

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

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

VICTORIA NESHEVA (EN 788436),

A Permanent Certificated Employee,

Moving Party,

and

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Responding Party.

OAH No. 2020030255

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

Cindy F. Forman, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter telephonically from Los Angeles, California on March 27, 2020.

Daniel J. Kolodziej, Esq., Trygstad, Schwab & Trygstad LLP, represented moving party Victoria Nesheva (Teacher).

M. Cristina Cruz, Assistant General Counsel, represented responding party Los Angeles Unified School District (District).

On January 10, 2020, District's Chief Human Resources Officer signed a Statement of Charges (Statement) notifying Teacher of District's intention to immediately suspend her without pay and thereafter dismiss her from employment pursuant to Education Code¹ section 44932. Teacher moved for immediate reversal of the suspension pursuant to section 44939, subdivision (c)(1). In support of her motion, Teacher also filed a Request for Judicial Notice of four decisions issued by OAH administrative law judges on motions filed by other teachers seeking immediate reversal of their own suspensions. District filed an opposition to Teacher's motion as well as to Teacher's Request for Judicial Notice. Teacher filed a reply memorandum, and counsel for both parties presented oral argument at the motion hearing. At hearing, the administrative law judge denied Teacher's Request for Judicial Notice on the ground of relevance because the decisions concerned different teachers as well as different facts and circumstances. (*San Francisco Baykeeper, Inc. v. State Lands Com.* (2015) 242 Cal.App.4th 202, 231 [only relevant evidence is admissible by judicial notice.].)

¹ Unless otherwise stated, all further statutory references are to the Education Code.

BACKGROUND

During the relevant period, Teacher was employed as a middle school physical education teacher. Pursuant to section 44939, subsection (b), District immediately suspended Teacher from her duties upon its filing of the Statement, which charged her with immoral conduct, including but not limited to, egregious conduct, in violation of sections 44932, subdivision (a)(1), and 44939; unprofessional conduct in violation of section 44932, subdivision (a)(2); evident unfitness for service in violation of section 44932, subdivision (a)(6); persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the governance of the public schools by the State Board of Education or by the governing board of District in violation of section 44932, subdivision (a)(8); and willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of District, in violation of section 44939.

In support of its charges, District alleges, between December 2, 2015, and October 25, 2019, Teacher engaged in the following acts: Teacher inappropriately touched her students, i.e., pulled a student's hair, touched a student's leg and arm, pulled a student's hoodie, pushed a student's buttock, marked students' arms with permanent marker to count laps, attempted to choke a student, hit a student with her elbow, and shoved a student; Teacher closed a door on a student's foot; Teacher moved a physical education equipment cart over a student's foot on two separate occasions without reporting or apologizing for the incidents; Teacher opened the door when a student was changing into his gym shorts although the student indicated he was not ready; Teacher used her personal cellphone to take pictures or video record female students while they were changing clothes in the locker room; Teacher refused to help Spanish-speaking students; Teacher directed students to pick up trash and sit

on the floor as forms of discipline; Teacher forced students to sit on hot pavement; Teacher refused to assist a student whose locker would not open; and Teacher opened a student's locker and threw the student's clothes on the floor. District further alleges Teacher willfully committed these acts in violation of District policies and directives addressed to correct Teacher's behavior.

District contends that the foregoing alleged actions warrant Teacher's immediate suspension without pay because they constitute immoral conduct and a willful refusal to perform regular assignments without reasonable cause. Teacher contends District failed to plead sufficient facts to establish either immoral conduct or willful refusal. Teacher further contends the actions complained of reflect at most impropriety, negligence, inadvertence, or an inconsistent failure to comply with District rules, none of which warrant immediate suspension.

LEGAL STANDARDS

A school district may immediately suspend without pay a permanent certificated employee 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 employing school district," or a violation of section 51530 (advocating communism with intent to indoctrinate). (Ed. Code, § 44939, subd. (b).) A suspended employee may file a motion for immediate reversal of the suspension with OAH. (Ed. Code, § 44939, subd. (c)(1).)

