

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

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

CARLOS POLANCO,
A Permanent Certificated Employee,

Moving Party,

and

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

Responding Party.

OAH No. 2019040627

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

(Ed. Code, § 44939, subd. (c))

On May 10, 2019, a telephonic hearing on the motion filed by Carlos Polanco for immediate reversal of suspension (Motion) was held by Julie Cabos-Owen, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), in Los Angeles.

Richard J. Schwab, Attorney at Law, with Trygstad, Schwab & Trygstad, represented moving party Carlos Polanco (Employee).

Lynn I. Ibara, Associate General Counsel I, with the Office of the General Counsel, represented responding party Los Angeles Unified School District (District).

The District filed a Statement of Charges (SOC) against Employee, and placed him on unpaid suspension pending the outcome of its action to dismiss Employee. 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.¹ In the Motion, Employee seeks an order for the immediate reversal of his suspension. The District opposes the Motion.

¹ The SOC also alleges the following grounds for dismissal under Education Code section 44931: unprofessional conduct; unsatisfactory performance; evident unfitness for

Employee timely filed his Motion with OAH, pursuant to Education Code section 44939, subdivision (c)(1). The District filed an opposition, and Employee filed a reply.

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

Education Code Section 44939 and 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 made pursuant to Education Code section 44939, subdivision (c)(1), like the current Motion, 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.)

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, subdivisions (a)(2) (for unprofessional conduct), (a)(5) (for unsatisfactory performance), and (a)(8) (for persistent violation of the school district’s reasonable regulations) authorize a teacher’s dismissal, but not immediate unpaid suspension. The threshold for immediate suspension, as authorized in Education Code section 44939, subdivision (b), is higher than the threshold for dismissal set forth in Education Code section 44932, subdivision (a). Education Code section 44939, subdivision (b), allows immediate suspension only if the refusal to perform regular assignments was “willful.” Notably, a teacher cannot be immediately suspended for *persistent violation* of school laws and district regulations. The use of the words “willful

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.

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.

In order to establish grounds for immediate suspension under Education Code section 44939, the employee’s refusal to perform his regular assignment must have been “willful.” In the context of a public employee’s engaging in “willful” misconduct, 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.) 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 with specificity numerous instances of Employee’s deficient performance and continued failure to improve after multiple directives and guidance sessions, which illustrated Employee’s “failure to perform” regular assignments in compliance with directives and guidance (see e.g., SOC, p. 15, lines 17-18, p. 19, lines 4-5). The factual allegations demonstrate that Employee did perform his duties, but unsatisfactorily. However, where the SOC alleges Employee “willfully refused to comply with the verbal and written directives provided him” (e.g., p. 18, lines 26-27), these assertions are conclusory, without specifically indicating how Employee’s “failure” to perform as directed constituted an intentional and deliberate refusal, rather than negligent conduct. 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 not sufficient 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 Supreme Court in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 223-224 (*Morrison*), further defined immoral conduct, 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 conduct of teachers, the Legislature is concerned with the welfare of the school community. Its objective is the protection of students from corruption.”

The SOC alleges that Employee used inappropriate, disrespectful, demeaning, and derogatory language. However, while Employee’s alleged comments to students may demonstrate poor judgment and unprofessional conduct, they do not rise to the level of immoral conduct as defined by *Weiland*, *Hensey*, and *Morrison*. Accordingly, the SOC contains no allegations that rise to the level of immoral conduct for purposes of resolving this Motion.

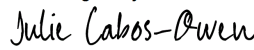
Based on the foregoing, the facts alleged in the SOC, if true, are not sufficient to establish a basis for Employee’s immediate suspension under Education Code section 44939, subdivision (b), for immoral conduct.

Disposition

Good cause having been established, the Motion is granted. Pursuant to Education Code section 44939, subdivision (c)(5), this order shall become effective within five days of service, and the District shall make Employee whole for any lost wages, benefits, and compensation within 14 days after service of the order.

IT IS SO ORDERED.

DATED: May 15, 2019

DocuSigned by:

18236F95DE98452...

JULIE CABOS-OWEN
Administrative Law Judge
Office of Administrative Hearings