

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

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

ARSENE HERNANDEZ, Moving Party

A Permanent Certificated Employee

and

LOS ANGELES UNIFIED SCHOOL DISTRICT, Responding Party

OAH No. 2019110089

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

Jennifer M. Russell, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter telephonically on November 22, 2019. Jason Wojciechowski, Attorney at Law, represented Arsene Hernandez (Hernandez), the moving party. Susan Hyman, Assistant General Counsel, represented the Los Angeles Unified School District (District), the responding party.

Pursuant to Education Code¹ section 44939, subsection (b), the District immediately suspended Hernandez from his duties upon its filing of a Statement of Charges containing allegations charging him with immoral conduct in violation of section 44939, unprofessional conduct in violation of section 44932, subdivision (a)(2), dishonesty in violation of section 44932, subdivision (a)(4), unsatisfactory performance in violation of section 44932, subdivision (a)(5), evident unfitness for service in violation of section 44932, subdivision (a)(6), persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the governance of the public schools by the State Board of Education or by the governing board of the District in violation of section 44932, subdivision (a)(8), and willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the District in violation of section 44939.

Pursuant to section 44939, subdivision (c)(1), Hernandez served and filed with the Office of Administrative Hearings a Motion for Immediate Reversal of Suspension. Pursuant to section 44939, subdivision (c)(2), the District filed an opposition.

Having considered the parties' written submissions and oral arguments, pursuant to section 44939, subdivision (4), the Administrative Law Judge issues the following Order granting the Motion for Immediate Reversal of Suspension.

¹ Unless otherwise stated, all further statutory references are to the Education Code.

Standard for Conducting Review of Section 44939 Motion for Immediate Reversal of Suspension

1. The governing board of a school district has the authority to suspend immediately a permanent employee without pay upon its filing of written charges for dismissal on grounds of immoral conduct, conviction of a felony or of any crime involving moral turpitude, incompetency due to mental disability, willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations, or violation of section 51530.² (§ 44939, subd. (b).) Reviewing the statutory scheme for tenured teacher dismissal, the California Supreme Court, in *Fontana Unified School District v. Burman* (1988) 45 Cal.3d 207, 215-216, has affirmed if one of the grounds for dismissal pursuant to section 44932 is also one of those specified in section 44939, the school district may immediately suspend the employee without pay pending disposition of the dismissal proceeding.

2. Review of a motion for immediate reversal of suspension is "limited to a determination whether the facts as alleged in the statement of charges, if true, are sufficient to constitute a basis for immediate suspension under this section." (§ 44939, subd. (c)(1).)

3. Thus, review of a motion for immediate reversal of suspension is analogous to a demurrer, which tests the sufficiency of the allegations in a complaint. (*Pacifica Homeowners' Ass'n v. Wesley Palms Retirement. Community* (1986) 178 Cal.App.3d 1147, 1151.) Facts properly pleaded are accepted as true, but contentions, deductions, or conclusions of fact or law should be disregarded. (*Blank v. Kirwan*

² Section 51530 prohibits advocacy of communism with intent to indoctrinate.

(1985) 39 Cal.3d 311, 318.) Conclusory characterizations of conduct as intentional, willful, or fraudulent are “patently insufficient.” (*Brousseau v. Jarrett* (1997) 73 Cal.App.3d 864, 872.) Where reading the allegations reveals the existence of an affirmative defense, the complaining party must plead around the defense by alleging specific facts that would avoid the apparent defense. (*Kirwan, supra*, 39 Cal.3d at 318.)

Immediate Suspension Based on Allegation of Immoral Conduct

4. As acknowledged in *Board of Education of the City of Los Angeles v. Swan* (1953) 41 Cal.2d 546, 552, “A teacher . . . in the public school system is regarded by the public and pupils in the light of an exemplar, whose words and actions are likely to be followed by the children coming under . . . [the teacher’s] care and protection. [Citation.] In this connection the following language used in *Johnson v. Taft School Dist.* [1937] 19 Cal.App.2d 405, at page 408[,] is pertinent: ‘A board of education is entrusted with the conduct of the schools under its jurisdiction, their standards of education, and the moral, mental and physical welfare of the pupils during school hours. An important part of the education of any child is the instilling of a proper respect for authority and obedience to necessary discipline. Lessons are learned from example as well as from precept. The example of a teacher who is continually insubordinate and who refuses to recognize constituted authority may seriously affect the discipline in a school, impair its efficiency, and teach children lessons they should not learn. Such conduct may unfit a teacher for service in a school even though . . . [the teacher’s] other qualifications may be sufficient. ‘Book learning’ is only a phase of the important lessons a child should learn in a school.’”

5. With that understanding of the regard for teachers in the public school system, “immoral conduct” in teacher dismissal cases 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 a 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." (*Board of Education of the San Francisco Unified School District v. Weiland* (1960), 179 Cal.App.2d 808, 811.)

