

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

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

**SHAWN MOEN, a permanent certificated employee,**

**Moving Party**

**and**

**FULLERTON SCHOOL DISTRICT,**

**Responding Party**

**OAH No. 2021120927**

**ORDER GRANTING MOTIONS FOR IMMEDIATE REVERSAL OF  
SUSPENSION AND FOR TAKING JUDICIAL NOTICE OF OAH ORDERS  
GRANTING MOTIONS FOR IMMEDIATE REVERSAL OF SUSPENSIONS**

Administrative Law Judge Deena R. Ghaly, Office of Administrative Hearings (OAH), State of California, heard these motions telephonically on January 28, 2022.

Attorney Ilissa B. Gold, Reich, Adell & Cvitan, PLC, represented moving party Shawn Moen (Respondent). Attorney Joseph Sanchez, Best, Best, and Krieger, PLC, represented responding party Fullerton School District (District).

## **BACKGROUND**

Respondent is a certificated, permanent employee of the District. For twenty years, she taught physical education at Nicolas Junior High School in the Fullerton School District (District). During the 2020-2021 school year, Respondent also served as a “master teacher” or mentor to a student teacher.

On December 14, 2021, the District suspended Respondent without pay, pending a termination hearing before a Commission on Professional Competence (CPC). The suspension and intent to terminate are premised on a Statement of Charges (Charges) adopted by the District Board.

In the Charges, the District alleged that during the 2019-2020 and 2020-2021 school years, Respondent repeatedly made unauthorized departures from school during the instructional hours to work for the food delivery platform, Door Dash and to drop off and retrieve her minor daughter who attends another school. According to the Charges, Respondent’s absences left her students and the student teacher without supervision, including during an emergency in April 2021 when the school was under lockdown. Additionally, the District alleged Respondent was untruthful when questioned by a District investigator about the absences.

The District further alleged Respondent’s conduct constitutes grounds for her termination under the Education Code, namely dishonesty and persistent violation 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 her (persistent violation/refusal to obey).

Respondent timely contested the Charges and brought a Motion for Immediate Reversal of Suspension (MIRS). Respondent also filed an additional motion requesting

the ALJ take judicial notice of three prior OAH orders granting MIRS's. The District filled its opposition to the MIRS. It also initially opposed the judicial notice motion though, at the January 28, 2022 hearing, through counsel, represented it did not oppose it.

### **Unpaid Suspension Pursuant to Education Code section 44939**

Under Education Code section 44939 (further statutory references are to the Education Code unless otherwise designated), upon filing disciplinary charges alleging certain enumerated grounds, a district may immediately suspend a teacher, pending a hearing on the charges. In the instant case, the grounds for discipline set out in the Charges are not among the ones enumerated in section 44939.

On January 18, 2022, the District amended the Charges to add an additional ground for discipline, "willful refusal to perform regular assignments without reasonable cause" (willful refusal), which is one of the enumerated grounds allowing for immediate suspension under section 44939. The amended charges are otherwise the same as the original version; no additional facts were alleged.

### **Respondent's Motion for Immediate Reversal of Suspension**

The same provision allowing districts to suspend teachers pending hearings allow suspended teachers to bring a motion to seek reversal of their suspension and, if successful, payment of any accrued backpay. (§§ 44939, subds. (c)(1) & (5).) In her motion, Respondent argued that the suspension is improper because she was not charged with one of the enumerated grounds permitting immediate suspension and the charges that were brought, dishonesty and persistent violation/refusal to obey, cannot be conflated with similar but not identical charges, moral turpitude and willful refusal, which do permit suspension. Respondent further argued the underlying facts

cannot be read to establish the more serious charges permitting suspension. Thus, Respondent requests a reversal of her suspension and an award of backpay.

In addition to backpay, Respondent's motion seeks interest on the backpay. Respondent cited California Civil Code section 3287 and *Currie v. Workers Comp. Appeals Board* (2001) 24 Cal.4<sup>th</sup> 1109, 1115, which states "once the obligation to pay retroactive wages is established, interest under Civil Code section 3287 properly accompanies reinstatement and a back pay award in order to make the employee whole" in support of her request.

