

BEFORE THE
OFFICE OF ADMINISTRATIVE
HEARINGS STATE OF CALIFORNIA

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

BRIAN HENDERSON,

Employee,

v

LOS ANGELES UNIFIED
SCHOOL DISTRICT,

District.

OAH No. 2019030236

**ORDER DENYING REQUEST FOR
JUDICIAL NOTICE AND ORDER
GRANTING MOTION FOR
IMMEDIATE REVERSAL OF
SUSPENSION**

Administrative Law Judge (ALJ) Kimberly J. Belvedere, Office of Administrative Hearings (OAH), State of California, heard this matter telephonically on March 29, 2019.

Daniel J. Kolodziej, Trygstad, Schwab & Trygstad, represented Brian Henderson (Employee).

Lee T. Patajo and Michael Voigt, Esq., represented the Los Angeles Unified School District (District).

The District filed a statement of charges against Employee, and placed him on indefinite unpaid suspension. The suspension is based on allegations that Employee willfully refused to perform regular assignments without reasonable cause, in violation of Education Code section 44939.

Employee timely filed a Motion for Immediate Reversal of Suspension (motion) with OAH, pursuant to Education Code section 44939, subdivision (c)(1). The various papers filed by the parties in connection with the motion were reviewed prior to the hearing. Employee had filed a request with OAH that judicial notice be taken of prior OAH decisions regarding motions for immediate reversal of suspensions in support of his argument; the district filed an opposition. The ALJ denied Employee's request for judicial notice on the grounds that 1) the motion must be heard and decided based solely on the information contained in the Statement of Charges; and 2) judicial notice may only be taken of the existence of the prior OAH decisions and not their content, and thus, are not relevant or helpful as argument in this matter.

Education Code section 44939, subdivision (b), provides that a school district may immediately suspend a permanent certificated employee who has been charged with willful refusal to perform regular assignments without reasonable cause. Education Code section 44939, subdivision (c)(1), allows a suspended employee to file a motion for review of the suspension, and review of that 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.”

In this case, the ALJ considered the written submissions of the parties and oral argument made during the hearing. Based upon a review of the statement of charges filed in the instant matter (the pleadings), and as set forth in detail on the record during the telephonic hearing, the motion is granted.

Although well-pleaded facts must be accepted as true for purposes of this motion, the ALJ need not accept “contentions, deductions or conclusions of fact or law.” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) A motion such as this is analogous to a demurrer. A demurrer can be sustained when a plaintiff’s “conclusory characterization of defendant’s conduct as intentional, willful and fraudulent” was “patently insufficient.” (*Brousseau v. Jarrett* (1977) 73 Cal.App.3d 864, 872.)

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.)

A comparison of Education Code sections 44932, subdivision (a), and 44939, subdivision (b), is instructive. Pursuant to section 44932, subdivision (a)(5) and (a)(2), discipline is warranted for unsatisfactory performance or unprofessional conduct, respectively, but not unpaid suspension. More importantly, under section 44932, subdivision (a)(8), while a teacher’s persistent violation of a school district’s reasonable regulations is grounds for discipline, it is not an authorized basis for unpaid suspension. Rather, unpaid suspension is authorized only for a willful refusal to perform regular assignments pursuant to section 44939, subdivision (b).

This comparison indicates the cause of discipline for willful refusal to perform a regular assignment is more akin to the traditional labor charge of insubordination, i.e., an intentional, willful, volitional refusal to perform any part of a particular regular assignment. However, a charge of willful refusal to perform a regular assignment must be more than unsatisfactory, unprofessional, negligent or even persistent failure to perform a regular assignment. Certainly, a failure to perform certain acts repeatedly may constitute a willful refusal to perform; but for purposes of a motion to immediately reverse a suspension, sufficient facts must be alleged in the charging document to show that the multiple and repeated failures are, in fact, willful.

A review of the statement of charges in its totality, does not demonstrate Employee’s alleged misconduct is the result of a willful, volitional, refusal to perform his regular assignment. The well-pleaded facts indicate that when Employee taught his classes, administrators found fault with his performance. Stated another way, the pleadings indicate Employee was teaching his classes, but did so deficiently in the District’s opinion. The allegations also indicate Employee failed to improve or correct the deficiencies even after receiving multiple conferences

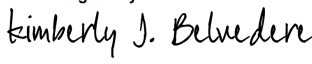
and, perhaps, persistently, but not always, failed to comply with directives given to him. This is not the same as a willful refusal to perform assignments without reasonable cause.

The pleadings allege with factual precision that Employee's teaching during the times in question was unsatisfactory, unprofessional and in persistent violation of the district's rules and regulations, among other things. The pleadings detail many failures of Employee to teach in the manner consistent with the district's rules and regulations, and state law. However, where the pleadings allege a *willful* refusal to perform a regular assignment, the allegations are conclusory and devoid of the kind of factual content which, if true, would constitute a *willful* state of mind or volitional refusal to perform as directed. As discussed above, vague and conclusory allegations are not binding on the ALJ and need not be accepted.

Good cause having been established, the motion is granted. Pursuant to Education Code section 44939, subdivision (c)(5), this order shall become effective within five days of service, and the District shall make the Employee whole for any lost wages, benefits, and compensation within 14 days after service of the order.

IT IS SO ORDERED.

DATED: April 2, 2019

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KIMBERLY J. BELVEDERE
Administrative Law Judge
Office of Administrative Hearings