

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

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

MICHAEL ALVARADO, Moving Party,

a Permanent Certificated Employee,

and

BAKERSFIELD CITY SCHOOL DISTRICT,

Responding Party.

OAH No. 2024050830

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

On June 21, 2024, a videoconference hearing was held before Administrative Law Judge (ALJ) Eric Sawyer, Office of Administrative Hearings (OAH), State of California.

Joshua F. Richtel, Attorney, represented moving party Michael Alvarado (Employee). Ellen C. Wu, Attorney, represented responding party Bakersfield City School District (District).

District filed a statement of charges (Charges) against Employee, and placed him on indefinite unpaid suspension. The suspension is based on allegations, in part, that Employee engaged in immoral conduct in violation of Education Code sections 44932, subdivision (a)(1), and 44939, subdivision (b); and willfully refused to perform regular assignments without reasonable cause in violation of Education Code section 44939, subdivision (b). (Undesignated statutory references are to this code.)

Employee timely filed a Motion for Immediate Reversal of Suspension (motion) with OAH, pursuant to 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 ALJ considered all of the above in making this Order.

Governing Procedure

Section 44939, subdivision (b), allows an employing school district to immediately suspend a permanent certificated employee without pay under specific circumstances, including immoral conduct and willful refusal to perform regular assignments without reasonable cause. In turn, section 44939, subdivision (c)(1), allows a suspended employee to file a motion seeking to reverse the unpaid suspension. Review of such a 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." (*Ibid.*)

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A motion such as this is analogous to a demurrer. Although well-pleaded facts must be accepted as true for purposes of a demurrer, "contentions, deductions or conclusions of fact or law" need not be accepted. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Thus, a demurrer can be sustained when a plaintiff's "conclusory characterization of defendant's conduct as intentional, willful and fraudulent" is "patently insufficient." (*Brousseau v. Jarrett* (1977) 73 Cal.App.3d 864, 872.)

Immoral Conduct

"Immoral conduct," pursuant to 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 used synonymously 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*).)

In *Weiland*, the teacher was fired for falsifying attendance records of her adult-typing classes by signing the names of students to such records when the students were absent in order to secure her continued employment with the school district. The court upheld the teacher's dismissal, finding that her conduct constituted immoral conduct. (*Weiland, supra*, 179 Cal.App.2d at pp. 810-812.)

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, references to "whore" and "whorehouses" throughout the year, discussion of "super-syphilis" in reference to Mexican-American students, and references to "pee" and "baby crap," taken together, did not constitute immoral conduct. (*Hensey, supra*, 9 Cal.App.3d at p. 974.)

On the other hand, the *Hensey* court deemed to be 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.*, pp. 974-975.)

Finally, in *Governing Board v. Haar* (1994) 28 Cal.App.4th 369, 378-385 (*Haar*), the court concluded a teacher engaged in immoral conduct by sexually harassing female students; offering students raffle tickets in exchange for sitting on his lap at a Christmas party; rubbing a student's thigh in a sexual manner; hugging another student; telling a student she was cute; and telling another student she was so cute that when she went to high school she would have to take mace.

In this case, the Charges allege Employee repeatedly engaged in verbal abuse of his fourth-grade students, including demeaning and belittling behavior and communications towards and in the presence of those students during the 2020-2021, 2021-2022, and 2023-2024 school years. For example, Employee is alleged to have

regularly screamed at his students, read and/or displayed his students' failing grades and reading levels to the entire class (including special education students), and told some students they would end up living in the ghetto and be homeless. Employee also allegedly directed derogatory, demeaning, and insulting language at his students, such as ordering students to "shut up," informing students that "I don't really care about you guys, I'm only here for the money," and calling his students by nicknames such as "Ms. Annoying," "Taco Tony," and "Lazy."

None of the Charges 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*; the sexual harassment found in *Haar*; or otherwise equate to the kind of shocking, corrupt, indecent, depraved, dissolute, flagrant, or shameless conduct generally defined in the case law. District has failed to sufficiently plead cause for suspension for immoral conduct.

