

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

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

HAKIM MENDEZ,

Employee,

versus

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

School District.

OAH No. 2019010397

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

(Ed. Code, § 44939, subd. (c)(4))

Administrative Law Judge (ALJ) Eric Sawyer, Office of Administrative Hearings (OAH), State of California, heard this matter telephonically from Los Angeles, on February 8, 2017.

Rosty G. Gore, Esq., represented Hakim Mendez (Employee). Christina Cruz, Assistant General Counsel, represented the Los Angeles Unified School District (District).

The District filed a statement of charges (Charges) against Employee, and placed him on indefinite unpaid suspension. The suspension is based on allegations that Employee engaged in immoral conduct in violation of Education Code sections 44932, subdivision (a), and 44939, and 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 described on the record during the hearing. The parties also presented oral argument during the hearing.

The aforementioned provisions of the Education Code allow a school district to immediately suspend a permanent certificated employee without pay. In turn, 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 Charges filed in the instant matter (or 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.)

Immoral Conduct

“Immoral conduct,” pursuant to Education Code sections 44932, subdivision (a), and 44939, has been defined to mean conduct that is willful, 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. It is sometimes used as synonymous with dishonesty or a high degree of unfairness. (*Board of Ed. of San Francisco Unified School Dist. v. Weiland* (1960) 179 Cal.App.2d 808, 811 [*Weiland*].)

Immoral conduct also can be construed according to common usage. “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 willful, 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.” (*Palo Verde etc. Sch. Dist. v. Hensey* (1970) 9 Cal.App.3d 967, 972 [*Hensey*].)

In *Hensey*, a junior college teacher’s removal of the fire alarm and bell system, statement to the president of the college that he would remove it again if it were replaced, his references to “whore” and “whorehouses” throughout the year, his discussion of super-syphilis in reference to Mexican-American students, and his references to “pee” and “baby crap,” taken together, still did not constitute immoral conduct. On the other hand, the court did deem as immoral conduct the teacher’s gesture of licking a classroom wall with his tongue in an up-and-down manner specifically directing his gesture to the County Superintendent of Schools. (*Hensey, supra*, 9 Cal.App.3d at p. 974.) The court stated “here, we have passed the limits of bad taste and vulgarity . . . this obscene incident indicates both ‘immorality’ and ‘evident unfitness.’” (*Id.* at pp. 974-975.)

In *Weiland*, the court held that falsifying attendance records for the purpose of securing continued employment and defrauding the state and school district constituted immoral conduct on the part of the teacher. (*Weiland, supra*, 179 Cal.App.2d at p. 812.)

In this case, the Charges allege that Employee engaged in disrespectful conduct, for example, yelling at or directly in the faces of students, yelling at parents, being mean and rude to students or co-workers, using his hands to move, grab, push and pull students or forcibly push them into their seats, and like conduct. In a handful of incidents, he uttered words to one student, which at face value appeared to challenge him to a fight, but which read in context of the other allegations appeared simply to be a disciplinary tactic gone terribly wrong. Yet, none of the allegations rise to the level of “immorality” discussed in the cases cited above. For example, the allegations do not involve dishonest conduct such as found in *Weiland*; prurient comments or actions done in bad taste as found in *Hensey*; or otherwise equate to the kind of shocking, corrupt, indecent, depraved, dissolute, flagrant, or shameless conduct generally outlined in both cases. The District has failed to sufficiently plead cause for suspension for immoral conduct.

Willful Refusal to Perform Regular Assignment

A comparison of Education Code sections 44932, subdivision (a), and 44939, subdivision (b), is illuminating. 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. Examples coming to mind are refusal to have children say the pledge of allegiance, perform yard duty, allow children to use the restroom during instructional time, teach certain parts of a school district’s curriculum, turn in lesson plans, attend meetings mandated by a supervisor, etc. 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.

In this case, a review of the Charges in totality indicates Employee’s alleged misconduct is not 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 after receiving multiple conferences and, perhaps, persistently, but not always, failed to comply with directives given to him.


The pleadings allege with factual precision and abundance that Employee's teaching during the times in question was unsatisfactory, unprofessional and persistently violated District rules and regulations, among other theories. But where the pleadings allege a willful refusal to perform a regular assignment, the allegations are vague, 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.

Conclusion

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: February 11, 2019

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ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings