

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

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

FELIPE VELASQUEZ, Moving Party

v.

TRACY UNIFIED SCHOOL DISTRICT, Responding Party

OAH No. 2021060998

**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 July 23, 2021.

Eric Lindstrom, Langenkamp, Curtis & Price, LLP, represented moving party, Felipe Velasquez.

Ingrid A. Meyers, Dannis Woliver Kelley, represented responding party, Tracy Unified School District (district).

The matter was submitted for decision on July 23, 2021.

Background

On June 21, 2021, the district's Associate Superintendent of Human Resources signed a Statement of Charges and Recommendation to Dismissal and for Immediate Unpaid Suspension (Statement of Charges) seeking the immediate suspension without pay and dismissal of Mr. Velasquez, a permanent certificated employee. On June 24, 2021, the district served Mr. Velasquez with the Statement of Charges and notice that its governing board had approved his dismissal and immediate suspension. The Statement of Charges alleges the following causes for dismissal: immoral conduct, evident unfitness for service, 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)(1), (a)(6) & (a)(8).)¹ The Statement of Charges also notified Mr. Velasquez of the district's intent to immediately suspend him without pay based on immoral conduct. (§ 44939, subd. (b).)

On June 28, 2021, Mr. Velasquez 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 of immoral conduct, which is necessary in this case to sustain the suspension. The district filed an opposition to the motion on July 13, 2021. Mr. Velasquez filed a reply brief on July 20, 2021. On July 23, 2021, a telephonic conference was held, during which the parties were invited to present any additional oral arguments.

¹ All future statutory references are to the Education Code.

Allegations in the Statement of Charges

The allegations in the Statement of Charges relate solely to Mr. Velasquez's conduct as the Kimball High School (KHS) wrestling head coach. The following is a summary of the relevant factual allegations cited in the Statement of Charges as evidence of immoral conduct:

Mr. Velasquez began employment with the district as a social science teacher in July 2019. In November 2020, he applied for the KHS wrestling head coach position. On January 12, 2021, the district approved hiring Mr. Velasquez as the KHS wrestling head coach, and he signed a temporary employment agreement on January 27.

On January 5, 2021, KHS Athletic Director Joseph Graham sent an email to all of the KHS athletic coaches (including Mr. Velasquez) providing an update on the status of athletics due to the pandemic and stating that "Students should also be cleared by the bookkeeper before participating, this will insure [sic] all school paperwork including physicals are complete."

On January 27, 2021, in conjunction with being hired as the head wrestling coach, a district employee, Ms. Martinez, emailed Mr. Velasquez with a list of certifications that needed to be completed, such as coaching coursework and CPR/First Aid. Mr. Velasquez responded that he would be completing the CPR/First Aid course this weekend and inquired about the required coaching paperwork. Ms. Martinez responded and attached a form with websites to where he could get his certifications.

On March 9, 2021, Mr. Graham emailed the KHS athletic coaches, including Mr. Velasquez, regarding team rosters. Specifically, Mr. Graham wrote, "With grades coming out next week for our student athletics it is important that we know who is

eligible to continue to play sports. Please email both Mr. Doyle and myself of your team rosters for every level as soon as possible."

On March 22, 2021, Mr. Graham emailed the KHS athletic coaches, including Mr. Velasquez directing them to inform all players and parents that the district will continue to follow current grade policies and eligibility for sports at this time.

On March 26, 2021, Mr. Graham again emailed the KHS athletic coaches, including Mr. Velasquez, explaining that he just received an update from student services that, "All eligible players can practice but not in any type of game/scrimmage and no riding a bus" and to "Please adhere to this policy and make sure you are checking your eligibility list."

On April 13, 2021, Mr. Graham sent Mr. Velasquez an email attaching Mr. Velasquez's list of eligible and ineligible wrestlers. On the same day, Mr. Graham sent the KHS athletic coaches, including Mr. Velasquez, an email addressing student injury reports and attaching a copy of the District's 20-21 Student Injury Report Form.

