

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

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

ISABEL YBARRA,
A Permanent Certificated Employee,

Moving Party,

and

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

Responding Party.

OAH No. 2018100526

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

[Ed. Code, § 44939, subd. (c)(1)]

On November 9, 2018, a telephonic hearing on the motion filed by Isabel Ybarra for immediate reversal of suspension (Motion) was held by Erlinda G. Shrenger, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), from Los Angeles.

Tamara M. Smith, Equality Law LLP, represented moving party Isabel Ybarra (Employee).

Mampre R. Pomakian, Associate General Counsel, represented responding party Los Angeles Unified School District (District).

The District has suspended Employee without pay pending the outcome of its action to dismiss Employee.¹ The grounds for the suspension under Education Code section 44939 are immoral conduct and willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing school district. In the Motion, Employee seeks an order for the immediate reversal of her suspension. The District opposes the Motion.

¹ The dismissal action bears OAH case number 2018100600. The grounds for dismissal alleged by the District against Employee are immoral conduct; unprofessional conduct; dishonesty; unsatisfactory performance; evident unfitness for service; and persistent violation of school laws and regulations. (Ed. Code, § 44932, subd. (a)(1), (2), (4), (5), (6), and (8).)

Having considered the moving, opposing, and reply papers filed by the parties, Employee's request for official notice and the District's opposition thereto,² the Statement of Charges (SOC) previously filed with OAH, and the oral argument of counsel, the undersigned ALJ hereby finds and orders as follows:

Education Code Section 44939

Education Code section 44939 authorizes the governing board of a school district, if it deems the action necessary, to immediately suspend a permanent employee from his or her duties, upon the filing of written charges with the governing board charging the employee with immoral conduct, conviction of a felony or 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 of the employing district, or violation of section 51530 (teaching communism).³

An employee who is suspended pursuant to section 44939 may serve and file with the Office of Administrative Hearings a motion for immediate reversal of suspension. The motion shall include "a memorandum of points and authorities setting forth law and argument supporting the employee's contention that the statement of charges does not set forth a sufficient basis for immediate suspension." (Educ. Code, § 44939, subd. (c)(1).) Review of the 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." (*Id.*)

Although well-pleaded facts must be accepted as true for purposes of the Motion, the ALJ need not accept "contentions, deductions or conclusions of fact or law." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

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.)

"Immoral conduct" has been defined to mean that which is hostile to the welfare of the general public and contrary to good morals. It includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, and dissoluteness. Or, it can be conduct that is willful, flagrant, or shameless, conduct showing moral indifference to the

² The ALJ denied Employee's request for taking official notice of a document obtained from the District's Personnel Commission website pertaining to the job classification of "Communication Support Assistant," on relevance grounds and a lack of showing that the matter was one for which official notice may be taken. (Evid. Code, § 452, subds. (b), (h); Gov. Code, § 11515.)

³ All further statutory references are to the Education Code unless otherwise indicated.

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.)

Discussion

In its opposition to the Motion, the District argues that immoral conduct to justify Employee's immediate suspension is established by the allegations in SOC ¶¶ 17, 23-25, 29-32 (related to billing discrepancies and inaccuracies), SOC ¶ 7 (related to Employee's requests to reschedule meetings with Field Director Esperon), and SOC ¶ 8 (related to Employee's audio recording of her assessment sessions). (Opposition, pp. 4-7.) These allegations, however, do not reflect conduct that rises to the level of immoral conduct to justify an immediate suspension under section 44939. The SOC contains no facts which, if true, would indicate Employee's conduct described by these allegations are indicative of corruption or resulted from willful, flagrant or shameless conduct, or reflect an inconsiderate attitude toward good order.

The factual allegations in the SOC, if true, are insufficient to constitute a basis for immediate suspension under section 44939 based on a willful refusal to perform regular assignments without reasonable cause. The SOC indicates Employee's alleged misconduct is not the result of a willful, volitional refusal to perform her regular assignment as a psychiatric social worker. The well-pleaded facts reflect Employee performed her assignment but she failed on multiple occasions to perform certain tasks accurately and on time. The deficiencies in Employee's job performance related to her documentation and billing, her discussing confidential information in public or semi-public areas, and her failure to assess and supervise two students who admitted suicidal ideation/behaviors. While the SOC pleads with specificity the deficiencies in Employee's job performance, the SOC's allegations that Employee willfully refused to perform her assignment are vague, conclusory, and devoid of facts which, if true, would establish a willful state of mind or volitional refusal to perform her job as directed. Vague and conclusory allegations are not binding on the ALJ and need not be accepted.

The District's argument that Employee's failure to follow directives constitutes a "willful refusal" to support an immediate suspension under section 44939 is contrary to the statutory scheme of the Education Code, where causes for dismissal are set forth in section 44932, but the limited grounds for immediate suspension are set forth separately in section 44939. Absent compliance with the requirements of section 44939, the Education Code does not contemplate immediate suspension based on a teacher's unsatisfactory performance or repeated failures to comply with directives or procedures. For example, under section 44938, subdivision (b), an employing district may not take action against an employee charged with unsatisfactory performance without first having given at least 90 days' written notice to the employee of the unsatisfactory performance with such specificity and particularity so as to "furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge." (Ed. Code, § 44938, subd. (b)(1).) There is a similar notice requirement when an employee is charged with unprofessional conduct. (Ed. Code, § 44938, subd. (a).)

Based on the foregoing, and the reasons stated on the record, the ALJ finds that the facts alleged in the Accusation, if true, are not sufficient to establish a basis for Employee's immediate suspension under section 44939. The Motion shall be granted.

Disposition

The Motion is granted. In accordance with Education Code section 44939, subdivision (c)(5), this Order shall become effective within five days of service of the Order, and the District shall make Employee whole for any lost wages, benefits, and compensation within 14 days after service of this Order.

IT IS SO ORDERED.

DATED: November 17, 2018

DocuSigned by:
Erlinda Shrenger
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ERLINDA G. SHRENGER
Administrative Law Judge
Office of Administrative Hearing