

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

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

JOHN HOANG,
A Permanent Certificated Employee,

Moving Party,

and

COLTON JOINT UNIFIED SCHOOL
DISTRICT,

Responding Party.

OAH No. 2019030857

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

[Ed. Code, § 44939, subd. (c)]

On April 12, 2019, a telephonic hearing on the motion filed by John Hoang for immediate reversal of suspension (Motion) was held by Eileen Cohn, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), from Los Angeles.

Carlos R. Perez, Attorney at Law, represented moving party John Hoang (Employee).

John W. Dietrich, of Atkinson, Andelson, Loya, Rudd and Roma, Attorneys at Law, represented responding party Colton Joint Unified School District (District).

The District has suspended Employee without pay pending the outcome of its action to dismiss Employee.¹ The basis for the suspension under Education Code section 44939² is employee's immoral conduct related to his misdemeanor conviction for conspiracy to

¹ The dismissal action bears OAH case number 2019031000. The grounds for dismissal alleged by the District against Employee are immoral conduct, dishonesty, conviction of a felony or any crime involving moral turpitude (Ed. Code § 44932, subd. (a)(1), (a)(4), (a)(9).) In addition, the District charges immoral conduct as a basis for its decision to immediately suspend him. (Ed. Code § 44939.)

² All further statutory references are to the Education Code (Code) unless otherwise indicated.

commit grand theft. In the Motion, Employee seeks an order for the immediate reversal of his suspension. The District opposes the Motion.

Having considered the moving and opposition papers, and oral argument, the ALJ hereby finds and orders as follows:

Education Code Section 44939

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 Code section 44932 violations including immoral conduct, dishonesty, or conviction of a felony or any crime involving moral turpitude. The District limited its basis for suspension under Code section 44939 to immoral conduct. As a consequence, the second charge for dishonesty toward the District is not directly relevant to his suspension, and at a minimum, requires more evidence to determine whether his conduct under this charge was also immoral.

An employee who is suspended pursuant to Code section 44939 may serve and file with OAH 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.” (§ 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.*) Respondent timely moved for an immediate reversal of suspension and provided the required support under the Education Code.

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.”

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.) A motion such as this is analogous to a demurrer. A demurrer can be sustained when, e.g., 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.)

In the Motion, Employee argued that the pleading, on its face, was insufficient to support his immediate suspension because it failed to provide any allegations that the conduct satisfied the factors set forth in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214 (1969), referred to as the “Morrison Factors.” In its opposition papers, the

District added an analysis of the Morrison Factors, which was conclusory, and as such, was disregarded.

Discussion

The issue presented is whether the Statement of Charges, on its face, supports respondent's immediate suspension based upon a conviction for conduct it alleges constitutes a conviction for a crime involving moral turpitude, that occurred outside of the classroom, school premises or the District.

Code section 44939 provides the District may, upon the filing of written charges, charging a permanent employee with, among other things, immoral conduct or conviction of a felony or of any crime involving moral turpitude, suspend without pay any employee, "if it deems the action necessary." Moral turpitude is solely determined by the elements of the crime, not by extrinsic evidence. (*People v Castro* (1985) 38 Cal.3d 301, 316-317). A conviction for moral turpitude may be established where there is no dishonesty, but an intent to do evil or an intent to corrupt. In *People v. Castro, supra*, 38 Cal.3d at pp. 314-315, 317-318, the court distinguished a felony for simple possession of heroin from possession of heroin for sale, the latter demonstrating an intent to corrupt and appropriate for impeachment despite not involving dishonesty.

"The term 'immoral' has been defined generally as that which is 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 Ed. of San Francisco Unified Sch. Dist. v. Weiland* (1960) 179 Cal.App. 2d 808, 811, citing *Orloff v. Los Angeles Turf Club* (1951) 36 Cal.2d 734, 740. The Supreme Court in *Morrison v. State Board of Education, supra*, 1 Cal.3d at pp. 223-224, further defined immoral conduct as follows, quoting from *Jarvella v. Willoughby-Eastlake City School Dist.* (1967) 12 Ohio Misc. 288: "[Immoral conduct] must be considered in the context in which the Legislature considered it, as conduct which is hostile to the welfare of the general public; more specifically in this case, conduct which is hostile to the welfare of the school community. . . . In providing standards to guide school boards in placing restraints on the conduct of teachers, the Legislature is concerned with the welfare of the school community. Its objective is the protection of students from corruption."

The District alleged a cause for immediate suspension under Code section 44939 for immoral conduct, based on count one of the Statement of Charges: "On or about November 2, 2018, you pled guilty in Riverside Superior Court to a misdemeanor violation of Penal Code section 182(a)(1), conspiracy to commit grand theft. Your conviction of this offense constitutes conviction of a crime involving moral turpitude." In support of this count, the District referred to the attached arrest warrant, felony complaint and sentencing memorandum.

Employee pleaded to a misdemeanor criminal count of conspiracy to commit grand theft. Under Penal Code section 182, subdivision (a)(1), a conspiracy occurs when two or more persons conspire to commit any crime. Conspiracy generally requires one or more overt acts to commit the underlying crime. (Pen. Code § 182, subd. (b).) As such, Employee, in his plea, did not admit to grand theft but admitted to participating in one or more overt acts to commit grand theft, the unlawful taking of someone else's property valued over \$950. (Pen. Code § 487.) The attachments referenced on the face of the pleading provide that the criminal conspiracy involved defrauding the Pechanga Resort and Player's Club system for the purpose of receiving casino credits in the amount of \$3,600.

From the face of the pleading, we know that Employee was convicted of a criminal act which, by way of the elements of the crime of conspiracy, demonstrated, at a minimum, an intent to corrupt or an act of moral turpitude, but also from the facts pleaded with the attachments incorporated by reference, the conviction was also an immoral act.

As a matter of law, Employee's misdemeanor plea and conviction is not considered as serious as a felony conviction. Employee persuasively and convincingly argued that, without any allegations that the misdemeanor conviction had some relation to his fitness to teach as required by the Morrison Factors, the Statement of Charges is insufficient to support an immediate suspension. The Statement of Charges does not provide sufficient facts to satisfy the Morrison Factors such that from the face of the pleading, if the facts are assumed to be true, there is a sufficient basis to determine Employee is unfit to teach; e.g., the likelihood the conduct adversely affected the students or the education community, the degree of the adversity, the type of credential held, extenuating or aggravating circumstances, the likelihood of reoccurrence, and the notoriety of the conviction. The District offers that its second charge for dishonesty about the conviction in Employee's communications with the District "compounds" his misconduct by showing an "ongoing scheme of deceit." (District's Opposition, p. 2.) During oral argument, the District conceded that the second charge for dishonesty to the District about Employee's crime supplements its charge for immoral conduct under the Education Code for the purpose of the interim suspension, but does not independently support its reasons for the suspension. At a minimum, the second count for dishonesty requires an evidentiary hearing to determine whether Employee's conduct was dishonest and also immoral.

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

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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: April 24, 2019

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EILEEN COHN
Administrative Law Judge
Office of Administrative Hearing