

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

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

CODY WALKER, Moving Party,

A Permanent Certificated Employee and

**WHEATLAND UNION HIGH SCHOOL DISTRICT, Responding
Party.**

OAH No. 2022031051

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

On April 22, 2022, a telephonic hearing on the motion filed by Cody Walker for immediate reversal of suspension (Motion) was held by Julie Cabos-Owen, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), in Los Angeles. Eric Lindstrom, Attorney at Law, with Langenkamp, Curtis, Price, Lindstrom & Chevedden, represented moving party Cody Walker (Employee or Respondent). Lindsay K. Moore, Attorney at Law, with Kingsley Bogard, LLP, represented responding party Wheatland Union High School District (District).

On March 18, 2022, the District filed a Statement of Charges (SOC) against Employee and immediately suspended him without pay pending the outcome of its action to dismiss him. The bases for the suspension under Education Code section 44939 are: willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing school district, and immoral conduct. (The SOC also alleges the following grounds for dismissal under Education Code section 44932: dishonesty; evident unfitness for service; and persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed by the State Board of Education or the school district.)

The SOC alleges Employee's Agricultural Mechanics and Construction class built and sold fire pits for a fundraiser, with payment for supplies taken from, and proceeds from sales deposited into, the Agricultural Mechanics ASB Fund (Fund). The SOC further alleges, in Spring 2021, Employee engaged in "misconduct supporting termination" (SOC, p. 7) by using "the District's shop for his own personal business and/or financial gain, us[ing] District supplies for his personal gain, mislead[ing] at least one community member when selling a fire pit, and misappropriate[ing] money from the sale of fire pits made for the Ag Mechanics fundraiser." (*Ibid.*) Regarding the purported misconduct, the SOC specifically alleges Employee received money from the sale of at least two firepits and the proceeds from those sales were not deposited into the Fund; Employee owns a custom fabrication business, and he used shop equipment and students in his class to produce a metal fence décor sold to another employee, but the proceeds from that sale were not deposited into the Fund; and Employee failed to follow the proper surplus process for a tractor donation. Another District employee brought Employee's misconduct to the attention of the Superintendent. The SOC does not specify which conduct constitutes immoral conduct and/or willful refusal to perform regular assignments.

On March 24, 2022, Employee filed the Motion, seeking the immediate reversal of his unpaid suspension, contending the charges in the SOC do not constitute either immoral conduct or willful refusal to perform regular assignments, and the District has not met the statutory requirements of Education Code section 44939, subdivision (b).

On April 8, 2022, after receipt of the Motion, District served an Amended Statement of Charges (ASOC) on Employee. The ASOC restates the bases for dismissal and the factual allegations set forth in the SOC, with additional factual allegations relating to Employee's work in food service delivery between March 13 and June 4, 2020, when school instruction was conducted only through virtual learning. The newly alleged conduct in the ASOC occurred prior to service of the SOC and the notice of immediate unpaid suspension on Employee.

On April 12, 2022, District filed its opposition to the Motion, citing both the new allegations of the ASOC and the original allegations of the SOC (as re-alleged in the ASOC) in support of its immediate suspension of Employee without pay. In his reply, filed on April 19, 2022, and in oral argument, Employee requested the ALJ ignore the new factual allegations contained in the ASOC and limit the analysis of the propriety of Employee's suspension to the allegations in the SOC. Additionally, Employee asserted the new allegations, even if considered, do not amount to conduct that is either immoral or a willful refusal by Employee to perform regular assignments without cause, thus failing to satisfy Education Code section 44939, subdivision (b), requirements for immediate suspension.

The ALJ reviewed and considered the SOC, the written submissions of the parties, and oral argument made during the hearing. The Motion is denied as set forth below.

Motions for Immediate Reversal of Suspension

Education Code section 44939, subdivision (b), provides that a school district may immediately suspend a permanent certificated employee who has been charged with, among other things, immoral conduct or willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the State Board of Education or the employing school district. 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.”

A motion such as the current Motion, made pursuant to Education Code section 44939, subdivision (c)(1), is analogous to a demurrer because the properly pleaded facts must be accepted as true for purposes of resolving the motion. However, the ALJ need not accept “contentions, deductions or conclusions of fact or law.” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Additionally, as with a demurrer, the Motion can be granted if the District’s “conclusory characterization of [Employee’s] conduct as intentional, willful and fraudulent” is “patently insufficient.” (See e.g., *Brousseau v. Jarrett* (1977) 73 Cal.App.3d 864, 872.)

