

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

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

KEN KIESSLING, a permanent certificated employee,

Moving Party

and

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Responding Party

OAH NO. 2020090633

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

Laurie R. Pearlman, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter telephonically on October 9, 2020.

Jason Wojciechowski, Attorney at Law, represented moving party Ken Kiessler (Respondent).

Lynn I. Ibara, Assistant General Counsel, represented responding party Los Angeles Unified School District (District).

BACKGROUND

Respondent is a certificated, permanent employee of the District, who was assigned as an elementary school teacher at Dr. Theodore T. Anderson, Jr., Science Center School.

On August 26, 2020, the District served a notice of immediate suspension and intent to terminate Respondent. The suspension and intent to terminate are premised on a 72-page Statement of Charges, dated August 3, 2020, alleging that Respondent engaged in substandard education of students at certain times between October 29, 2010 and December 12, 2019, and failed to model appropriate and professional conduct in disciplining students in 2017. The District placed Respondent on an indefinite unpaid suspension, pending a hearing before the Commission on Professional Competence (CPC). Thereafter, Respondent submitted a timely request for hearing.

The District's Contentions

The District contends that its Statement of Charges contains sufficient facts showing that Respondent willfully refused to perform regular assignments without reasonable cause, pursuant to Education Code (Code) section 44939, thereby justifying his immediate suspension without pay. The District does not assert that immoral conduct is a basis for respondent's immediate suspension without pay.

The District argues that allegations in the Statement of Charges establish that Respondent refused to perform regular assignments without reasonable cause despite repeated oral and written assistance, guidance, and directives. It contends that

Respondent was on notice that he was failing to perform these assignments, rendering his conduct willful, rather than accidental or negligent.

The allegations in the Statement of Charges involve Respondent's failure to: model appropriate and professional conduct in disciplining students; submit adequate lesson plans; adequately prepare whiteboard; adequately prepare for lessons or activities; adequately implement lesson plans; deliver effective instruction; demonstrate evidence of standards-based planning and instruction; monitor or redirect student behavior; provide students with structure or clear directions; provide constructive feedback; use strategies to ensure he had students' undivided attention; have a classroom management plan that included rules, consequences, and rewards; post adequate class rules; ensure equitable student participation; create a safe and supportive classroom environment conducive to learning; establish rigorous learning goals; design instructional groups to support student understanding; align activities with the lesson objective; plan for the school assembly; maximize instructional time; establish, teach, and reinforce routines and procedures for dismissing students to lunch; use one consistent method for calling on students; ensure students' safety when he attempted to have the entire class sit on a small rug; have an established routine for providing pencils to students; provide adequate instruction before sending books home with students; follow the directed sequence of activities; model academic vocabulary; provide students with alternate activities; permit a student to attend a field trip; and provide a student with equal access to a public education.

The District also asserts in its Statement of Charges that at certain times between August 15, 2017 and December 12, 2019, Respondent willfully refused to meet written or oral directives to: establish a safe and supportive classroom environment where teacher/student interactions are respectful and polite; provide

clear behavior expectations for students and monitor student behavior; create and maintain an effective environment for learning; design activities to engage students in cognitively challenging work aligned to Standards; use resources that will promote high levels of learning and student engagement in the classroom; closely monitor student learning to understand how students are progressing toward the learning objectives and provide students with instructive and timely feedback to move their learning forward; understand and organize subject matter for student learning; plan instruction and design learning experiences for all students; assess students for learning; engage and support all students in learning; reflect on his practice and student work and use reflection to inform future instruction; develop as a professional educator; submit weekly lesson plan; and establish a classroom environment that is safe and supportive, risk-taking is encouraged, students feel free to contribute their ideas, and teacher and student interactions are respectful and polite to promote a positive learning environment for all students.

The District also alleges in the Statement of Charges that between August 15, 2017 and December 5, 2017, Respondent failed to model appropriate and professional conduct when he allegedly had students sit on the floor facing the corner, pushed a student with his knee, and grabbed a student by the shoulders to have him face the wall.

