

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

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

**SERGIO VELASCO, Moving Party**

**v.**

**LOS ANGELES UNIFIED SCHOOL DISTRICT, Responding Party**

**OAH No. 2020120602**

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

Adam L. Berg, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard oral argument on this matter by telephone on January 8, 2021.

Shirley A. Lee, Equality Law LLP, represented moving party, Sergio Velasco.

Michael Voight, Assistant General Counsel, represented responding party, Los Angeles Unified School District (district).

The matter was submitted for decision on January 8, 2021.

## Background

On October 16, 2020, the district's chief human resources officer signed a Statement of Charges seeking the immediate suspension without pay and dismissal of Mr. Velasco, a permanent certificated employee. The Statement of Charges was served on Mr. Velasco on November 12, 2020. The Statement of Charges alleges the following causes for dismissal: unprofessional conduct, unsatisfactory performance, and persistent violation of or refusal to obey state school laws or regulations prescribed by the district's governing board. (Ed. Code, § 44932, subd. (a)(2), (a)(5) & (a)(8).)<sup>1</sup> The Statement of Charges also notified Mr. Velasco of the district's intent to immediately suspend him without pay based on willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing district. (§ 44939, subd. (b).)

On December 11, 2020, Mr. Velasco filed a Motion for Immediate Reversal of Suspension (motion) with OAH, pursuant to Section 44939, subdivision (c)(1), alleging that the Statement of Charges does not set forth facts sufficient to support an allegation that he willfully refused to perform regular assignments, which is necessary in this case to sustain the suspension. The district filed an opposition to the motion on December 29, 2020. Mr. Velasco filed a reply brief on January 5, 2021. On January 8, 2021, a telephonic conference was held, during which the parties were invited to present any additional oral arguments.

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<sup>1</sup> All future statutory references are to the Education Code.

## **Allegations in the Statement of Charges**

In general, the Statement of Charges alleges multiple deficiencies with Mr. Velasco's presentation of instructional material and classroom management, beginning on October 1, 2018, and ending on December 9, 2019. The following summarizes the allegations (for most allegations identified below, the Statement of Charges cites multiple and specific examples not included in the summary):

Mr. Velasco exhibited multiple deficiencies related to his instructional methods and classroom management during observed class periods on October 1 and 31, 2018.

During an observed class period on November 29, 2018, Mr. Velasco:

- Failed to clearly communicate the purpose of the biology activities at the beginning or end of class.
- Failed to provide effective opportunities for student-to-student interaction to engage them in discussion.
- Failed to monitor student learning and provide meaningful feedback.
- Failed to ask questions that could reveal students' understanding of the concepts.
- Willfully failed to comply with the directive by Principal Ben Gertner provided to him during conferences held on November 16 and 26, 2018, and contained in a memo dated November 28, 2018, that Mr. Velasco communicate the purpose at the beginning and end of each activity in order to provide students a context for the learning.

During a class period on January 31, 2019, Mr. Velasco failed to:

- Indicate the *Next Generation Science Standards* (NGSS) he planned to teach in his lesson plan.
- Follow the activities listed in the lesson plan.
- Communicate the purpose of the lesson to specify what students would learn.
- Deliver standards-based activities aligned to the NGSS.
- Encourage equitable participation.
- Address student off-task behavior.
- Follow the school's Non-Negotiable Expectations (Expectations), in addition to other cited deficiencies in his instruction and classroom management.
- Willfully refused to comply with the directives provided to him on November 16, November 26, and December 14, 2018, during conferences with Mr. Gertner and contained in memos on November 28 and December 14, 2018, that he: communicate the purpose at the beginning and end of each activity; establish, teach, and reinforce a classroom management plan to address off-task behavior; and communicate the purpose of the activities at the start and end of each lesson.

During a class period on February 28, 2019, Mr. Velasco:

- Failed to post learning objectives on the whiteboard.
- Failed to deliver the activity in a clear and concise manner.