On April 16, 2021, Mr. Graham emailed Mr. Velasquez explaining that he needed to get his outstanding certifications and trainings done "asap." According to Ms. Martinez, Mr. Velasquez still needed to complete his coaching certifications, as noted in an email to Mr. Graham. In response, Mr. Velasquez later emailed Ms. Martinez, on April 16, 2021, with a copy of his "Adult, Child and Baby First Aid/CPR/AED Online Only" Certificate of Completion indicating he completed the training on March 22, 2021. Mr. Velasquez also represented to Ms. Martinez that he was "currently in the process of completing the coaching certification. I will have that done this weekend and get it to you by Monday." As of April 21, 2021, the District did

not have record of Mr. Velasquez completing his coaching certification or Sudden Cardiac Arrest or Concussion certifications as required.

Despite not completing all of the requisite certifications, and being informed on multiple occasions of the grade and physical exam requirements for KHS students to be eligible to participate in wrestling, Mr. Velasquez permitted 13 students to board a bus and travel to another school to participate in a wrestling scrimmage on April 21, 2021. Of the 13 students on the bus, "a number of them" were ineligible to participate in the scrimmage, including Student D, because they lacked the requisite grades, parent permission, and/or physical clearance to participate in wrestling and/or to even ride the bus to the scrimmage.

Mr. Velasquez permitted Student D to participate in the scrimmage even though he did not appear on the April 13, 2021, list of eligible wrestlers Mr. Graham provided to Mr. Velasquez. Student D participated in a scrimmage where he was pinned down. Shortly thereafter, he started not to feel well, and expressed to Carlos Salazar, a parent volunteer, that his breathing was heavy. After being assisted to move outside, his breathing became heavier, prompting Mr. Salazar to call 911. Student D further expressed that he felt cold and after being escorted back inside, he began vomiting. After paramedics arrived, they went to speak with Mr. Velasquez who was on the mat coaching another wrestler and not paying attention to the incident with Student D. Student D was transported to the hospital by the paramedics, where he remains.

On April 23, 2021, two days after the incident with Student D, Mr. Velasquez submitted a Student Injury Report Form, which was required to be submitted within 24 hours after the incident.

Once informed of the April 21, 2021, incident with Student D, the District conducted an investigation into the incident. The District concluded that Mr. Velasquez was aware of Student D not being eligible to ride the bus or participate in wrestling, including a scrimmage. The district also concluded that:

- There is an electronic system for athletic coaches, including Mr. Velasquez, through which they can check which players have clearance to participate in athletics and that this information includes emergency contact information, physicals by a doctor, and medical insurance for the players. Despite having this system available, Mr. Velasquez did not utilize the system and, in fact, asked the school bookkeeper for access to the system on April 23, 2021 after, the April 21 incident.
- A couple of days prior to the April 21 incident, Mr. Velasquez permitted Student D to participate in wrestling practice, again, without proper clearance or eligibility.
- On April 28, 2021, KHS's Principal confirmed that Student D was left off the eligible roster for the scrimmage on April 21, because he had no physical on file and had failing grades. The Principal confirmed that Student D was not on the wrestling roster submitted on or about April 12th or 13th by Mr. Velasquez. Also, without a physical exam on file, students cannot participate in sports.
- Student D never completed a packet to participate in wrestling/sports prior to April 21, 2021.

When interviewed on June 8, 2021, by Associate Superintendent Tammy Jalique, and with his legal counsel present, Mr. Velasquez confirmed that, prior to April 21,

2021, he was not aware of any grade requirement for students to participate in KHS sports. Mr. Velasquez also failed to recall receiving various emails from Mr. Graham and administration including, but not limited to, that ineligible players can practice but not play in any game or scrimmage and no riding a bus, and about grade policies eligibility for students to participate in sports. Mr. Velasquez did, however, claim that Student D was on the bus April 21 because he was tested and cleared for COVID. When asked what steps he took to ensure all wrestlers had been cleared to participate by the bookkeeper, Mr. Velasquez stated, "I didn't do anything." Mr. Velasquez also claimed that he did not receive his coach's packet until April 28 outlining all required training he was to complete to be the KHS head wrestling coach and that he was not aware of what trainings he needed to complete, despite various emails from district administration on this issue and his representations he completed or was completing the various required trainings.