An administrative law judge's review of the motion is "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.” (Ed. Code, § 44939, subd. (c)(1).) 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 (*Blank*).) Conclusory characterizations of conduct as intentional, willful, or fraudulent are “patently insufficient.” (*Brousseau v. Jarrett* (1977) 73 Cal.App.3d 864, 872 (*Brousseau*).) Where reading the allegations reveals the existence of an affirmative defense, the complaining party must plead around the defense by alleging specific facts that would avoid the apparent defense. (*Blank, supra*, 39 Cal.3d at p. 318.)

DISCUSSION

Immediate Suspension Based on Immoral Conduct

Immoral conduct is conduct “‘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 School Dist. v. Weiland* (*Weiland*) (1960) 179 Cal.App.2d 808, 811, quoting *Orloff v. Los Angeles Turf Club* (1951) 36 Cal.2d 734, 740.)

In its opposition brief, District describes the following actions allegedly taken by Teacher as immoral: attempting to choke a student; forcing students to sit on hot pavement; not helping a student open her locker and directing the student to say Ms. ten times; taking pictures or video recordings of female students while changing;

refusing to help non-English speaking students; running over students' feet with an equipment cart; throwing a student's clothes on the floor; and making inappropriate physical contact (pulling on a hoodie, elbowing a student, tapping a student's buttocks, arms, legs, etc.). (District Brief at pp. 2, 6–7.) District also asserts in its opposition brief (but not in the Statement) that the amalgamation of these alleged acts constitutes immoral conduct because they reflect a pattern of knowing bullying and abuse, which Teacher refused to ameliorate despite repeated warnings and directives.

Resolution of the motion is determined not by the arguments or assertions in a party's brief, but by the sufficiency of the facts pleaded in the Statement. The Statement does not contain sufficient allegations to support a reasonable inference of immoral conduct. There are no allegations that Teacher faced criminal charges for her actions. The Statement also does not contain any allegations that Teacher's actions, whether the impermissible physical contact or the photographing or recording of female students, were sexual in nature or that Teacher's actions caused any student physical or psychological injury. There are no allegations that Teacher's actions, particularly the inappropriate touching, caused "unjustifiable mental suffering, child neglect, and child health endangerment" as District argues. (See District Brief, p. 6.) In addition, while taking pictures or video of female students changing their clothes is against District policy, such conduct does not rise to the level of immoral conduct without allegations regarding the content of the pictures and the video or what Teacher did with any alleged pictures or video. The other claimed immoral acts, such as Teacher's refusal to help students in need or her embarrassing or shaming of students, may reflect poor judgment and self-regulation, unfitness for service, or unprofessional conduct, but, without additional facts, those acts are not inherently "indicative of corruption, indecency, depravity, [or] dissoluteness" or reflect Teacher's

"moral indifference" to community standards. (See *Weiland, supra*, 179 Cal.App.2d at p. 811.)

District's claim that the Statement alleges a pattern of bullying, which constitutes immoral conduct, also lacks merit. The alleged incidents are generally unrelated and occurred over the course of four years, thereby not necessarily indicative of a pattern of bullying. In addition, the Statement contains no allegation that these incidents constitute a pattern of bullying or that such bullying amounted to immoral conduct. (See *Blank, supra*, 39 Cal.3d at p. 318 [when testing the sufficiency of allegations in a pleading, deductions should be disregarded].)

Accordingly, the pleaded facts in the Statement, if true, are insufficient to sustain Teacher's immediate suspension because of immoral conduct.

Immediate Suspension Based on Willful Refusal

According to District, Teacher received, but willfully refused to obey directives instructing her to do the following: use good judgment; treat students with respect, courtesy, and sensitivity; create safe, respectful classroom environment; never grab a student unless for his or her own safety; never touch, grab or pull a child to redirect them; and treat students better. District contends that Teacher's conduct must be construed as willful because she was aware of these directives and refused to perform them. (District Brief, p. 10.) District contends that compliance with these directives fall within Teacher's regular assignments. (*Id.* at p. 7.) According to District, Teacher's "actions and behavior demonstrate that she made a decision to commit to her own methods and preferences and ignore the notice and directives given to her" and thus, her actions constitute willful refusal to comply with regular assignments. (*Id.* at p. 3.)

