

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

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

DAVID SAUVAGE,  
A Permanent Certificated Employee,  
  
Moving Party,

and,

ELK GROVE UNIFIED SCHOOL  
DISTRICT,

Responding Party.

OAH No. 2018051146

ORDER GRANTING MOTION FOR  
IMMEDIATE REVERSAL OF  
SUSPENSION

[Ed. Code, § 44939, subd. (c)(1)]

On June 22, 2018, a telephonic hearing on the motion filed by David Sauvage for immediate reversal of suspension (Motion) was held before Cindy F. Forman, Administrative Law Judge (ALJ), Office of Administrative Hearings, in Los Angeles, California.

Christopher O. Hammer, Attorney at Law, represented moving party David Sauvage (Employee). Erin M. Hamor and Gabriela D. Flowers, Attorneys at Law, represented responding party Elk Grove Unified School District (District).

On May 8, 2018, District notified Employee of its intent to dismiss him from his assignment as a special education teacher at Monterey Trail High School (MTHS) in Elk Grove, California, pursuant to Education Code<sup>1</sup> section 44932. District's Statement of Charges (SOC) alleged that Employee acted inappropriately toward District employees, failed to comply with the protocols and procedures relating to Individual Education Programs (IEPs) and IEP meetings, performed poorly as a classroom teacher, interacted inappropriately with students, failed to implement proper procedures and plans as the case manager for certain of his students, manipulated school records, made false statements to District teachers, and violated express District directives.<sup>2</sup> The District alleged that certain of the foregoing acts consisted of immoral conduct or reflected the willful refusal to perform

---

<sup>1</sup> All further statutory references are to the Education Code unless otherwise stated.

<sup>2</sup> The dismissal action bears OAH No. 2018060308.

regular assignments without cause as prescribed by District's reasonable rules and regulations, and District immediately suspended Employee without pay on those bases pursuant to section 44939, subdivision (b).<sup>3</sup>

On May 24, 2018, Employee filed the Motion, seeking immediate reversal of District's unpaid suspension order. Employee contends that the charges in the SOC do not constitute either immoral conduct or willful refusal to perform regular assignments. Accordingly, Employee contends that District has not met the statutory requirements of section 44939, subdivision (b), and his suspension is not warranted and should be immediately reversed.

On June 5, 2018, after receipt of the Motion, District served an Amended Statement of Charges (ASOC) on Employee. The ASOC includes the same bases of dismissal and factual allegations found in the SOC. The ASOC also contains new factual allegations relating to Employee's use of inappropriate sexual innuendo with students, his inappropriate contact with a District paraeducator in November 2016, his failure in December 2016 to supervise a male and a female student who were sitting side-by-side under a blanket, and his failure to document properly student misconduct that occurred on January 6, 2017. The ASOC further alleges that District issued a letter of reprimand on February 3, 2017, with respect to the foregoing conduct. (ASOC, p. 15 ¶16 – p. 19, ¶ 22.) The conduct underlying the new allegations in the ASOC occurred prior to service of the SOC on Employee.

On June 13, 2018, District filed its opposition to the Motion, citing both the new allegations of the ASOC and the original allegations of the SOC (as re-alleged in the ASOC) in support of its suspension order. In his reply, filed on June 20, 2018, Employee requested that the ALJ ignore the new factual allegations contained in the ASOC and limit the analysis of the propriety of Employee's suspension to the allegations found in the SOC. In addition, Employee asserted that the new allegations, even if considered, do not describe conduct that is immoral or reflects a willful refusal by Employee to perform regular assignments without cause, and he re-asserted that the original allegations likewise failed to satisfy the section 44939, subdivision (b), threshold for immediate suspension.

## ORDER

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:

---

<sup>3</sup> Section 44939, subdivision (a), provides that the governing board of the school district may immediately suspend a permanent employee from his duties upon a written statement of charges charging the employee 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 with violation of Section 51530 [advocating or teaching communism].”

1. The new allegations contained in the ASOC are not relevant to, and therefore will not be considered in, determining whether District's suspension of Employee met the statutory requirements of section 44939, subdivision (b). The District's suspension order was based on the allegations in the SOC, not the new allegations contained in the ASOC. Nothing in the statute permits the retroactive application of new allegations made after the initial statement of charges to support the original suspension order. (*Bd. of Trustees of Placerville Union School Dist. v. Porini* (1968) 263 Cal.App.2d 784, 789 [statutes pertaining to teacher discipline should be "strictly construed"].) It makes no difference that the events underlying the new allegations were known to the District and Employee prior to service of the SOC if those allegations were not included in the SOC.