- Failed to pace the instruction to ensure he finished the activities listed on the board.
- Failed to monitor student learning and provide feedback.
- Failed to establish, teach, and reinforce classroom expectations with rules and consequences for off-task behavior.
- Willfully refused to comply with the directives provided to him on November 16, November 26, and December 14, 2018, and February 19, 2019, during conferences with Mr. Gertner and contained in memos dated November 28, 2018, December 14, 2018, and February 20, 2019 that he: establish a plan to address off-task behavior; monitor student learning and provide meaningful feedback; and implement the school's Expectations and Instructional Goals.

During a class period on May 2, 2019, Mr. Velasco:

- Failed to plan activities aligned to the NGSS identified in his lesson plan.
- Failed to plan and design learning objectives.
- Failed to deliver standards-based learning activities.
- Failed to effectively use the school's literacy strategies.
- Failed to circulate the classroom and monitor student learning activities.
- Failed to encourage equitable participation.
- Failed to clearly identify class rules.

During a class period on September 4, 2019, Mr. Velasco:

- Failed to model for the class how he expected them to take on their group rules.
- Failed to use effective discussion techniques.
- Failed to ask "scaffold" questions to help students make connections between the activity and "guiding question."
- Failed to align the activity listed in the lesson plan with the activity posted on the whiteboard.
- Failed to communicate the purpose of the lesson.
- Failed to deliver standards-based learning activities.
- Failed to comply with a previous directive that he plan and deliver standards-based activities aligned to the NGSS.
- Failed to adequately pace activities.
- Failed to effectively redirect student off-task behavior.
- Failed to effectively get students' attention.
- Failed to establish and reinforce procedures for returning confiscated student phones; and failed to effectively supervise students.
- Willfully refused to comply with the directives provided to him on May 16, 2019, during a conferences with Mr. Gertner and contained in memos dated November 28, 2018, and February 20, 2019, and May 21, 2019, that he: establish a plan to address off-task behavior and create and post a set of clearly defined class rules.

During a class period on October 23, 2019, Mr. Velasco failed to:

- Include an English language development standard for a class comprised of English language learners.
- Deliver the activity in a clear and concise manner so students would be able to complete the objective.
- Use the school's literacy frame.
- Provide structured opportunities for students to practice developing inference and speaking skills.
- Monitor students' progress and achievement on the *Achieve 3000* program.
- Prepare and assign additional activities aligned to the day's objectives.

During a class period on December 9, 2019, Mr. Velasco failed to:

- Plan and design a learning objective aligned to the NGSS he posted on the board.
- Posted an incomplete agenda on the board.
- Failed to clearly communicate the purpose of the activity.
- Willfully refused to comply with the directives provided to him on October 7, 2019, during a conferences with Assistant Principal Eftihia Danellis and contained in memos dated February 20, 2019, March 21, 2019, October 7, 2019, and November 28, 2019, that he communicate the purpose of the lesson at the beginning and end of each activity to give students a context for their learning.

- Failed to deliver a standards-based biology activity with checks for understanding and modeling the concept.
- Willfully refused to comply with the directives provided to him on May 16, 2019, and October 7, 2019, during conferences with Ms. Danellis and Mr. Gertner, and memorialized in memos dated May 21 and October 7, 2019, that he plan and deliver standards-based activities aligned to the NGSS.
- Failed to consistently implement routines and procedures for documenting late arrival of students and dismissing students from class.
- Attempted but was unsuccessful with redirecting students' off-task and defiant behavior.

The district alleged Mr. Velasco was issued notices of unsatisfactory performance on June 5, 2019, and January 27, 2020, and issued notices of suspension for 11 days and 15 days respectively. The content of the notices was not specified in the Statement of Charges.