New Allegations Brought after Suspension without Pay

The new factual allegations asserted in the ASOC should not be considered in determining whether District’s suspension of Employee met the statutory requirements of Education Code section 44939, subdivision (b). The District’s immediate suspension of Employee was based on the factual allegations in the SOC, not the new allegations of misconduct asserted in the ASOC, brought after Employee was already suspended.

Nothing in Education Code section 44939 permits the retroactive application of new allegations made after the initial statement of charges to support the original suspension order. (*Board of Trustees of Placerville Union School Dist. v. Porini* (1968) 263 Cal.App.2d 784, 789 [statutes pertaining to teacher discipline should be “strictly construed”].) The appeal procedures set forth in Education Code section 44939, subdivision (c), are predicated on service of the “initial pleading” in the matter. (Ed. Code, § 44939, subd. (c)(2) [“The motion shall be served upon the governing board of the school district and filed with the Office of Administrative Hearings within 30 days after service upon the employee of the *initial pleading* of the matter.” (Emphasis added).]) Any other result would allow a school district to continually amend its charges to address any pleading deficiencies pointed out by Employee and maintain a teacher’s suspension indefinitely. Such action would contravene the apparent intent of Education Code section 44939 to provide an efficient and cost-effective procedure for determining the propriety of immediate suspensions without pay.

Willful Refusal to Perform Regular Assignments without Reasonable Cause

In analyzing whether cause exists for Employee’s immediate suspension under Education Code section 44939, subdivision (b), for “willful refusal to perform regular assignments without reasonable cause,” a comparison to Education Code section 44932, subdivision (a), is informative. Education Code section 44932, subdivision (a)(8) (persistent violation of, of or refusal to obey, school laws or the district’s reasonable regulations), authorizes a teacher’s dismissal, but not immediate unpaid suspension. Education Code section 44939, subdivision (b), allows immediate suspension only if the refusal to perform regular assignments was “willful.” The statute’s use of the words “willful refusal” rather than “persistent violation” indicates that, although repeated

performance failures may establish grounds for dismissing a teacher under Education Code section 44932, such continuing failures are not grounds for immediate suspension under Education Code section 44939.

The Education Code, in creating the separate grounds and procedures for dismissal versus immediate suspension, contemplates a distinction between two types of cases. In narrowing the substantive grounds for immediate suspension and creating additional due process protections for the employee, Education Code section 44939, subdivision (b), requires a higher threshold to justify immediate suspension than the threshold for dismissal set forth in Education Code section 44932, subdivision (a).

To establish grounds for immediate suspension under Education Code section 44939, Employee's refusal to perform his regular assignment must have been "willful." In the context of a public employee's insubordination or "willful" misconduct, the term insubordination "carries a volitional coloration which excludes the notion of accidental or even negligent conduct. . . [and] insubordination, equally with willful misconduct, requires proof of intent or willfulness. The latter elements imply that the person knows what he is doing and intends to do what he is doing." (*Coomes v. State Personnel Bd.* (1963) 215 Cal. App. 2d 770, 775.) Consequently, a willful refusal to perform a regular assignment must be more than an unsatisfactory, unprofessional, negligent, or even persistent failure to perform a regular assignment. Instead, it must be an intentional, volitional refusal to perform any part of a regular assignment.

The SOC alleges Employee failed to follow District policies and regulations when selling firepits for fundraising, using District equipment, and handling the surplus process for a tractor donation. However, the SOC contains no specific allegation that Employee willfully refused to perform his regular assignments. Instead, the SOC generally alleges Employee's "misconduct, as described above establishes the

following causes for his dismissal [and] immediate suspension pursuant to Education Code sections 44932 and 44938: [1] Immoral conduct, including, but not limited to egregious misconduct; [2] Dishonesty; [3] Evident unfitness for service; [4] Persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the state board or by the governing board of the school district employing him or her; [5] Willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing school district.” (SOC, p. 11.) This general assertion is conclusory, without specifically indicating how Employee’s conduct constitutes an intentional and deliberate refusal to perform his regular assignment. As noted above, conclusory characterizations of conduct as intentional or willful are not binding on the ALJ and need not be accepted. Consequently, the SOC does not sufficiently plead Employee’s “willful refusal to perform regular assignments without reasonable cause.”

Based on the foregoing, the facts alleged in the SOC, if true, are insufficient to establish a basis for Employee’s immediate suspension under Education Code section 44939, subdivision (b), for willful refusal to perform regular assignments.