The Parties' Arguments

Mr. Velasquez argues that the Statement of Charges does not directly allege or plead facts that would support a reasonable inference that he was in fact aware that Student D was ineligible to participate; instead, the Statement of Charges allege that "*the District concluded* that [Mr. Velasquez] was aware of Student D not being eligible." [emphasis in original]. He also contends that under state law and the district's own policies, the district was required to ensure he had already received all required coaching training and competencies (citing Cal. Code Regs., tit. 5, § 5593; Board Policy 4127). As for the charge of immoral conduct, Mr. Velasquez argues there are no reported cases upholding a charge of immoral conduct for anything close to what he is accused of. He notes that cases sustaining immoral conduct fall within four categories: sexual misconduct or harassment, drugs, intentional fraud or other willful

conduct amounting to a crime, and “racist statements about students on social media that gained notoriety.” He notes that no reported cases have sustained immoral conduct outside of these extremes, and he cites two cases where the courts upheld a Commission on Professional Competence (CPC) conclusion that the conduct did not constitute immoral conduct.

The district contends that it pled sufficient facts that would support a reasonable inference, that Mr. Velasquez was in fact aware that Student D was ineligible to participate. It argues that Mr. Velasquez “engaged in behavior that crossed the bounds of decency, rendering him unfit to teach and justifying his immediate suspension on grounds of immoral conduct.” The district cites the recent Court of Appeal decision in *Crawford v. Comm. on Professional Competence* (2020) 53 Cal.App.5th 339, in which the court rejected the notion that “immoral conduct” pursuant to section 44932 “should be given a colloquial interpretation that includes only conduct that would be deemed ‘immoral’ in an everyday sense.” (*Id.* at p. 338.) The district argues that Mr. Velasquez persistently and knowingly failed to comply with directives, resulting in Mr. Velasquez allowing an ineligible student, with no physical on file, no parent permission slip, and not the appropriate grades, to ride the bus, participate in a wrestling scrimmage, and end up in the hospital where he remains. The district argues that this is not “merely negligent procedural violations” as Mr. Velasquez contends.

In reply and during oral argument, Mr. Velasquez argues that allegations of unintentional rule violations, even when persistent, do not constitute immoral conduct. Mr. Velasquez argues that he was unaware that eligibility requirements applied to scrimmages, he did not have access to the electronic system to check eligibility and was never told it was his responsibility, and Mr. Velasquez believed the administration

was aware Student D was participating in wrestling because the student had been tested and cleared for COVID.

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 immoral conduct. 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. Velasquez argues that that the Statement of Charges does not directly allege or plead facts that would support a reasonable inference that he was aware that Student D was ineligible to participate in the scrimmage. 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 immoral conduct. The Paragraph 18 of the Statement of Charges alleges that Mr. Graham sent Mr. Velasquez an email attaching a list of eligible and non-eligible wrestlers. Paragraph 23, states that through its investigation, the district concluded that Mr. Velasquez "was aware of Student D not being eligible to ride the bus or participate in wrestling, including a scrimmage." Paragraph 24c states that the Principal confirmed Student D was left off the roster for the April 21 scrimmage because he had no physical on file and had failing grades, and he was not on the wrestling roster submitted on April 12 or 13 by Mr. Velasquez. If true, these facts could establish that Mr. Velasquez's conduct in allowing Student D to participate was willful or intentional such as to establish the

volitional requirement of immoral conduct. Even if his action *could* more fittingly be explained by negligence or mistake, so long as a factfinder could conclude that he knowingly permitted an ineligible student to participate in the scrimmage (as alleged in paragraph 23), the volitional requirement for immoral conduct is sufficiently pled. The Statement of Charges is sufficiently pled to specify “instances of behavior and the acts or omissions constituting the charge” such that Mr. Velasquez was placed on sufficient notice such that he can prepare a defense. (§ 44934, subd. (c); *Wisuri v. Newark School Dist. of Alameda County* (1966) 247 Cal.App.2d 239, 242.) Mr. Velasquez cites no caselaw requiring the pleadings to establish that the *only* reasonable inference from the alleged facts is that his actions were willful or intentional, as opposed to negligent or unintentional.

