

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

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

**HOPE JOHNSTON, Moving Party**

**And**

**MENIFEE UNION SCHOOL DISTRICT, Responding Party**

**OAH No. 2020100779**

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

Alan R. Alvord, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard oral argument on this matter by telephone on November 20, 2020.

Jon Cadieux, Smith Steiner Vanderpool, APC, represented moving party Hope Johnston (Johnston).

Todd M. Robbins, Atkinson, Adelson, Loya, Ruud & Romo, a Professional Law Corporation, represented responding party Meniffee Union School District (district).

The matter was submitted for decision on November 20, 2020.

## **Background**

On September 8, 2020, the Menifee Union School District Governing Board (board) suspended Johnston without pay and gave notice of the board's intent to dismiss Johnston from her position as a permanent certificated teacher. The board served Johnston with notice of the suspension and intent to dismiss and the statement of charges by regular and certified mail on September 11, 2020.

Johnston, through counsel, requested a hearing on the dismissal on September 21, 2020.

Johnston, through counsel, filed the present motion to immediately reverse her suspension without pay with OAH on October 26, 2020.

On October 27, 2020, the district filed a request to set the dismissal case for hearing. The hearing is set for March 2021.

## **Timeliness of This Motion**

The district contends that this motion was untimely under Education Code section 44939, subdivision (c)(2). Johnston contends the motion was timely. All references to statutes are to the Education Code, unless indicated.

Section 44939, subdivision (c)(2) requires this motion to be "served upon the governing board . . . and filed with [OAH] within 30 days after service upon the employee of the initial pleading in the matter." The question is what the legislature meant by "initial pleading in the matter." There does not appear to be any controlling authority interpreting the legislature's meaning. The district contends the 30 days starts when it served Johnston with the notice of intention to dismiss and the written

statement of charges. Johnston contends the 30 days started on October 27, 2020, when the district filed the request to set the dismissal case for hearing with OAH.

Section 44934 states that the notice of intention to dismiss and the written charges are sufficient to initiate a hearing under Government Code section 11503. The district is not required to file or serve a separate accusation. The Education Code does not state a time limit within which the district must initiate a hearing, but it states that the hearing must be commenced within six months from the date of the employee's demand for a hearing (Educ. Code § 44944, subd. (b)(1)(A).)

In addition to filing the motion within 30 days after the "initial pleading," section 44939, subdivision (c)(3), requires a hearing on the motion no later than 30 days after it is filed with OAH. Section 44939, subdivision (c)(4), requires a decision on the motion to be issued within 15 days after the hearing. Read together, these provisions demonstrate the legislature's intent to provide a quick resolution of the motion where a teacher has been suspended without pay.

Under Johnston's reading of the law, the time to file the motion would not start to run until the school district filed a disciplinary case with OAH – an action that has no specific deadline in the Education Code. Under this reading, a district could delay a teacher's right to request reversal of a suspension without pay by simply delaying filing a dismissal case with OAH. Likewise, if a teacher filed a motion for reversal of suspension before the disciplinary case was filed with OAH, the district could argue the motion should be dismissed because the 30 days had not started yet. In fact, Johnston's own motion could be premature because it was filed the day before the district filed its disciplinary case at OAH. One day before is not "within 30 days after" the filing. The legislature could not have intended such absurd outcomes. When a statute is susceptible of different constructions, one leading to mischief or absurdity

and the other consistent with justice and common sense, the latter will be adopted. (*Schulz v. Superior Court* (1977) 66 Cal.App.3d 440, 446.)

The motion for relief from suspension was required to be filed with OAH within 30 days after September 11, 2020, the date the district served Johnston with the notice of suspension and intent to dismiss. The motion filed with OAH on October 26, 2020, was untimely. Even assuming the motion was timely, it fails on the merits, as discussed below.

### **Allegations in the Statement of Charges**

The district alleges that Johnston hosted a birthday party at her house for a 16-year-old former student. Other district students were present at the party. During the “happy birthday song,” a video shows the student smoking something while Johnston stands by. The video was posted on social media with a caption stating that the student would be “high asf.” The statement of charges says that this means “high as fuck.” There is a factual dispute about what the student was smoking. The statement of charges referred to it as a CBD (cannabidiol) cigarette based on the student’s answers to an investigator, but also stated that the investigator concluded “none of the individuals were credible.” There is also a dispute about whether it was illegal for Johnston to allow a 16-year-old to smoke anything at her home.

The statement of charges also alleges that Johnston exchanged text messages with two students “as far back as 2014” that had inappropriate sexual content and referenced instances when Johnston touched the students in an improper way. The statement of charges says these incidents came to the district’s attention in December 2016. The statement of charges states that the previous sexually charged text

messages, together with the permissive conduct allowing the student to smoke the cigarette, are warning signs of grooming behavior, which is immoral conduct.

The statement of charges also alleges Johnston was dishonest during the investigation, that she induced others to be dishonest, and that this conduct is immoral.

### **Johnston's Arguments**

Johnston asserts that the smoking incident is not on its face immoral conduct sufficient to sustain a suspension without pay. The district does not allege that she provided the student with the cigarette, consented to his smoking it, or knew he had it in his possession. Johnston contends she waited until after "happy birthday" was finished to address the smoking issue. She contends she was helping to raise the student as a co-parent and her parenting decisions are beyond the scope of district discipline.

As to the allegations of inappropriate text messages and grooming behavior, Johnston argues that the messages were falsified and, even if they weren't, they are evidence that falls outside of the four-year evidentiary limitation set forth in section 44944, subdivision (b)(2)(A).

### **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. Section 44939, 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.”

Immoral conduct is conduct 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. (*Board of Education v. Weiland* 179 Cal. App. 2d, 808, at 811, quoting *Orloff v. Los Angeles Turf Club* (1951) 36 Cal.2d 734, 740 and *Palo Verde Unified School District of Riverside v. Hensey* (1970) 9 Cal.App.3d 967, 972.)

## **Evaluation**

The allegations that Johnston exchanged sexually inappropriate text messages with students and touched them improperly, if proved at hearing, could support a finding of immoral conduct. The statement of charges on its face alleges the district discovered this conduct in December 2016. Section 44944, subdivision (b)(2)(A)(i), provides an exception to the four-year evidence exclusion rule for behavior or communication of a sexual nature. Whether this exception, or any other, applies is a matter to be determined by the commission after the parties present evidence at the hearing.

The allegations that Johnston stood by while a 16-year-old smoked a CBD cigarette in her home in front of a group of people including district students, if proved at hearing, could support a finding of immoral conduct.

The allegation that the CBD smoking incident, when considered together with the inappropriate text messages and improper touching of a minor student, is grooming behavior, if proved at hearing, could support a finding of immoral conduct.

The allegation that Johnston was dishonest with the district during the investigation and induced others to be dishonest, if proved at hearing, could support a finding of immoral conduct.

## **ORDER**

The motion for immediate reversal of suspension is denied.

DATE: December 2, 2020

*Alan R. Alvord*

ALAN R. ALVORD

Administrative Law Judge

Office of Administrative Hearings