

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

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

DIANE GREGORY,
A Permanent Certificated Employee,

Moving Party,

and

VISALIA UNIFIED SCHOOL DISTRICT,

Responding Party.

OAH No. 2018101073

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

[Ed. Code, § 44939, subd. (c)(1)]

On November 9, 2018, a telephonic hearing on the motion filed by Diane Gregory for immediate reversal of suspension (Motion) was held by Erlinda G. Shrenger, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), from Los Angeles.

Joshua F. Richtel, Esq., Tuttle & McCloskey, represented moving party Diane Gregory (Employee).

Gabriela D. Flowers and Janae D. Castellani, Attorneys, Lozano Smith, represented responding party Visalia 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 44939 is willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing school district. In the Motion, Employee seeks an order for the immediate reversal of her suspension. The District opposes the Motion.

¹ The dismissal action bears OAH case number 2018110332. The grounds for dismissal alleged by the District against Employee are unprofessional conduct; dishonesty; unsatisfactory performance; evident unfitness for service; and persistent violation of rules. (Ed. Code, § 44932, subd. (a)(2), (4), (5), (6), and (8).)

Having considered the moving, opposing, and reply papers filed by the parties, the Statement of Charges (SOC) attached to the moving papers, the exhibits attached to and referenced in the SOC, and the oral argument of counsel, the undersigned ALJ hereby finds and orders as follows:

Education Code Section 44939

Education 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 immoral conduct, conviction of a felony or 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 district, or violation of section 51530 (teaching communism).²

An employee who is suspended pursuant to section 44939 may serve and file with the Office of Administrative Hearings 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." (Educ. Code, § 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.*)

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.) With regard to the alleged misconduct of a public employee, 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.)

Discussion

In the SOC, the District alleges that Employee's "failure to follow directives after administrators had made numerous attempts to communicate with [her] regarding [her] unprofessional conduct and unsatisfactory behaviors" demonstrates a willful refusal to complete her regular assignments without reasonable cause. (SOC ¶ 44.) The District also alleges that Employee's "willful refusal" was "demonstrated" when, "on several occasions, [she] was given job-related directives by [her] supervisor, which [she] agreed to implement but failed to do so without any reasonable cause." (*Ibid.*)

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

The specific instances of Employee's misconduct alleged in the SOC involve her failure to provide and follow adequate lesson plans; her lack of preparation for classroom instruction; her poor classroom management and disorganization; her failure to timely submit documentation as directed; her failure to properly supervise and ensure students safety; and her failure to properly report her absences from work.

A review of the SOC in its totality indicates Employee's alleged misconduct is not the result of a willful, volitional refusal to perform her regular assignment. The well-pleaded facts indicate that when Employee taught her classes, administrators found fault with her performance. In other words, Employee was performing her assignments as a first and sixth grade teacher, but she did so deficiently in the District's opinion.

The District's argument that Employee's failure to follow directives constitutes a "willful refusal" to support an immediate suspension under section 44939 is contrary to the statutory scheme of the Education Code, where causes for dismissal are set forth in section 44932, but the limited grounds for immediate suspension are set forth separately in section 44939. Absent compliance with the requirements of section 44939, the Education Code does not contemplate immediate suspension based on a teacher's unsatisfactory performance or repeated failures to comply with directives or procedures. For example, under section 44938, subdivision (b), an employing district may not take action against an employee charged with unsatisfactory performance without first having given at least 90 days' written notice to the employee of the unsatisfactory performance with such specificity and particularity so as to "furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge." (Ed. Code, § 44938, subd. (b)(1).) There is a similar notice requirement when an employee is charged with unprofessional conduct. (Ed. Code, § 44938, subd. (a).)

In its opposition to the Motion, the District cites to other OAH decisions that found grounds for immediate suspension for willful refusal to perform regular assignments, based on the employee's failure to follow directives. The District acknowledges that those other OAH decisions are "not binding here." (Opposition, p. 15-16.) Further, all but one of those OAH decisions were decided prior to the January 1, 2015 revisions to section 44939 which added the provisions for motions for immediate reversal of suspension.

The District, in its opposition, also relies on *Powers v. Commission on Professional Competence* (1984) 157 Cal.App.3d 560-564-565, to support its contention that Employee's continued pattern of failing to follow directives constitutes insubordination and demonstrates a willful refusal to perform her assignments. The District's reliance on *Powers* is misplaced. In *Powers*, the Commission on Professional Competence found the teacher to be insubordinate after a multi-day evidentiary hearing, in which both school district representatives and the teacher testified. In contrast, the analysis on 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 section 44939. While the SOC alleges multiple instances of Employee's failure to comply with directives, the allegations do not reflect that Employee's failure was intentional or deliberate. The conclusory allegations in the SOC that Employee's conduct is "reasonably viewed as" or

"demonstrates" a willful refusal to perform her assignments are not binding on the ALJ and need not be accepted.

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

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: November 16, 2018

DocuSigned by:
Erlinda Shrenger
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ERLINDA G. SHRENGER
Administrative Law Judge
Office of Administrative Hearing