Immoral Conduct

“Immoral conduct” has been defined as conduct “which is hostile to the welfare of the general public and contrary to good morals. [It] 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 of San Francisco Unified School Dist. v. Weiland* (1960) 179 Cal.App.2d 808,

811 [*Weiland*]; *Palo Verde etc. Sch. Dist. v. Hensey* (1970) 9 Cal. App.3d 967, 972 [*Hensey*].) The term "immoral conduct" has been used interchangeably with the term "moral turpitude" which in turn is sometimes used as synonymous with dishonesty or a high degree of unfairness. (*Weiland*, 179 Cal.App.2d 808, 811.)

The SOC alleges, among other things, that Employee "misappropriated money from the sale of fire pits made for the Ag Mechanics fundraiser." (SOC, p. 7.) Misappropriation, i.e., theft, reflects dishonesty and is an act of moral turpitude. (See e.g., *People v. Wheeler* (1992) 4 Cal. 4th 284, 289 ["Grand theft reflects dishonesty and is a crime involving moral turpitude."]; *In re Rothrock* (1944) 25 Cal.2d 588 [petty theft is a crime of moral turpitude].) Employee's alleged misappropriation was dishonest, evidences a moral indifference to the opinions of others, and demonstrates an inconsiderate attitude towards good order and the public welfare. As defined in general, Employee's alleged misappropriation of funds constitutes immoral conduct.

However, the determination of what constitutes immoral conduct must be contextual. As noted in *Morrison v. State Board of Education* (1969) 1 Cal. 3d 214, 224 (*Morrison*), "immoral conduct" is not "considered in the abstract. It must be considered in the context in which the Legislature considered it, as conduct which is hostile . . . to the welfare of the school community." The *Morrison* court determined a teacher's actions cannot constitute immoral conduct or conduct involving moral turpitude unless those actions indicate his unfitness to teach. Given the Education Code's additional due process protections and higher threshold to justify immediate suspension, the SOC should be required to sufficiently allege facts demonstrating a nexus to teaching, just as would be required for dismissal.

In conducting this analysis, it is important to note that teachers act as role models for students. As noted in *Board of Education v. Swan*, 41 Cal.2d 546, at 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 (students) coming under her care and protection. . . . Lessons are learned from example as well as from precept."

The SOC sufficiently alleges an unfitness to teach. Employee's alleged misappropriation of District funds was antithetical to his role as an example for students, was hostile to the welfare of the school community, and shows a disregard for the impact of his conduct on students and on the District.

The *Morrison* Court provided a list of possible factors to aid in the analysis as follows:

In determining whether the teacher's conduct thus indicates unfitness to teach the board may consider as the likelihood that the conduct may have adversely affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness or blameworthiness of the motives resulting in the conduct, the likelihood of the recurrence of the questioned conduct, and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. These factors are relevant to the extent that they assist the board in determining a teacher's fitness to teach.

(1 Cal. 3d 214, 229-230. Emphasis added.)

Employee argues, and District disagrees, that the factors articulated in *Morrison* are applicable in determining the propriety of an immediate suspension. The *Morrison* factors have been provided to assist in the required analysis of whether conduct has a sufficient nexus with teaching to warrant adverse employment action. However, *Morrison* does not require that any or all factors be utilized and met. Nevertheless, for this inquiry, the factors are reviewed to the extent they assist in determining whether Employee's immoral conduct, as alleged, indicates his unfitness to teach.

The allegations in the SOC satisfy enough of the *Morrison* factors to further demonstrate an unfitness to teach. The SOC alleges activity occurring on a District campus, involving Employee's abuse of his certificated position to misappropriate funds belonging to the District students' fund, which may adversely impact students who have been deprived of those funds. The alleged misappropriation was purportedly known to at least one other employee, and it is proximate in time, occurring about one year ago. Moreover, there is nothing praiseworthy, instead only blameworthy, about Employee's alleged misappropriation.

Based on the foregoing, the facts alleged in the SOC, if true, are sufficient to establish a basis for Employee's immediate suspension under Education Code section 44939, subdivision (b), for immoral conduct.

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Disposition

Since the District has pleaded facts which, if true, support a cause for immediate unpaid suspension for immoral conduct, the motion is denied.

IT IS SO ORDERED.

DATE: 04/27/2022

Julie Cabos-Owen

JULIE CABOS-OWEN

Administrative Law Judge

Office of Administrative Hearings