

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

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

**TYRONE LIDDELL, A Permanent Certified Employee,

Moving Party,**

v.

HEMET UNIFIED SCHOOL DISTRICT, Responding Party.

OAH No. 2021050589

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

Ji-Lan Zang, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by telephone on June 11, 2021, in Los Angeles, California.

Jon Cadieux, Attorney at Law, represented moving party Tyrone Liddell (Employee). David E. Robinett, Attorney at Law, represented responding party Hemet Unified School District (District).

District has suspended Employee without pay pending the outcome of its action to dismiss Employee.¹ The basis for the suspension under Education Code² section 44939 is willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing school district. On March 18, 2021, Employee filed a motion (Motion) seeking an order for the immediate reversal of his suspension. On June 1, 2021, District filed an opposition (Opposition) to the Motion. On June 8, 2021, Employee filed a reply.

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:

Section 44939

1. 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). (§ 44939, subd. (b).)

¹ The dismissal action bears OAH No. 2021060060.

² All further statutory references are to the Education Code unless otherwise indicated.

2. 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." (§ 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.*)

The Statement of Charges

3. District seeks to dismiss Employee from his assignment as a chemistry teacher. The Statement of Charges alleges causes for dismissal, pursuant to section 44932, for unprofessional conduct, dishonesty, unsatisfactory performance, evident unfitness for service, and persistent refusal to obey school laws and regulations.

4. District's dismissal action against Employee consists of allegations of his poor or unsatisfactory performance as a classroom teacher during the 2019 to 2020 and 2020 to 2021 school years. In general, Employee's performance deficiencies relate to areas including, but not limited to, refusal to contact parents of students who are failing or at risk of failing; refusal to return calls to parents or students; refusal to enter or update grades; refusal to submit lesson plans; failure to submit collaboration meeting minutes; failure to timely respond to District emails and failure to appear at scheduled meetings; failure to timely submit administrative documents; improper storage of chemicals; noncompliance with directives; and dishonesty.

5. 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. According to District, the following allegations contained in the Statement of Charges establish Employee's willful refusal:

- Employee did not attempt to contact 53 students who earned a "D" or "F" during the 2020 to 2021 school year for the purpose of providing academic intervention, despite numerous prior directives to do so (SOC, ¶ 4);³
- Employee did not return calls or emails to parents or students, in some cases requiring multiple prompts over multiple weeks or months before doing so (*Id.* at ¶ 5);
- Employee failed to follow numerous directives to input, update, and finalize student grades in a timely manner (*Id.* at ¶ 5);
- Employee did not turn in any lesson plans for the 2020 to 2021 school year (*Id.* at ¶ 7);
- Employee did not provide agenda minutes for his Wednesday collaboration meetings on several occasions dating back to the 2019 to 2020 school year (*Id.* at ¶ 8);
- Employee did not turn in his weekly Time Value Certification documents between October 16 and December 14, 2020 (*Id.* at ¶ 10(a)); and

³ References to specific paragraphs of the Statement of Charges are indicated by "SOC" followed by the paragraph number.

- Employee did not turn in his Weekly Attendance Reports for the periods of August 21 to September 24, 2020; October 7 to 14, 2020; and November 2 to December 7, 2020 (*Id.* at ¶ 10(b)).

(Opposition, pp. 5-6.)

The Parties' Contentions

6. Section 44939 limits the grounds for immediate suspension of a teacher to instances of "willful refusal" to perform regular assignments without reasonable cause. Employee contends that the allegations contained in the Statement of Charges fall within the meaning of "persistent refusal" to obey the school laws and regulations under section 44932, subdivision (a)(8),⁴ but they do not constitute "willful refusal" to perform regular assignments without reasonable cause under section 44939, subdivision (b). (Motion, pp. 2-4.) According to Employee, "willful refusal" under

⁴ Section 44932, subdivision (a)(8), states:

(a) A permanent employee shall not be dismissed except for one or more of the following causes:

[¶]. . . . [¶]

(8) 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 or by the governing board of the school district employing him or her.

section 44939 is not the same as “persistent refusal” under section 44932, which provides grounds for only dismissal, but not immediate suspension, of a teacher. (*Ibid.*)

7. In its oral argument during the hearing, District contended that the critical distinction between sections 44939, subdivision (b), and 44932, subdivision (a)(8), is not whether Employee’s refusal is “willful” or “persistent,” but whether Employee refused to perform his regular assignments as a chemistry teacher (section 44939, subdivision (b)) or obey the school laws and regulations (section 44932, subdivision (a)(8).) District further contended that even if willfulness is the distinguishing feature of section 44939, subdivision (b), Employee’s willful refusal may be inferred from his repeated failure to perform his assigned tasks, despite numerous directives from District.

