

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL**

MINUTE ORDER

DATE: 10/20/2017

TIME: 01:30:00 PM

DEPT: C-67

JUDICIAL OFFICER PRESIDING: Eddie C Sturgeon

CLERK: Patricia Ashworth

REPORTER/ERM: Dana Saruk CSR# 10653

BAILIFF/COURT ATTENDANT: M. Micone

CASE NO: **37-2017-00022539-CU-WM-CTL** CASE INIT.DATE: 06/21/2017

CASE TITLE: **Randall Burgess vs Coronado Unified School District [IMAGED]**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Writ of Mandate

EVENT TYPE: Motion Hearing (Civil)

APPEARANCES

Matthew V Herron, counsel, present for Petitioner(s).

Sam G. Sherman, specially appearing for counsel Phillip G Simpler, present for Respondent(s).

Petitioner Randall Burgess' Motion for Writ of Mandate is before the Court.

The Court hears oral argument and makes the following ruling:

Petitioner Randall Burgess's writ of mandate is denied. Petitioner has not met its burden to show at this time that respondent Coronado Unified School District's ("District" or "CUSD") actions are an illegal suspension and violate the collective bargaining agreement ("CBA") or the California Education Code.

The District has shown petitioner is not on suspension but is on paid administrative leave while an investigation as to the claim made merits discipline. The actions of the District show recognition and respect for petitioner's long history of teaching and coaching without any incidents or disciplinary concerns. Notwithstanding petitioner has not been advised how much longer this investigation will last, and petitioner has faced uncertainty and stress over the delays, Rita Beyers, the assistant superintendent of the District, stated under oath the investigation is ongoing, and that additional details have come to light and additional witnesses have been identified and interviewed, as recently as the end of September 2017. She also stated the District is making every effort to complete the investigation as quickly as possible without jeopardizing the accuracy of the results. (Beyers decl., ¶7.) The underlying claim involves events allegedly occurring over 5 years ago. Thus, some investigative leeway is necessary to properly balance the District's concerns and petitioner's right to have a speedy investigation.

Plaintiff continues to be paid his full salary and benefits. There has been no issuance of a notice of unprofessional conduct given to petitioner, and no suspension or disciplinary mandatory leave of absence has been instituted. There are no negative reports in petitioner's personnel file regarding this

claim. (Beyers decl., ¶9.)

There are no cases on point in California, nor do the facts in this case fit squarely within the CBA or the Education Code. Although there are no cases on point within California, two federal cases have characterized paid administrative leave as not a materially adverse employment action for discrimination purposes. (*Michael v. Caterpillar Financial Services Corp.* (6th Cir. 2007) 496 F.3d 584, 594; *Peltier v. United States*, 388 F.3d 984, 988 (6th Cir.2004) [holding that an employee's placement on paid administrative leave pending the outcome of an investigation is not an adverse employment action].)

Until petitioner is suspended without pay or terminated, or given an adverse employment action, the CBA and Education Code do not mandate a hearing at this time. The District has not made any determination there is just cause to discipline petitioner, so section 24 of the CBA is not triggered. "Suspension" has been specifically defined in the CBA as "suspension *without pay*... and shall include loss of any extra compensation." (CBA, §24.3.) Thus, *Shields v. Poway Unified School District* (1998) 63 Cal.App.4th 1955, 960, is distinguishable in its definition of "suspension." Education Code section 44932(b) deals with suspensions without pay. This case is also different than *Miller v. Chico Unified School District Board of Education* (1979) 24 Cal3d 703, because the District has not made a negative employment decision based upon material in a different file. Petitioner was given prompt notice of the reasons for paid administrative leave pending the investigation.

Additionally, petitioner and respondent do not fit within the provisions dealing with voluntary or involuntary leaves of absence under either the CBA or Education Code sections 44932, 44940, or 44940.5, or even under transfers and reassignments under the CBA §13.2.2. Although petitioner asserts respondent is attempting to invent its own remedies outside of the Education Code, there is authority for paid administrative leave. The CBA does not limit all of the Districts actions as set forth in 2.1.7:

2.1.7 The exercise of the foregoing powers, rights, authority, decisions and responsibilities by the District; the adoption of policies, rules, regulations and practices in furtherance thereof; and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this Agreement and then only to the extent such specific and express terms are in conformance with law. It is not the intention of the parties, in setting forth the foregoing rights, to detract or diminish in any way the rights of unit members or the Association as expressly set forth in this Agreement.

The District had previously adopted various board policies, 2210, 5000, 4142, 4118, and an administrative regulation 4117, which when read together gives the District the discretion to implement paid administrative paid leave pending an investigation into the claims made. Accordingly, petitioner's writ it denied.

The District argues petitioner has waived his rights to complain of the District placing him on paid administrative leave because he did not follow the grievance procedures under CBA, Article X. Petitioner relies on Business and Professions Code section 4118 with regard to waivers. However, that section did not involve school personnel. The CBA §6.1.4 provides, "No grievance shall be processed through the grievance procedure involving this provision if the unit member pursues any other available legal course of action." This suggests that there is some leeway with regard to the grievance process, at least for "non-discrimination" claims under Article VI. However, the court is not required to address this issue. However, nothing in this ruling will prevent petitioner from pursuing any rights under the CBA when the District reaches a decision.

The CBA and Education Code have numerous time limitations for the protection of the teachers and the District is cautioned that its investigation must not be open ended indefinitely or capricious.

The court grants the District's sealing request pursuant to California Rules of Court, rule 2.551 for filing the supplemental declaration of Rita Beyers under seal. The court finds: 1) there is an overriding interest supporting sealing records; (2) there is substantial probability that the interest will be prejudiced absent sealing; (3) proposed sealing is narrowly tailored to serve the overriding interest; and (4) there is no less restrictive means of achieving the overriding interest. The declaration is sealed as of October 20, 2017, for all persons except authorized court personnel.

Eddie C. Sturgeon

Judge Eddie C Sturgeon