As for Mr. Velasquez’s argument that under law and district policy it was the district’s responsibility, not Mr. Velasquez’s, to ensure he met all requirements required for coaching before employment, this argument has no bearing on whether the facts, as pled, could establish immoral conduct.

Finally, regarding Mr. Velasquez’s argument that there are no reported cases upholding a charge of immoral conduct for anything close to what he is accused of, Mr. Velasquez raises a fair point. There is broad discretion in determining what constitutes immoral conduct in the context of teacher disciplinary matters. (*California Teachers Association v. State of California* (1999) 20 Cal.4th 327.) Immoral conduct has been defined by the courts as follows:

[T]hat 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,

indecent, 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. (*Palo Verde etc. School Dist. v. Hensey* (1970) 9 Cal.App.3d 967, 972, citing *Bd. of Education of San Francisco Unified School Dist. v. Weiland*, 179 Cal. App 2d 808, 811.)

Immoral conduct alone cannot serve as a basis to terminate a teacher unless the conduct indicates the teacher is also unfit to teach. (*Palo Verde, supra*, at p. 972.) The definition of immoral or unprofessional conduct must be considered in conjunction with the unique position of public school teachers, upon whom are imposed "responsibilities and limitations on freedom of action which do not exist in regard to other callings." (*Board of Trustees v. Stubblefield*, 16 Cal.App.3d 820, 824.)

In *Crawford, supra*, at p. 337, the court rejected Ms. Crawford's contention that there are three fixed categories of conduct that constitute "immoral conduct" as a matter of law. Instead, the court held the term "immoral conduct" in Section 44932, "stretch[es] over so wide a range" of conduct that it "embrace[s] an unlimited area of conduct." (*Ibid.*, citing *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 224-225.) Citing *Morrison, supra*, at p. 224, the court added, the term 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.*'"[citations] (*Crawford*, at p. 337 [italics in original].) "A teacher's conduct is therefore "immoral" under section 44932, subdivision (a)(1), when it negatively affects the school community in a way that demonstrates the

teacher is 'unfit to teach.'" (*Ibid.* [footnote omitted].) The court then addressed Ms. Crawford's argument that the term should be given a colloquial interpretation that includes only conduct that would be deemed "immoral" in an everyday sense, such as criminal activity and using profanity or racial epithets. (*Id.* at p. 338.) The court wrote,

We disagree. Immoral conduct "stretch[es] over so wide a range that [it] embrace[s] an unlimited area of conduct."
([*Morrison, supra*, at pp. 224-225].) Thus, "the proper criteria is fitness to teach" because the term "immoral conduct" is "so broad and vague" that it is "constitutionally infirm."
([citation].) (*Ibid.*)

Accordingly, under the rationale of *Crawford*, because immoral conduct could "embrace an unlimited area of conduct," the fact that there are no reported cases upholding immoral conduct similar to the factual situation of this case, does not, as a matter of law, preclude the CPC from finding immoral conduct in this case. So long as the CPC could, after application of the *Morrison* factors, find that Mr. Velasquez's conduct "negatively affected the school community in a way that demonstrates he is 'unfit to teach,'" Mr. Velasquez's motion must be denied. The facts as alleged in the Statement of Issues are sufficient to establish that the CPC *could*, albeit improbably, reach such a finding. (§ 44939, subd. (c)(1).)

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ORDER

The motion for immediate reversal of suspension is denied.

DATE: July 28, 2021


Adam Berg (Jul 28, 2021 11:06 PDT)

ADAM L. BERG

Administrative Law Judge

Office of Administrative Hearings