District's argument fails on several grounds. First, simply alleging Teacher's conduct was willful without more is insufficient to establish willful refusal. (See *Blank, supra*, 39 Cal.3d at p. 318; *Brousseau, supra*, 73 Cal.App.3d at p. 872.) Facts reflecting the absence of reasonable cause to perform the regular assignments must also be alleged to meet the statutory requirements for immediate dismissal without pay.

Second, the Statement does not allege Teacher willfully refused to comply with a specific rule, unlike the employees in *Swan, Wilbur, or Peters, supra*. Contrary to the rules and regulations set forth in those cases, the directives Teacher is alleged to have violated are general in scope and incorporate a wide range of unpermitted activities. For instance, although failing to exercise good judgment violates a District directive to do so, it does not necessarily indicate a willful refusal to obey reasonable rules and regulations. Thus, the facts plead in the Statement are insufficient to support an inference that Teacher intentionally and deliberately refused to comply with the identified directives by committing a particular act. Although District contends it can be reasonably inferred Teacher received more specific guidance in conference memoranda and Notices of Unsatisfactory Acts (District Brief, p. 8), the Statement alleges no such guidance. Given these circumstances, the inference is not warranted. (See *Blank, supra*, 39 Cal.3d at p. 318.)

Third, District conflates the different basis for termination and suspension under sections 44932 and 44939 and by doing so disregards the element of willfulness required by section 44939, subdivision (b). Pursuant to section 44932, subdivision (a)(8), a teacher may be dismissed for "[p]ersistent 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." The threshold for immediate suspension as set forth in section

44939, subdivision (b), however, is higher than the threshold for dismissal set forth in section 44932, subdivision (a)(8). A teacher cannot be immediately suspended for persistent violation of school regulations and laws or for the mere refusal to comply with those regulations and laws. Rather, section 44939, subdivision (b), provides that a teacher can be immediately suspended only when the refusal to obey reasonable regulations is "willful." The use of the word "willful" rather than "persistent" indicates that while repeated misconduct may establish grounds for teacher dismissal under section 44932, it is insufficient for immediate suspension under section 44939.

Thus, it cannot be reasonably inferred from the Statement that Teacher's misconduct was willful simply because she failed on a "significant number of occasions" to follow District directives. (District Brief, p. 9.) District argues that Teacher's alleged repeated disregard and ignorance of its directives is sufficient to establish her "willful refusal" pursuant to section 44939, subdivision (b). (*Ibid.*) However, while Teacher's alleged continued failure to comply with District directives may be described as persistent or reflect a refusal to comply, her conduct cannot necessarily be deemed willful. Her failure to comply with directives could be attributable to negligence or accident, not necessarily intentionality. (See *Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 412 [sustaining demurrer to willful misconduct cause of action because "[w]illful misconduct involves more than a failure to use ordinary care; it ' ' ' involves a more positive intent actually to harm another or to do an act with a positive, active, and absolute disregard of its consequences." (Citations omitted.)].) In addition, the alleged incidents of misconduct were unrelated, and District did not allege that Teacher engaged in such incidents despite of and in response to any particular directive. The Statement, therefore, does not by itself provide a sufficient factual basis to infer a "volitional coloration" to

Teacher's behavior consistent with a willful refusal to perform her regular assignments without reasonable cause. (*Coomes, supra*, 215 Cal.App.2d at p. 775.)

A refusal needs to be "conscious, intentional and deliberate" to be willful. (*Goodhew, supra*, 157 Cal.App.2d at p. 257.) While the Statement alleges several instances of Teacher's failure to comply with directives and other regulations, the allegations do not reflect that Teacher's failure to do so was conscious, intentional, or deliberate. Accordingly, the pleaded facts in the Statement, if true, are insufficient to sustain Teacher's immediate suspension because of a willful refusal to comply with District's rules and regulations.

ORDER

The motion for immediate reversal of suspension is granted. The Los Angeles Unified School District shall make Victoria Nesheva whole for any lost wages, benefits, and compensation within 14 days after service of this order. (Ed. Code, § 44939, subd. (c)(5).)

DATE: April 9, 2020

DocuSigned by:
Cindy F. Forman
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CINDY F. FORMAN

Administrative Law Judge

Office of Administrative Hearings