District cites one case it argues shows Employee engaged in immoral conduct, i.e., *DeYoung v. Commission on Professional Competence of the Hueneme Elementary School District* (2014) 228 Cal.App.4th 568 (*DeYoung*). In that case, the teacher was fired based on various grounds, including immoral conduct, for physically and abusively disciplining his elementary school students during a single incident. Specifically, the teacher became angry and frustrated with students who were talking and laughing during a classroom movie. He grabbed some of the students, told them to "shut up," called them "stupid," struck one student in the foot with a chair, hit three students on top of the head with a yardstick or metal desk leg, and threw a pencil or pen at several students. The teacher's conduct frightened the students and, in some instances, caused physical pain. (*Id.*, pp. 571-572.)

However, *DeYoung* is not on point. While the court upheld the teacher's dismissal, including on the grounds of immoral conduct, the holding was limited to a narrow, highly technical procedural issue. Nowhere does the court discuss the sufficiency of the grounds for dismissal based on immoral conduct. In any event, the teacher in *DeYoung* committed physical harm and abuse of students, an element lacking in the instant case.

District relies on the words and phrases from the above cases such as "willful," "flagrant," "showing moral indifference," and "an inconsiderate attitude" in arguing Employee's conduct was immoral. However, it is not apparent from the Charges that Employee's methodology was a flagrant breach of moral values or displayed an inconsiderate attitude toward the public of the kind contemplated in the *Weiland*, *Hensey*, or *Haar* cases. Employee's conduct, if proven, could be deemed unprofessional, unsatisfactory, and displaying evident unfitness. But the conclusory characterization of Employee's conduct as set forth in the Charges is insufficient to establish immoral conduct for purposes of the motion.

Willful Refusal to Perform Regular Assignments

As noted above, section 44939, subdivision (b), allows an employing school district to suspend a teacher without pay who is charged with engaging in "willful refusal to perform regular assignments without reasonable cause." There is no published decision either defining this phrase or applying it to a set of facts.

However, comparing this phrase with other forms of misconduct described in section 44932, subdivision (a), is illuminating.

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Specifically, under section 44932, subdivision (a)(5) and (a)(2), a teacher may be disciplined for “unsatisfactory performance” or “unprofessional conduct,” respectively, but not placed on an unpaid suspension. Under section 44932, subdivision (a)(8), while a teacher’s *persistent* violation of a school district’s reasonable rules and regulations is grounds for discipline, it too is not an authorized basis for unpaid suspension.

This comparison indicates the discipline for willful refusal to perform regular assignments is akin to the traditional labor charge of insubordination, i.e., an intentional, willful, volitional refusal to perform any part of a regular assignment. Examples include refusal to have children say the pledge of allegiance, allow children to use the restroom during instructional time, teach certain parts of a school district’s curriculum, turn in lesson plans, or attend meetings mandated by a supervisor.

Thus, a charge of willful refusal to perform regular assignments is based on a teacher refusing to perform an assignment or carry out a duty, not allegations that the teacher has done so in a way that is unsatisfactory, unprofessional, negligent, or even a persistent violation of the employing school district’s rules or regulations.

In this case, Employee is not charged with refusing to carry out any particular assignment. Instead, the Charges allege Employee, over three school years, repeatedly was issued discipline and directives to refrain from engaging in the same or similar verbal abuse towards his students, and that he willfully refused to do so thereafter. While such behavior may constitute unsatisfactory and unprofessional conduct, as well as persistent violation of District’s rules, regulations, and directives, for purposes of section 44932, subdivision (a), such conduct does not equate to willful refusal to carry out regular assignments for purposes of section 44939, subdivision (b).

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Conclusion

Good cause exists to grant the motion.

Pursuant to Education Code section 44939, subdivision (c)(5), this order shall become effective within five days of service, and District shall make Employee whole for any lost wages, benefits, and compensation within 14 days after service of the order.

IT IS SO ORDERED.

DATE: 06/25/2024


Eric C. Sawyer (Jun 25, 2024 11:28 PDT)

ERIC SAWYER

Administrative Law Judge

Office of Administrative Hearings