

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

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

DANIEL ATWELL, a Permanent
Certificated Employee,

Moving Party,

v.

MILPITAS UNIFIED SCHOOL DISTRICT,

Responding Party.

OAH No. 2019040595

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

(Ed. Code, § 44939, subd. (c)(4))

Administrative Law Judge (ALJ) Danette C. Brown, Office of Administrative Hearings (OAH), State of California, heard this matter telephonically from Sacramento, California, on May 3, 2019.

Attorney Christopher E. Schumb represented Daniel Atwell.

Attorney John R. Yeh, with the law firm Burke, Williams & Sorensen, LLP, represented the Milpitas Unified School District (District).

PROCEDURAL HISTORY

On or about March 12, 2019, the Governing Board of the District (Governing Board) approved the Statement of Charges and Recommendation for Dismissal and Immediate Unpaid Suspension of Mr. Atwell, based on causes including, but not limited to: (1) immoral conduct; (2) unprofessional conduct; (3) evident unfitness for service; and/or (3) 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 of Education or by the governing board of the school district employing him. (Ed. Code, §§ 44932, subds. (a)(1), (2), (6) and (8); 44939, subd. (b).) On March 12, 2019, the Governing Board gave notice to Mr. Atwell of its decision and placed him on immediate suspension without pay pursuant to Education Code section 44939. Thereafter, the Governing Board received Mr. Atwell's demand for a hearing.

On April 15, 2019, Mr. Atwell filed a Motion for Immediate Reversal of Suspension (Motion), pursuant to Education Code section 44939, subdivision (c)(1), contending that the Statement of Charges is defective in that it fails to specify what facts constitute immoral conduct, and that alone should be sufficient to set aside the immediate suspension. Mr. Atwell also contends that the “majority of the allegations in the Statement of Charges are inadmissible,” and “objects to the Court considering any of them except for the allegations in paragraphs A, B, and C which come within the four-year rule.”

DISCUSSION

Applicable Statute

Education Code section 44939 states, in relevant part, that a school district may immediately suspend a permanent employee of the school district who has been charged “with immoral conduct, conviction of a felony or of any crime involving moral turpitude, with incompetency due to mental disability, with willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the School District, or with violation of [Education Code] section 51530.” (Ed. Code, § 44939, subd. (b).)

Standard of Review

Under Education Code section 44939, subdivision (c)(1), “review of a motion filed pursuant to this section 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.”

Statement of Charges

The Statement of Charges is based upon three incidents: (1) on October 25, 2018, respondent wiped his finger on the bare knee of an eighth grade female student; his contact was unwelcome by the student; (2) on May 22, 2017, respondent engaged in unprofessional conduct by angrily asking a student to leave the classroom immediately and calling the student a “dumbass” in front of other students; and (3) on September 27, 2016, respondent engaged in inappropriate contact with a student by chasing after a student who ignored his directives and grabbed and pulled a lanyard around the student’s neck to get the student to stop, causing the student to choke. Respondent further blocked the student from moving, and grabbed/touched the student’s arm.

The Statement of Charges also sets forth prior discipline for similar conduct. The District is not seeking to dismiss or suspend respondent for those prior incidents, as they occurred outside of the “four-year rule” pursuant to Education Code section 44944, subdivision (b)(2)(B). That section provides: “Evidence of records kept by the governing board of the school district concerning the employee may be introduced, but no decision

relating to the dismissal or suspension of an employee shall be made based on charges or evidence of any nature relating to matters occurring more than four years before the filing of the notice ...” Thus, the present review is limited to the three incidents cited above.

Conclusion

The written submissions of the parties and oral argument have been considered. Based upon a review of the Statement of Charges, the District has not alleged facts which, if true, are sufficient to constitute a basis for immediate suspension under Education Code section 44939, subdivision (b).

ORDER

GOOD CAUSE HAVING BEEN ESTABLISHED, the Motion is GRANTED.

DATED: May 17, 2019

DocuSigned by:
Danette C. Brown
ACEA0DD79CC44EF...

DANETTE C. BROWN
Administrative Law Judge
Office of Administrative Hearings