## **The Parities' Arguments**

Mr. Velasco contends this is a "garden-variety" unsatisfactory performance case that does not constitute a basis for an immediate suspension. Here, the district is simply attempting to transform an unsatisfactory performance case into a "willful refusal" case without any facts to support such a charge. The Legislature intended that a teacher could be suspended for only the most serious situations, specifically, those where the only logical inference from the facts pleaded is that the teacher willfully, deliberately, intentionally, and without reasonable cause refused – as opposed to merely failing to perform – regular assignments. The Statement of Charges failed to



show how he acted in an insubordinate and defiant fashion. The allegations that he failed to communicate to purpose at the beginning and end of each activity; establish, teach, and reinforce a classroom management plan; and plan and deliver standards-based activities aligned to the NGSS, are “hardly the kind of allegations which warrant an immediate suspension of pay.” Mr. Velasco cites specific examples contained in the Statement of Charges that show he attempted to comply with the directives of his superiors, but just not to the district’s satisfaction.

The district contends Mr. Velasco was provided multiple opportunities and directives to remediate his performance, but continuously failed to comply with his superior’s directives to deliver instruction aligned with the NGSS, implement the school’s Expectations, and communicate the purpose of his lessons at the beginning and end of each activity. The Statement of Charges is sufficiently pled, and on its face, establishes a cause for suspension based on willful refusal. Mr. Velasco erroneously contends that the Statement of Charges is subject to a heightened pleading standard such that it shows Mr. Velasco affirmatively refused to follow the district’s directives.

## **Applicable Law**

Section 44939, subdivision (b), authorizes the district to suspend an employee without pay pending the outcome of the hearing if the district charges “willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing school district” (willful refusal). 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.)*

Section 44939, subdivision (c)(1), allows the employee to file a motion for relief from the suspension and requires review of this motion to 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.”

## **Evaluation**

Mr. Velasco first argues that in order for the district to immediately suspend him, the alleged conduct must be sufficiently serious, and the only logical inference from the facts pleaded is that the teacher willfully, deliberately, intentionally, and without reasonable cause refused to perform assignments. In other words, he contends that the facts contained in the Statement of Charges *must* show that his refusal to perform directives was willful, as opposed to negligent or merely failing to follow the district’s directives. However, a review of a motion to reverse immediate suspension is limited to whether the facts as alleged in the statement of charges, if true, are sufficient to constitute willful refusal. Thus, the inquiry is not whether there are other alternative explanations for his failure to adhere to the directives, but whether if the facts as alleged *could* lead to the conclusion that Mr. Velasco willfully refused to follow a regular assignment. In this case, the question must be answered in the affirmative.

There are multiple instances in the Statement of Charges where the district alleges Mr. Velasco failed to deliver instruction aligned with the NGSS, implement the school’s Expectations, and communicate the purpose of his lessons at the beginning and end of each activity. These allegations, if true, could lead to the conclusion that he willfully refused to do as directed. Mr. Velasco argues that the specific examples cited in the Statement of Charges reflect his attempt to comply with the directives, rather than an obstinate refusal. Even if “those instances would more fittingly be explained by

negligence, mistake, or error, and at worst, persistent refusal to perform the assignment," as Mr. Velasco claims, so long as a factfinder could conclude that the refusal was willful, the motion to reverse immediate suspension must be denied to permit the district to establish its case at an evidentiary hearing. The Statement of Charges is sufficiently pled to place Mr. Velasco on notice of the charges such that he can prepare a defense. (*Wisuri v. Newark School Dist. of Alameda County* (1966) 247 Cal.App.2d 239, 242.) Mr. Velasco cites no caselaw requiring the pleadings to establish that the *only* reasonable inference from the alleged facts is that his refusal to follow directives was willful, even if the district is unlikely to ultimately prevail on this charge. Accordingly, Mr. Velasco's motion must be denied.

## **ORDER**

The motion for immediate reversal of suspension is denied.

DATE: January 15, 2021

  
Adam Berg (Jan 15, 2021 10:46 PST)

ADAM L. BERG

Administrative Law Judge

Office of Administrative Hearings