

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

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

GABRIEL GIPE,

Moving Party,

A Permanent Certificated Employee, and

NATOMAS UNIFIED SCHOOL DISTRICT,

Responding Party.

OAH No. 2021110341

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

Laurie R. Pearlman, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter telephonically on December 3, 2021.

Costa Kerestenzis and Ruby Acevedo, Attorneys at Law, represented moving party Gabriel Gipe (Respondent).

Gabriela D. Flowers and Andrew W. Blan, Attorneys at Law, represented responding party Natomas Unified School District (District).

BACKGROUND

Respondent is a certificated, permanent employee of the District. During the relevant time period, Respondent taught Advanced Placement (A.P.) United States Government and Politics A.P. Economics, and U.S. History to high school students.

In October 2021, the District suspended Respondent without pay, pending a termination hearing before a Commission on Professional Competence (CPC). The suspension and intent to terminate are premised on a Statement of Charges (Charges), exceeding 400 pages, which was adopted on August 14, 2021.

In the Charges, the District alleges that Respondent engaged in behavior constituting **immoral conduct**; dishonesty; evident unfitness for service; 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; **violation of Education Code (Code) section 51530 or conduct specified in Government Code section 1028**; and **willful refusal to perform regular assignments without reasonable cause**. [Only the bolded charges constitute the District's basis for placing Respondent on immediate suspension without pay.]

On October 15, 2021, Respondent was notified of his placement on unpaid suspension and was served with the Board-approved Charges. Respondent timely filed a request for hearing on October 21, 2021, contesting his recommended termination. He timely filed a Motion for Immediate Reversal of Suspension (Motion) on November

12, 2021. The District filed its opposition to the Motion, and Respondent filed a reply in support of the Motion. Both parties filed declarations.

The District's Contentions

The District contends that the Charges contain sufficient facts under Education Code (Code) section 44939 to justify Respondent's immediate suspension without pay. In the Charges, the District alleges that Respondent engaged in "immoral conduct" under Code section 44932, subdivision (a)(1); "dishonesty" under Code section 44932, subdivision (a)(4); "evident unfitness for service" under Code section 44932, subdivision (a)(6); "persistent violation or refusal to obey" under Code section 44932, subdivision (a)(8); violation of Code section 51530 or conduct specified in Government Code section 1028, under Code section 44923, subdivision (a)(10); and "willful refusal to perform regular assignments without reasonable cause," under Code section 44939. However, as noted above, only three of these charges permit a school district to place a teacher on unpaid leave.

The District asserts that it sufficiently pled charges of Respondent's immoral conduct, willful refusal to perform regular assignments without reasonable cause, and violation of Education Code section 51530, thus authorizing Respondent's immediate unpaid suspension under Education Code section 44939. Accordingly, the District contends that the Motion should be denied.

IMMORAL CONDUCT

With respect to the District's claim of immoral conduct, the District alleges that Respondent posted images in his classroom of dictators, the swastika (as part of a "political compass" showing the extremes of various political ideologies), communist symbols and leaders, antifa symbols, and brass knuckles. Additionally, Respondent

allegedly displayed a magnet denigrating former president Trump, and allegedly called the Democratic party a “massive toilet.” He also allegedly refused to use the textbook chosen for the course.

The District alleges that Respondent used rubber stamps on student work that contained an image of Joseph Stalin pointing his finger and a quote stating: “Go to the Gulag;” an image of Kim Jong-un with the letters “KJU” and the quote “Bomb!”; and the heads of a group of famous Marxist leaders clustered together: Karl Marx, Vladimir Lenin, Joseph Stalin, Fidel Castro, and Mao Zedong. (Charges, ¶ II (17.)

The District further alleges that Respondent exhibited in his classroom a large antifa flag, mug, and magnet, along with Russian leader nesting dolls, the Worker’s Party of Korea flag, a Mao Zedong poster, an EZLN Sub comandante Marcos banner, a Zapatista pamphlet, and a “Reds in ED” bookmark. Respondent allegedly also displayed a poster entitled, “Pyramid America Fascism Check List Warning Sign,” on his classroom wall.

