employer-employee relationships provides a definition of "willful" that does not require that the refusal to perform a required act must be conscious, intentional, or deliberate; rather, it suffices that the actor knows what she is required to do and refuses to do it. Courts have held that declining to obey an employer's directions, without reason, is sufficient to establish willful refusal. (*Wilbur v. Office of City Clerk of City of Los Angeles* (1956) 143 Cal.App.2d 636, 642 (Observing an employee who made "no showing before the hearing examiner of willingness to comply with the reasonable orders of his superiors," demonstrated "willful refusal to obey the reasonable orders of an employer").)

The District argues that when considering the unique position of teachers, immoral conduct has been sufficiently plead in the SOC. The actions alleged offend community notions of fair play in both academics and sports. The SOC alleges facts which would establish that Respondent engaged in willful, flagrant and shameless conduct showing moral indifference to the opinions of respectable members of the community. Additionally, in *Board of Education v. Weiland* (1960) 179 Cal. App. 2d 808,

809, the seminal case that defines immoral conduct in a teacher dismissal, the court drew a parallel from the definition of “moral turpitude” to state that immoral conduct in the teacher dismissal process could be synonymous with “dishonesty.” Stripped to its essence, the SOC alleges that Respondent was dishonest and cheated.

Respondent’s argument that the District should be required to plead and prove “fraud” is not well-taken. There is no cause for dismissal for “fraud” under the Education Code; rather, there is cause for “immoral conduct.”

Respondent’s argument that the grade changes may have been based on mistake or miscommunication are not persuasive. The charges allege that the grade changes violated numerous District policies. As a veteran teacher and athletic director with the District, Respondent is imputed to have knowledge of her job duties, as well as District policies.

LEGAL STANDARDS

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 file a motion for immediate reversal of the suspension with the Office of Administrative Hearings. (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 well-pleaded facts 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 willful, 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 v. Weiland, supra*, at 811, quoting *Orloff v. Los Angeles Turf Club* (1951) 36 Cal.2d 734, 740 and *Palo Verde Unified School District of Riverside v. Hensey* (1970) 9 Cal.App.3d 967, 972.)

The conduct alleged is immoral conduct as it is willful, flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the community and constitutes an inconsiderate attitude toward good order and the public welfare.

A teacher may be placed on an immediate unpaid suspension where she is charged with willful refusal to perform regular assignments without reasonable cause, as prescribed by the reasonable rules and regulations of the employing school district. (Ed. Code, § 44939 subd. (b).)

Willful refusal is properly plead in the SOC based upon the alleged misconduct. Respondent's regular assignments include adherence to the directives issued by her administrators. The California Supreme Court has ruled that the refusal of a teacher to accept assignments, which the school authorities have the power to make, constitutes a violation of school laws and grounds for dismissal and placement on unpaid

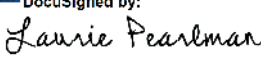
suspension. (*See Board of Education, City of Los Angeles v. Swan* (1963) 41 Cal. 2d 546, 551-52 [261 P.2d. 261], disapproved on another ground in *Bekiaris v. Board of Education* 6 Cal.3rd 575, 594, fn. 7 [100 Cal.Rptr. 16, 493 P.2d 480].) Here, Respondent's willful refusal to abide by the directives given to her on April 30, 2019, is straightforward and adequately plead.

Accordingly, Berman failed to establish good cause to reverse the immediate suspension.

ORDER

The motion for immediate reversal of suspension is denied.

DATE: February 10, 2020

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LAURIE R. PEARLMAN

Administrative Law Judge

Office of Administrative Hearings