

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of the Motion for Immediate  
Reversal of Suspension Filed by:

MIGUEL ALVAREZ,

Employee,

versus

LOS ANGELES UNIFIED SCHOOL  
DISTRICT,

District.

OAH No. 2018120567

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

(Ed. Code, § 44939, subd. (c)(4))

Administrative Law Judge (ALJ) Eric Sawyer, Office of Administrative Hearings (OAH), State of California, heard this matter telephonically from Los Angeles, on January 11, 2019.

Tamra M. Smith, Esq., represented Miguel Alvarez (Employee). Michael Voigt, Assistant General Counsel, represented the Los Angeles School District (District).

The District filed a statement of charges against Employee, and placed him on indefinite unpaid suspension. The suspension is based on allegations that Employee willfully refused to perform regular assignments without reasonable cause, in violation of Education Code section 44939.

Employee timely filed a Motion for Immediate Reversal of Suspension (motion) with OAH, pursuant to Education Code 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 ALJ granted Employee's request for official notice of the pleadings, but denied her request as for prior orders granting similar motions and legislative materials concerning Assembly Bill 449 for the reasons stated on the record. The parties also presented oral argument during the hearing.

Education Code section 44939, subdivision (b), provides that a school district may immediately suspend a permanent certificated employee who has been charged with willful refusal to perform regular assignments without reasonable cause. Education Code section 44939, subdivision (c)(1), allows a suspended employee to file a motion for review of the

suspension, and review of that 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.”

In this case, the ALJ considered the written submissions of the parties and oral argument made during the hearing. Based upon a review of the statement of charges filed in the instant matter (the pleadings), and as set forth in detail on the record during the telephonic hearing, the motion is granted as follows.

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

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.)

A comparison of Education Code sections 44932, subdivision (a), and 44939, subdivision (b), is illuminating. Pursuant to section 44932, subdivision (a)(5) and (a)(2), discipline is warranted for unsatisfactory performance or unprofessional conduct, respectively, but not unpaid suspension. More importantly, under section 44932, subdivision (a)(8), while a teacher’s *persistent* violation of a school district’s reasonable regulations is grounds for discipline, it is not an authorized basis for unpaid suspension. Rather, unpaid suspension is authorized only for a willful refusal to perform regular assignments pursuant to section 44939, subdivision (b).

This comparison indicates the cause of discipline for willful refusal to perform a regular assignment is more akin to the traditional labor charge of insubordination, i.e., an intentional, willful, volitional refusal to perform any part of a particular regular assignment. Examples coming to mind are refusal to have children say the pledge of allegiance, perform yard duty, allow children to use the restroom during instructional time, teach certain parts of a school district’s curriculum, turn in lesson plans, attend meetings mandated by a supervisor, etc. However, a charge of willful refusal to perform a regular assignment must be more than unsatisfactory, unprofessional, negligent or even persistent failure to perform a regular assignment.

In this case, a review of the statement of charges in its totality indicates Employee’s alleged misconduct is not the result of a willful, volitional, refusal to perform his regular assignment. The well-pleaded facts indicate that when Employee taught his classes, administrators found fault with his performance. Stated another way, the pleadings indicate Employee was teaching his classes, but did so deficiently in the District’s opinion. The


allegations also indicate Employee failed to improve after receiving multiple conferences and, perhaps, persistently, but not always, failed to comply with directives given to him.

The pleadings allege with factual precision and abundance that Employee's teaching during the times in question was unsatisfactory, unprofessional and persistently violated District rules and regulations, among other theories. But where the pleadings allege a willful refusal to perform a regular assignment, the allegations are vague, conclusory and devoid of the kind of factual content which, if true, would constitute a willful state of mind or volitional refusal to perform as directed. As discussed above, vague and conclusory allegations are not binding on the ALJ and need not be accepted.

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

IT IS SO ORDERED.

DATED: January 14, 2019

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ERIC SAWYER  
Administrative Law Judge  
Office of Administrative Hearings