The District alleges that Respondent asked students to bring in a photo of themselves and take an “ideology quiz” for a large “political compass” on his wall. The online quiz was meant to reveal the students’ political leanings/ideologies, which made some students uncomfortable. The District further alleges that instead of using the District-approved course textbook, Respondent used books and content he had purchased and that he did not teach his AP U.S. Government students with the intent of preparing students for the AP exam. As a result, the District alleges that Respondent’s students failed the AP U.S. Government exam at a much higher rate than the District average.

The District asserts the foregoing conduct was immoral and grounds for suspension without pay.

ADVOCATING OR TEACHING COMMUNISM WITH INTENT TO INDOCTRINATE

The District alleges that Respondent violated Code section 51530, which prohibits teachers from “advocate[ing] or teach[ing] communism with the intent to indoctrinate or to inculcate in the mind of any pupil a preference for communism.” The District also cites Government Code section 1028, which permits dismissal of a public employee who advocates the overthrow of the government “by force or violence.”

In addition to the allegations set forth above regarding Communist leaders and symbols, the District alleges that Respondent referred to writings by Lenin and other publications that referenced Marxism. The District further alleges that Respondent has a large red hammer and sickle tattoo on his chest, a symbol of Communism. However, it was not alleged that Respondent removed his shirt in class, or otherwise revealed his tattoo to students.

WILLFUL REFUSAL TO PERFORM REGULAR ASSIGNMENTS

The District alleges that Respondent refused to perform regular assignments without reasonable cause, relying on many of the allegations set forth above. The District also alleges that Respondent refused to use the approved textbook in his AP United States Government and Politics Course, substituted his own choice of reading materials, and rather than preparing students for the AP Government exam, Respondent taught students what he thought they should know, such as the influence of the media.

The District further alleges that Respondent had the stated goal of turning his students into revolutionaries by scaring them; made comments in class that his hobby is beating up the mentally ill; told students that the government is terrible; and referred to the Democratic party as a massive toilet, among other inappropriate comments.

The Charges do not include any indication that the District brought the alleged failure to perform regular assignments to Respondent's attention prior to suspending him.

Respondent's Contentions

Respondent asserts that the facts as alleged in the Statement of Charges, even if accepted as true as they must be for purposes of this motion, do not allege any behavior that could be construed as immoral, establish that Respondent intended to indoctrinate his students in communism, or willfully refused to perform regular assignments.

Respondent contends that the allegations against Respondent amount to a dispute with his political views. While disagreement with a teacher's political ideology may or may not constitute grounds for dismissal, Respondent asserts that it clearly is insufficient to constitute a basis upon which to deprive that teacher of pay pending adjudication of those charges.

Respondent requests that the Administrative Law Judge issue an Order to immediately reverse the District's unpaid suspension and make him whole for any lost wages, benefits, and compensation pursuant to Code section 44939, subdivision (c)(5).

IMMORAL CONDUCT

Respondent asserts that the Charges underlying the claim of immoral conduct, if true, may support a claim of unsatisfactory performance or unprofessional conduct, but they do not support a claim of immoral conduct.

ADVOCATING OR TEACHING COMMUNISM WITH INTENT TO INDOCTRINATE

Respondent asserts that in order to teach his students about U.S. government and politics, he must expose them to other political and economic systems and world history. Respondent asserts that the College Board's AP Sample Syllabus for U.S. Government and Politics, attached to the Statement of Charges as Exhibit 27, includes discussions regarding ideology, political socialization, changes in ideology, and ideology and social policy.

Respondent argues that while the District contends that Respondent was engaged in advocating Communism, it alleges no specific facts to support this conclusion. Respondent asserts that none of the excerpted student statements presented in the Charges suggests that Respondent encouraged his students to prefer communism. At most, the students' statements reflect that Respondent's classroom suggested his political views were ideologically left-wing.