## **The District's Contentions**

The District contends that the Charges contain sufficient facts under section 44939 to justify Respondent's immediate suspension without pay, arguing that, while the Charges did not allege willful refusal, the underlying facts support such grounds. "Therefore, Respondent was given sufficient and reasonable notice that the facts alleged supported not only the enumerated charges of dishonesty and [persistent violation/refusal to obey] but also that of [willful refusal]." (Response to Respondent's MIRS.)

In its written response, the District further argued that the matter was now moot as the Charges had been amended to add willful refusal as an additional ground for discipline in its Amended Charges. At the January 28, 2022 hearing, the District withdrew that argument and conceded the amendment to the Charges cannot be the basis of suspending Respondent.

The District did not address Respondent's request for backpay and interest in the event she prevailed on the MIRS.

## **Analysis**

### **REVERSING ORDER OF SUSPENSION**

Section 44939, subdivision (b) states:

Upon the filing of written charges, duly signed and verified by the person filing them with the governing board of a school district, or upon a written statement of charges formulated by the governing board of a school district charging a permanent employee of the school district 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 [s]ection 51530 [prohibiting teachers from advocating or teaching the tenets of communism with the intent to indoctrinate students], the governing board of the school district may, if it deems that action necessary, immediately suspend the employee from his or her duties and give notice to him or her of his or her suspension, and that 30 days after service of the notice of dismissal, he or she will be dismissed, unless he or she demands a hearing.

Section 44939, subdivision (c)(1) provides that, in reviewing a motion to reverse a suspension, the ALJ "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.”

The District’s interpretation of section 44939, that, if the facts alleged, if true, *could* constitute violation of one of the enumerated grounds, even if not charged, would render the language of subdivision (b) superfluous, a result inconsistent with standard principles of statutory interpretation. (See Cal. Jur. Statutes, § 92, May 2021 [“Courts do not presume that the legislature performs idle acts, nor do they construe statutory provisions so as to render them superfluous.”] Nothing supports the District’s approach to interpreting 44939 in this manner and, applying standard statutory interpretation principles, its argument is not credited. Because the District did not charge Respondent with one of the grounds enumerated in section 44939, subdivision (b), she should not have been suspended and her motion to reverse the suspension is granted, as set out in the Order below.

### **BACKPAY AND INTEREST**

Section 44939, subdivision (b)(5) provides: “An order granting a motion for immediate reversal of suspension shall become effective within five days of service of the order. The school district shall make the employee whole for any lost wages, benefits, and compensation within 14 days after service of an order granting the motion.”

The Education Code does not provide further guidance about how a teacher granted a reversal of suspension is “made whole” beyond repayment of wages, benefits, and “compensation.” Respondent points to Civil Code section 3287 as support for her contention that making her whole would include backpay. Civil Code section 3287, subdivision (a) provides:

A person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in the person upon a particular day, is entitled also to recover interest thereon from that day, except when the debtor is prevented by law, or by the act of the creditor from paying the debt. This section is applicable to recovery of damages and interest from any debtor, including the state or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state.

Respondent's damages can clearly be calculated to a mathematical certainty based on her rate of pay multiplied by the time since she was placed on suspension. Nothing has been raised by the District supporting a finding that such recovery is "prevented by law." Also, the provision expressly notes that it applies to governmental entities, as is the District. Thus, statutory interest pursuant to Civil Code section 3287 is recoverable by Respondent.

#### **JUDICIAL NOTICE OF PREVIOUS OAH MIRS ORDERS**

Respondent's motion to have judicial notice taken of earlier OAH orders granting MIRS was unopposed and therefore there is no basis to deny it; however, as these earlier decisions were not sufficiently similar to the instant matter to provide much guidance, they are accorded little weight.

## 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, including interest payments pursuant to Civil Code section 3287.

DATE: 02/11/2022

Deena R. Ghaly  
Deena R. Ghaly (Feb 11, 2022 13:58 PST)

DEENA R. GHALY

Administrative Law Judge

Office of Administrative Hearing