The District argues that Respondent had assistance and repeated notices and opportunities to perform his assignments, each of which involved regular assignments of teachers. The District further notes that the assignments alleged are not based on school laws of the State, or on regulations prescribed for the government of public schools, but on reasonable rules and regulations of the District. It contends that Respondent had knowledge of his regular assignment, and was provided with

guidance and resources. Accordingly, the District asserts that Respondent's failure to act constitutes a willful refusal in that it was voluntary and intentional, justifying his immediate suspension under Code section 44939.

Coomes v. State Personnel Board (1963) 215 Cal.App.2d 770 involved disciplinary action against a state employee accused of using improper force while physically restraining a mental patient in a state hospital. The District notes that in *Coomes*, the court identified "knowledge and prior course of conduct as evidence of a person's intent." (Opp. at 4:15–16.)

Respondent's Contentions

Respondent asserts that the facts as alleged in the Statement of Charges, even if accepted as true as they must be for purposes of this motion, are insufficient to constitute a basis for immediate suspension without pay under Code section 44939. The District alleges a variety of failures to perform and lists directives that Respondent allegedly violated. However, Respondent asserts that the allegations contained in the Statement of Charges fail to establish the necessary element of volition or willfulness. Respondent argues that the concept of willful refusal is distinct from the concept of unsatisfactory performance and that Code section 44939 does not authorize a school district to suspend a teacher without pay based on allegations of persistent violations, unsatisfactory performance, or unprofessional conduct.

Respondent notes that in *Coomes* the court found no willful conduct by the state employee because there was no evidence that he had engaged in "any habitual or expected course of improper controls [of patients]." *Coomes, supra*, 215 Cal.App.2d at 777. Respondent asserts that the Statement of Charges alleges that Respondent met performance standards on some occasions, but failed to do so at other times.

Accordingly, Respondent contends that the allegations do not establish willfulness, as Respondent's alleged failure to meet standards was neither habitual nor expected.

LEGAL STANDARDS

Applicable Law

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.)

Although there are no cases interpreting the term "willful refusal to perform regular assignments without reasonable cause" under Code section 44939, case law from related settings reflects that the term "willful" "carries a volitional coloration which excludes the notion of accidental or even negligent conduct." (*Coomes, supra*, 215 Cal.App.2d at 775; see also *Peters v. Mitchell* (1963) 222 Cal.App.2d 852, 862 ["Willful disobedience connotes a specific violation of command or prohibition."].) Declining to obey an employer's directions, without reason, is sufficient to establish

willful refusal. (See, e.g., *Wilbur v. Office of City Clerk of City of Los Angeles* (1956) 143 Cal.App.2d 636, 642 [observing that an employee who “did not attribute his refusals to illness” and 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”].)

Analysis

A comparison of Code sections 44932, subdivision (a), and 44939, subdivision (b), is illuminating. Pursuant to Code section 44932, subdivision (a)(2) and (a)(5), unprofessional conduct or unsatisfactory performance warrants discipline, but not unpaid suspension. More importantly, under Code 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 Code 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. 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.

In this case, the Statement of Charges does not contain sufficient facts to establish that Respondent's alleged teaching deficiencies are the result of a willful, volitional refusal to perform his regular assignment. Respondent was teaching his class, but did so deficiently in the District's opinion, despite the fact that he was

provided with guidance and resources. The well-pleaded facts indicate that when Respondent taught his classes, administrators found fault with his performance at times.

The allegations, if true, may establish that Respondent's teaching during the dates in question was unsatisfactory. But the allegations are devoid of the kind of factual content which, if true, would constitute a willful state of mind or volitional refusal to perform as directed. Therefore, Respondent is entitled to immediate reversal of his suspension.

ORDER

The motion for immediate reversal of suspension is granted. The District shall make Respondent whole for any lost wages, benefits, and compensation within 14 days after service of this order. (Ed. Code, § 44939, subd. (c)(5).)

DATE: Oct 23, 2020

Laurie Pearlman
Laurie Pearlman (Oct 23, 2020 18:13 PDT)

LAURIE R. PEARLMAN

Administrative Law Judge

Office of Administrative Hearing