In addition, the appeal procedures set forth in section 44939, subdivision (c), are predicated on service of the "initial pleading" in the matter. (§ 44939, subd. (c)(2) [The motion shall be served upon the governing board of the school district and filed with the Office of Administrative Hearings within 30 days after service upon the employee of the *initial pleading* of the matter." (emphasis added).]) Any other result would allow a school district to continually amend its charges to address any pleading deficiencies pointed out by Employee and maintain a teacher's suspension indefinitely. Such action would contravene the intent of the Legislature to provide an efficient, cost-effective, and quick procedure to litigate unpaid suspensions. (See Assem. Bill No. 215 (2013-14 Reg. Sess.) § 1.)

2. The SOC contains no allegations that rise to the level of immoral conduct. As stated in *Board of Ed. of San Francisco Unified Sch. Dist. v. Weiland* (1960) 179 Cal.App. 2d 808, 811 (*Weiland*), "The term 'immoral' has been defined generally as that which is 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 wilful, 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." The Supreme Court in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 223-224, further defined immoral conduct, in quoting from *Jarvella v. Willoughby-Eastlake City School Dist.* (1967) 12 Ohio Misc. 288: "It [immoral conduct] must be considered in the context in which the Legislature considered it, as conduct which is hostile to the welfare of the general public; more specifically in this case, conduct which is hostile to the welfare of the school community. . . . In providing standards to guide school boards in placing restraints on conduct of teachers, the Legislature is concerned with the welfare of the school community. Its objective is the protection of students from corruption."

While the alleged acts in the SOC may demonstrate professional incompetence and poor judgment, they are not indicative of "corruption, indecency, depravity, dissoluteness, or show moral indifference to the opinions of respectable members of the community." (*Weiland*, 179 Cal.App. 2d at 811.) Employee's alleged comments to students, while inappropriate, do not rise to the level of immorality. In addition, the allegations that Employee misled parents and falsified student documents were not criminal in nature, nor were they alleged as designed to deliberately defraud the State or District. Accordingly,

contrary to District's contention, those allegations are distinguishable from the fraud allegation noted as immoral conduct in *Weiland*.

3. The SOC contains no allegations that reflect Employee's willful refusal to perform regular assignments without reasonable cause as prescribed by the District's reasonable rules and regulations. District contends that under the statute, "willful refusal" is present here because Employee repeatedly failed to implement "repeated verbal and written directives related to IEP protocol, working professionally with staff, mismanagement mistreatment of students, and repeated directives to follow the directives of administrators." (District Opposition, p. 12, lines 20 - 22.) District's claim is not persuasive in that District's position disregards the element of willfulness required by section 44939, subdivision (b).

Under section 44932, subdivision (a)(8), a teacher may be dismissed for "[p]ersistent 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." The threshold for immediate suspension as set forth in section 44939, subdivision (b), however, is higher than the threshold for dismissal set forth in section 44932, subdivision (a)(8). A teacher cannot be immediately suspended for persistent violation of school regulations and laws or for the mere refusal to comply with those regulations and laws. Rather, section 44939, subdivision (b), provides that a teacher can be immediately suspended only if the refusal to obey reasonable regulations was "willful." The use of the word "willful" rather than "persistent" indicates that while repeated and continuing performance issues may establish grounds for dismissing a teacher under section 44932, they are not grounds for immediate suspension under section 44939. Likewise, a refusal needs to be "conscious, intentional and deliberate" to be willful. (*Goodhew v. Industrial Acc. Commission* (1958) 157 Cal.App.2d 252, 257.) While the SOC alleges multiple instances of Employee's failure to comply with directives and other regulations, the allegations do not reflect that Employee's failure was intentional or deliberate.

District's reliance on *Powers v. Commission on Professional Competence* (1984) 157 Cal.App.3d 560, 564-65 (*Powers*), to support its claim that Employee's alleged failure to follow directives constitutes insubordination, is misplaced. In *Powers*, the Commission found the teacher to be insubordinate after a multi-day disciplinary hearing, in which both school district representatives and the teacher facing dismissal testified. The analysis here is "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." (§ 44939, subd. (c)(1).) The SOC contains no allegations of the reasons, if any, for Employee's failure to follow District's directives. Without allegations reflecting that Employee intentionally and affirmatively refused assignments, the SOC does not reflect that Employee engaged in insubordination. (See *Board of Educ. of City of Los Angeles v. Swan* (1953) 41 Cal.2d 546, 552 ["[t]he willful refusal of a teacher to obey the reasonable rules and regulations of the employing board of education is insubordination."])

4. Based on the foregoing, the ALJ finds that the facts alleged in the SOC, if true, are not sufficient to establish a basis for Employee's immediate suspension under section 44939.

The Motion 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 Employee whole for any lost wages, benefits, and compensation within 14 days after service of this Order.

IT IS SO ORDERED.

DATED: July 2, 2018

DocuSigned by:  
*Cindy Forman*  
5FA8153C6031440...

---

CINDY F. FORMAN  
Administrative Law Judge  
Office of Administrative Hearing