

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

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

NICOLE BURKETT, Moving Party

v.

TWIN RIVERS UNIFIED SCHOOL DISTRICT, Responding Party

OAH No. 2021060102

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

Adam L. Berg, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard oral argument on this matter by telephone on June 25, 2021.

Andrea Price, Langenkamp, Curtis & Price, LLP, represented moving party, Nicole Burkett.

R. Peter Rittling and Julianne S. Rossiter, Dannis Woliver Kelley, represented responding party, Twin Rivers Unified School District (district).

The matter was submitted for decision on June 25, 2021.

Background

On May 4, 2021, the district's chief human resources official signed the Statement of Charges and Recommendation for Dismissal and for Immediate Unpaid Suspension (Statement of Charges) seeking the immediate suspension without pay and dismissal of Ms. Burkett, a permanent certificated employee. On May 5, 2021, the district's governing board passed a resolution approving the dismissal and immediate suspension. The Statement of Charges was served on Ms. Burkett the same day. The Statement of Charges alleges the following causes for dismissal: immoral conduct, unprofessional conduct, persistent violation of or refusal to obey state school laws or regulations prescribed by the district's governing board, and evident unfitness. (Ed. Code, § 44932, subd. (a)(1), (a)(2), (a)(8), & (a)(6).)¹ The Statement of Charges also notified Ms. Burkett of the district's intent to immediately suspend her without pay based on immoral conduct. (§ 44939.)

On June 1, 2021, Ms. Burkett filed a Motion for Immediate Reversal of Suspension (motion) with OAH, pursuant to Section 44939, subdivision (c)(1), alleging that the Statement of Charges does not set forth facts sufficient to support an allegation that she engaged in immoral conduct, which is necessary in this case to sustain the suspension. The district filed an opposition to the motion on June 15, 2021. On June 25, 2021, a telephonic conference was held, during which the parties were invited to present any additional oral arguments.

¹ All future statutory references are to the Education Code.

Allegations in the Statement of Charges

The Statement of Charges alleges that on February 25, 2021, while conducting her third period Spanish class via Zoom, Ms. Burkett pulled on the corners of her eyes to turn them into different shapes. As she did so, she stated, "If your eyes went up, they're Chinese. If they go down, they're Japanese. If they're just straight, you don't know." The district alleges Ms. Burkett made these comments to her classroom of students, including students of Asian descent. Video of her comments were posted on social media and picked up by local, national, and international media outlets.

The Parties' Arguments

Ms. Burkett contends the district failed to plead facts sufficient to establish immoral conduct, and because there is no context provided about her actions, there are no facts to establish her motives. Ms. Burkett also argues the allegations, even if true, do not constitute immoral conduct as a matter of law. Specifically, she argues this case is distinguishable from *Crawford v. Commission on Professional Competence* (2020) 53 Cal.App.5th 327, in which the court upheld a finding of immoral conduct where a school counselor posted comments on a public Facebook page criticizing and insulting students who took part in "A Day Without Immigrants" protest. Finally, Ms. Burkett contends that the district failed to afford her a *Skelly* hearing prior to removing her from her job without pay.

The district contends it pled sufficient facts to establish immoral conduct and to provide Ms. Burkett fair notice so that she can prepare a defense. The district contends that immoral conduct under the Education Code covers a wide range of conduct, and Ms. Burkett's actions were inimical to the welfare of the general public and school community. The district also argues that Ms. Burkett was not entitled to a *Skelly*

hearing for immediate suspension, as her instant motion is the exclusive means of obtaining interlocutory review of her suspension pending dismissal.

Applicable Law

Section 44939, subdivision (b), authorizes the district to suspend an employee without pay pending the outcome of the hearing if the district charges immoral conduct. Subdivision (c)(1), allows the employee to file a motion for relief from the suspension and requires review of this motion to 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.”

Evaluation

The Statement of Charges specifies “instances of behavior and the acts or omissions constituting the charge” such that Ms. Burkett was placed on sufficient notice such that she can prepare a defense. (§ 44934, subd. (c); *Wisuri v. Newark School Dist. of Alameda County* (1966) 247 Cal.App.2d 239, 242.) While there might be explanations for her conduct such that a factfinder could conclude that her actions did not constitute immoral conduct, such is the purpose of an evidentiary hearing before a Commission on Professional Competence. Ms. Burkett cites no caselaw requiring the pleadings to establish that the *only* reasonable inference from the alleged facts is that her conduct was immoral. Put another way, because the facts as alleged, if true, *could* result in a finding of immoral conduct, Ms. Burkett’s motion must be denied. All other arguments by Ms. Burkett have been considered and are rejected.

ORDER

The motion for immediate reversal of suspension is denied.

DATE: June 25, 2021

A handwritten signature in black ink, appearing to read 'ALB', is written over a horizontal blue line.

ADAM L. BERG

Administrative Law Judge

Office of Administrative Hearings