6. In this matter, the Statement of Charges alleges, during the five-month period between January 11 and May 26, 2016, Hernandez engaged in immoral conduct when he "failed to provide for the health and safety of student V [REDACTED] B. when he failed to intervene when students J [REDACTED] H. and M [REDACTED] called her a 'bitch,' punched her, and pulled her by the hair." The circumstances surrounding the alleged altercation, including, for example, the notoriety and frequency of occurrence, are not specified in the Statement of Charges. As such, the Statement of Charges fails to state specific facts that would avoid apparent affirmative defenses, including Hernandez's ignorance of any threat or risk of harm to the student, Hernandez's inability to intervene, or Hernandez's unsuccessful attempted intervention.

7. The Statement of Charge alleges, on or about May 26, 2016, Hernandez "made two phone calls to V [REDACTED] B., on her personal cell phone." The allegation does not specify the purpose for the call, whether the student answered the call, or the substance of the matter(s) discussed during the call. Without such specificity, even accepting the allegation as true, Hernandez's conduct does not amount to immoral conduct as defined in *Weiland, supra*.

8. The Statement of Charge further alleges, between May 26 and 28, 2016, Hernandez "failed to provide health and safety to V [REDACTED] B. when, despite being told by Principal Cameron to keep the information confidential, he disclosed confidential

information to at least one student, J [REDACTED] H., resulting in J [REDACTED] H. sending V [REDACTED] . . . [text messages stating] “That’s fucked up,” “Why you snitch on J [REDACTED],” “Now you made us come out later, that’s shade,” and “And stop ratting the whole class out.” While noncompliance with a directive to keep information confidential may amount to disobedience, it is not per se immoral conduct. The allegation does not specify the substance of the confidential information, how the alleged confidential disclosure occurred, or the circumstances surrounding its occurrence. Absent pleaded facts about the substance of the confidential information and the circumstances surrounding its disclosure, the Statement of Charges invites deduction, if not speculation, about events precipitating transmittal of the text messages. As set forth in *Kirwan, supra*, 39 Cal.3d at 318, when testing the sufficiency of allegations in a pleading, such as the Statement of Charges in this matter, deductions should be disregarded.

9. The pleaded facts in the Statement of Charges, if true, are insufficient to sustain Hernandez’s immediate suspension on the basis of immoral conduct.

Suspension Based on Allegation of Willful Refusal to Perform Regular Assignments

10. The willful refusal of a teacher to obey the reasonable rules and regulations of the employing board of education is insubordination. (*Swan, supra*, 41 Cal.2d at 552, citing *Harrison v. State Board of Education* (1946) 134 N.L.J. 502 and *State ex rel. Steele v. Board of Education of Fairfield* (1949) 252 Ala. 254.) The term “willful” carries a volitional determination that excludes the notion of accidental or even negligent conduct. (*Coomes v. State Personnel Board* (1963) 215 Cal.App.2d 770, 775.)

11. In this matter, the Statement of Charges alleges the District's reasonable rules and regulations are codified in, but not limited to, the LAUSD Code of Conduct with Students, LAUSD Employee Code of Ethics, LAUSD Attendance Policy, LAUSD Respectful Treatment of all Persons Policy, LAUSD Teaching and Learning Framework, California Standards for the Teaching Professions, LAUSD/UTLA Collective Bargaining Agreement, Central High School Assignment Policy, and Class Description for Secondary Teachers.

12. The Statement of Charges alleges Hernandez failed to adhere to District rules and regulations on specific enumerated dates, days, and length of time when he was absent from duty or tardy reporting to duty and as a consequence failed to provide instruction to his students. The Statement of Charges further alleges Hernandez failed to provide prior notification to the District when he did not report to duty, failed to submit lesson plans for his substitute during his absence, dismissed students from his class early, and failed to enter grades or earned points.

13. A reading of these allegations in the Statement of Charges suggests affirmative defenses, including but not limited to, justification or excuse, may be available to Hernandez. As previously discussed, the complaining party must plead around an affirmative defense by alleging specific facts that would avoid the apparent defense. (*Kirwan, supra*, 39 Cal.3d at 318.) As pleaded, the allegations in the Statement of Charges do not avoid apparent defenses available to Hernandez.

14. Without the specific context of the circumstances surrounding his absence and tardiness, his noncompliance with the District's policies, and his nonperformance of his duties, the allegations, even if true, are insufficient to support Hernandez's immediate suspension on the basis of willful refusal to perform regular assignments.


15. Based on the foregoing, good cause exists to grant the Motion for Immediate Reversal of Suspension.

16. Pursuant to section 44939, subdivision (c)(5), the Order below shall become effective within five (5) days of service, and the District shall make Arsene Hernandez, a permanent certificated employee of the District, whole for any lost wages, benefits, and compensation within fourteen (14) days after service of the Order.

ORDER

The Motion for Immediate Reversal of Suspension in OAH case number 2019110089 is granted.

DATE: December 6, 2019

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JENNIFER M. RUSSELL
Administrative Law Judge
Office of Administrative Hearings