Statutory Construction

8. District’s first contention, that it matters little whether an employee’s refusal is “willful” or “persistent,” entirely disregards the word “willful” used in section 44939, subdivision (b), rendering it surplusage. “It is a settled axiom of statutory construction that significance should be attributed to every word and phrase of a statute, and a construction making some words surplusage should be avoided.” (*People v. Woodhead (Woodhead)* (1987) 43 Cal.3d 1002, 1010; *Moyer v. Workmen’s Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230.) Consequently, District’s construction of section 44939, subdivision (b), is precluded because the statute requires the element of willfulness.

9. District’s second contention, that willfulness may be inferred from repeated failures to comply with directives, is also not persuasive. Because there is no case law interpreting the word “willful” as it is used in section 44939, subdivision (b), its

meaning must be construed through legislative intent. 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 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 (Goodhew)* (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.)

10. Turning then to the statutory framework, the Education Code establishes two separate schemes for dismissals under section 44932, and immediate suspensions 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.

11. The Education Code also sets forth different procedural requirements for dismissals and immediate suspensions. 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.

12. 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 an intent to set a higher threshold for the employing district to justify immediately suspending a teacher without pay.

13. Furthermore, although both sections 44932, subdivision (a)(8), and 44939, subdivision (b), use the word "refusal", the dismissal statute uses the modifier "persistent," and the immediate suspension statute uses the modifier "willful." "It is an equally settled axiom that when the drafters of a statute have employed a term in one place and omitted it in another, it should not be inferred where it has been excluded."

(*Woodhead, supra*, 43 Cal.3d at p. 1010; *Ford Motor Co. v. County of Tulare* (1983) 145 Cal.App.3d 688, 691.) Therefore, the use of the word “willful” in section 44939 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.

14. 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. In support of his argument that accidental or negligent conduct cannot constitute willful refusal to perform regular assignments for purposes of section 44939, Employee cites to *Board of Education of City of Los Angeles v. Swan* (*Swan*) (1953) 41 Cal.2d 546. In *Swan*, the court stated, “[t]he willful refusal of a teacher to obey the reasonable rules and regulations of the employing board of education is insubordination.” (*Id.* at p. 552.) Willfulness, therefore, requires an intentional and affirmative decision on the part of the teacher to refuse assignments and to engage in insubordination.

15. 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 correct performance deficiencies.

Analysis

16. The Motion tests whether the alleged facts, if true, are "sufficient to constitute a basis for immediate suspension." (§ 44939, subd. (c)(1).) In the Statement of Charges, the word "willful refusal" is used in several 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 directives, as contained in the Statement of Charges, do not show a "willful refusal" to perform his regular assignment as a chemistry teacher.

17. For example, with respect to the allegation that Employee failed to contact 53 students with failing grades, there is no allegation that Employee affirmatively refused to perform his duties without reasonable cause. When questioned by his principal about the lack of entries in Aeries (the school computer system) of his contacts with the 53 students, Employee responded that he "attempted to contact many of these families but were unable to reach them." (SOC, ¶ 4(a).) In another instance, where the Statement of Charges alleges that Employee failed to enter grades into the Aeries system, there is no showing that Employee's failure was in fact, intentional or deliberate. The pleading states that on September 11, 2020, Employee blamed unspecified "technical difficulties" for his failure to enter grades, but it does not establish when the grades were due or whether Employee ever entered the grades after receiving technical support from the school. (*Id.* at ¶ 6(a).)

18. Similarly, allegations of Employee's insufficient or non-compliance with other directives and policies and procedures do not manifest a "willful refusal" to perform his duties, although some of the allegations show that Employee was repeatedly negligent in failing to complete his assignments on time. For example, Employee responded to his principal's request for a student's grade information but just did so late, approximately one week later. (SOC, ¶ 9c.) Employee also eventually complied with the school principal's directive to properly store chemicals in his classroom on November 18, 2020, albeit five days after the principal had notified him to do so by email. (*Id.* at ¶ 11.) Moreover, District has not alleged any instances where Employee refused to accept an assignment, failed to come to work, or repudiated his supervisor's authority.

Disposition

19. Because the Statement of Charges does not allege sufficient facts demonstrating an intentional or affirmative decision on Employee's part to refuse performing his duties as a teacher, grounds for his 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.

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ORDER

The Motion for Immediate Reversal of Suspension of Tyrone Liddell 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 Mr. Liddell whole for any lost wages, benefits, and compensation within 14 days after service of this Order.

DATE: 06/24/2021



JI-LAN ZANG

Administrative Law Judge

Office of Administrative Hearings