Respondent asserts that he posted a great variety of political images and symbols in his classroom, including the American flag, a poster featuring the three branches of the United States government, and a World War II memento. (Charges, Exhibit 20.) Moreover, Communism is a topic covered in A.P. U.S. Government and Politics, U.S. History, and Economics classes.

Respondent maintains that the allegations are devoid of any evidence demonstrating that he advocated or taught communism with the intent to indoctrinate his students.

WILLFUL REFUSAL TO PERFORM REGULAR ASSIGNMENTS

Respondent asserts that the Charges fail to establish that Respondent refused to perform regular assignments without reasonable cause. Respondent contends that the District alleges no facts demonstrating that Respondent acted with a willful or insubordinate state of mind or that any alleged failure to perform regular assignments was brought to Respondent's attention before he was suspended. Respondent contends that the District relies upon conclusory and unsupported characterizations of Respondent's conduct.

In the Charges, the District alleges that Respondent refused to use a 2018 textbook in his AP United States Government and Politics course. However, the approved syllabus, attached to the Charges as Exhibit 23, shows that the approved course textbook for the class was the 2011 edition of, *American Government: Institutions and Policies*, by James Q. Wilson, et al. Respondent asserts that the 2018 edition textbook, identified in the Charges as the text Respondent refused to use, was not part of the approved course syllabus.

The District alleges that rather than preparing students for the AP Government exam, Respondent taught students about topics such as the influence of the media. However, Respondent asserts that topic is part of the approved course syllabus (Ex. 23, Charges) and is specifically delineated in the College Board's sample syllabus. (Exhibit 27, pp. 15-17, Unit 5: Political Participation.) Respondent notes that the College

Board's sample syllabus, copyrighted in 2020, suggests the topic of Media Bias as a sample assignment.

Respondent contends that the District should not be permitted to remove Respondent from paid status for teaching students about the influence of the media in his AP U.S. Government and Politics class when the topic is included in the course syllabus, as well as the College Board's sample syllabus.

Respondent asserts that the rest of the allegations in the Charges consist of conclusory statements. For instance, Respondent asserts that the statement regarding turning students into revolutionaries is taken from a heavily edited and rearranged video which lacks context and is unreliable. Additionally, Respondent notes that the District fails to cite to any specific document or student statement to support its claim that Respondent made the alleged comments in class. He asserts that the District does not establish that such comments demonstrate Respondent was willfully refusing to perform assignments.

Respondent suggests that while the District may have a claim that Respondent engaged in unprofessional conduct or that his performance was unsatisfactory, it does not allege facts warranting suspension without pay under Code sections 44939. Respondent argues that the concept of willful refusal is distinct from the concept of unsatisfactory performance and that Code section 44939 does not authorize a school district to suspend a teacher without pay based on allegations of unsatisfactory performance, or unprofessional conduct.

LEGAL STANDARDS

Applicable Law

A school district may immediately suspend a permanent, certificated employee who has been charged with: immoral conduct; conviction of a felony or of any crime involving moral turpitude; incompetency due to mental disability; willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing school district; or advocating communism. (Code, § 44939, subd. (b).)

A suspended employee may file a motion for immediate reversal of the suspension with the Office of Administrative Hearings. (Code, § 44939, subd. (c)(1).) An administrative law judge reviews the motion, and the review “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.” (*Ibid.*) Although well-pleaded facts must be accepted as true, the administrative law judge need not accept contentions, deductions, or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Analysis

IMMORAL CONDUCT

For purposes of certificated employee discipline proceedings, the term “immoral conduct” means conduct that 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 public welfare. (*Board of Education v. Weiland* (1960) 179 Cal.App.2d 808, 811.) Courts have found immoral conduct by a teacher to include, among other things, sexual harassment or public sexual activity, drug use or possession, and theft.

The District has failed to allege sufficient facts to establish that Respondent's exercise of judgment rose to the level of being immoral, corrupt, depraved, morally repugnant, or that he acted with a reckless disregard for the public welfare. Instead, the allegations suggest that Respondent taught in an overly political manner and posted certain ideologically-related items in his classroom.

The Education Code sets forth limited circumstances in which an employee may be placed on unpaid leave. While disagreement with a teacher's political ideology may or may not constitute grounds for dismissal, it is insufficient to constitute grounds to deprive a teacher of pay pending adjudication of those charges.

Code section 44939, subdivision (c)(1), mandates that the ALJ look to the alleged conduct to determine whether, on its face, it is immoral. As demonstrated herein, the Charges do not set forth sufficient facts to demonstrate that Respondent engaged in immoral conduct.

VIOLATION OF CODE SECTION 51530

Code section 51530 prohibits teachers from advocating or teaching communism with the intent to indoctrinate or inculcate in the mind of students a preference for communism. Respondent's assertion that this provision is likely unconstitutional cannot be adjudicated at the administrative hearing level and will not be addressed in this Order.

The Charges do not contain sufficient facts to establish a violation of Code section 51530. The allegations, if taken as true, establish that Respondent made references to certain leaders of communist countries and to certain publications that referenced ideas such as Marxism while teaching A.P. U.S. Government and Politics to high school students. While the District contends that Respondent was engaged in advocacy to indoctrinate his students with a preference for Communism, it fails to allege sufficient facts to support this contention. Accordingly, such allegations do not support Respondent's suspension without pay.

WILLFUL REFUSAL TO PERFORM REGULAR ASSIGNMENTS

Code section 44939, subdivision (b), provides that a school district may immediately suspend a permanent certificated employee who has been charged with willful refusal to perform regular assignments without reasonable cause.

Although no cases interpret the term "willful refusal to perform regular assignments without reasonable cause" under Code section 44939, case law from related settings reflects that 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; see also *Peters v. Mitchell* (1963) 222 Cal.App.2d 852, 862 ["Willful disobedience connotes a specific violation of command or prohibition."].)

A comparison of Code sections 44932, subdivision (a), and 44939, subdivision (b), is illuminating. Pursuant to Code section 44932, subdivisions (a)(2) and (a)(5), unprofessional conduct or unsatisfactory performance warrants discipline, but not unpaid suspension. More importantly, under Code section 44932, subdivision (a)(8), while a teacher's persistent violation of a school district's reasonable regulations is

grounds for discipline, it is not an authorized basis for unpaid suspension. Rather, unpaid suspension is authorized only for a willful refusal to perform regular assignments pursuant to Code section 44939, subdivision (b).

This comparison indicates the cause of discipline for willful refusal to perform a regular assignment is more akin to the traditional labor charge of insubordination, i.e., an intentional, willful, volitional refusal to perform any part of a particular regular assignment. A charge of willful refusal to perform a regular assignment must be more than unsatisfactory, unprofessional, negligent, or even persistent failure to perform a regular assignment.


In this case, the Statement of Charges does not contain sufficient facts to establish that Respondent's alleged teaching deficiencies are the result of a willful, volitional refusal to perform his regular assignment. The Charges, taken as true, establish that Respondent was teaching his A.P. U.S. History and Politics class but did so deficiently in the District's opinion. Such allegations may establish that Respondent's teaching during the relevant time period was unsatisfactory.

The Charges contain no allegation whatsoever that, prior to his suspension, Respondent was warned or counseled about any refusal to perform his regular assignment. The allegations are devoid of the kind of factual content which would establish a willful state of mind or volitional refusal to perform as directed. The Charges are not sufficient to support Respondent's suspension.

ORDER

The motion for immediate reversal of suspension is granted. The District shall make Respondent Gabriel Gipe whole for any lost wages, benefits, and compensation within 14 days after service of this order. (Code, § 44939, subd. (c)(5).)

DATE: 12/17/2021


Laurie Pearlman (Dec 17, 2021 17:05 PST)

LAURIE R. PEARLMAN

Administrative Law Judge

Office of Administrative Hearing