

1 **BEFORE THE FAIR DISMISSAL APPEALS BOARD**
2 **OF THE**
3 **STATE OF OREGON**

4 In The Matter of the Appeal of:

5 JOHN BISHOP,

6 Appellant,

7 v.

8 RIDDLE SCHOOL DISTRICT,

9 District.

Case No.: FDA-13-08

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER**

10
11 **INTRODUCTION**

12 Appellant, a contract teacher, was dismissed from his employment with Riddle School
13 District (the "District") on June 19, 2013. Appellant timely appealed to the Fair Dismissal
14 Appeals Board ("FDAB") on or about July 12, 2013. A hearing on the merits was conducted in
15 Roseburg, Oregon on October 1 and 2, 2013. Appellant was represented by Erin A. Fennerty,
16 Attorney at Law, and the District was represented by Dan W. Clark, Attorney at Law. The
17 hearing was conducted before a panel appointed from the FDAB, consisting of Dennis Ross,
18 Michael Cosgrove, and Bob Sconce. The panel, having considered the evidence and the
19 arguments of counsel, makes the following rulings, findings, conclusions and order.

20 **PANEL RULINGS AND OTHER MATTERS**

21 Exhibits A-1 through A-26 were offered by Appellant and received. The District
22 objected to Exhibit A-27 on the grounds that it does not constitute "evidence" or a document
23 containing facts with any connection to the present case. The District did not object to A-27
24 being considered in conjunction with Appellant's legal briefing or legal arguments, however. A-
25 27 is essentially a summary of Teacher Standards and Practices Commission ("TSPC") license
26 revocation cases that Appellant's legal counsel compiled based on decisions found on the TSPC
website. The cases listed are those where TSPC has revoked a teaching license for inadequate

1 professional judgment, inappropriate interest in a student's personal life, and crossing adult
2 boundaries with students. At hearing, the Panel conditionally admitted A-27 subject to the Panel
3 making a final determination on its admissibility in this order. After further consideration of the
4 admissibility of A-27, this Panel reverses its decision to admit A-27 as an exhibit on the basis
5 that it constitutes legal argument rather than factual evidence. This Panel, nevertheless, reviewed
6 the document in conjunction with the arguments raised in Appellant's hearing memorandum.

7 Exhibits D-1 through D-12 were offered by the District and received. During the course
8 of the hearing, the District moved to admit D-13 through D-16. Appellant objected to the
9 admission of Exhibit D-13 and D-15 on the basis that these documents referenced attachments
10 not included with the exhibits the District presented.

11 D-13 is a "hearing memorandum" Appellant submitted to the District School Board for
12 consideration at the June 19, 2013 board meeting during which the school board voted to dismiss
13 Appellant. The Panel determined that it was appropriate to admit D-13 subject to the Panel's
14 assessment of its evidentiary value, given that it was offered without the attachments referenced
15 therein.

16 D-15 is Appellant's written response to Principal Starkweather's notes taken during an
17 investigatory interview with student KR. After objecting to admission of D-15, Appellant
18 located the attachments referenced therein and offered them to be included with D-15. Thus,
19 Appellant withdrew the objection so long as (1) an April 19, 2013 letter written by Echo Gordon
20 referenced in D-15 was attached thereto; and (2) the record showed that the other attachment
21 referenced in Exhibit D-15 was already in the record at Exhibit A-10.¹ Therefore, with that
22 addition and clarification, Exhibit D-15 was admitted into the record.

23 The parties were not in agreement on submitting closing briefs in this case; the District
24 opposed the submission of closing briefs, while the Appellant requested leave to submit a closing
25 brief. Appellant desired to submit a closing brief because, among other things, Appellant desired
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¹ A-10 is a letter dated April 17, 2013, written by CheyLyne Kremer, one of Appellant's former students.

1 to brief additional legal arguments that arose during the hearing. While past FDAB panels have
2 allowed parties to submit closing briefs where both parties were in agreement on the submission
3 of closing briefs, in this case both parties were not in agreement. The Panel considered the
4 arguments both parties raised at hearing for and against submission of closing briefs and decided,
5 consistent with OAR 586-030-0060(2)(f), to hear only oral closing arguments.²

6 All other objections and rulings were reviewed and determined to be correct.

7 **FINDINGS OF FACT**

8 1. Respondent Riddle School District (“District”) is a school district in the state of
9 Oregon and is subject to fair dismissal laws. ORS 342.805 *et seq.*³

10 2. Appellant John Bishop (“Appellant”) was a “contract teacher” for the District
11 within the meaning of ORS 342.815(3) from approximately 2001 to June 19, 2013.⁴

12 3. Prior to Appellant’s employment with the District, he had worked as a contract
13 teacher at Camas Valley School District #21J since approximately 1991.⁵

14 4. During his employment with the District, Appellant taught social studies, English
15 and history at the junior high school and high school level. He also acted as the junior high boys
16 and girls track coach from 2001-2012, the junior high school boys basketball coach in 2002-
17 2003, the junior high girls basketball coach from 2004-2011 and part of 2012, the assistant girls
18 basketball coach in 2010-2011, and the junior high girls volleyball coach in 2007-2008 and
19 2012.⁶

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21 ² OAR 586-030-0060(2)(f) provides: “The District may make oral closing argument, followed by the
22 appellant. District, as the moving party, may reserve some time for final closing. The Panel shall advise the parties
of any time limitation on closing argument in advance.”

23 ³ Stip. ¶ 1. The Panel uses the following citation methods in this order. The District exhibits and Appellant
24 exhibits are referred to as D-# and A-#, respectively, with the relevant page number following when appropriate.
The parties’ Stipulated Facts are cited as “Stip.,” with the relevant paragraph number following (*e.g.* Stip. ¶ #). The
25 hearing transcript is referred to by citation to the volume number, *e.g.*, either “TR1” (for Oct 1, 2013) or “TR2” (for
Oct. 2, 2013) and then the relevant page number(s) (*e.g.* “TR1 25”).

25 ⁴ Stip. ¶ 2; TR2 223.

26 ⁵ Stip. ¶ 2.

⁶ Stip. ¶ 3.

1 5. During the time that Appellant was employed by the District, Superintendent
2 David Gianotti introduced and encouraged teachers to embrace the Search Institute's 40
3 Developmental Assets program to help students succeed.⁷

4 6. In addition, Superintendent Gianotti also distributed to teachers and encouraged
5 them to utilize the activities set out in a pamphlet called "150 ways to Show Kids You Care."
6 This pamphlet was also distributed to parents and community members.⁸

7 7. During the time that Appellant was employed by the District, there were no
8 District policies prohibiting teachers from electronically communicating with students.⁹

9 8. During the time that Appellant was employed by the District, there were no
10 policies in the staff handbook, which pertained to District teachers, that prohibited teachers from
11 electronically communicating with students.¹⁰

12 9. During the time that Appellant was employed by the District, the District
13 provided training to teachers, including Appellant, regarding maintaining professional
14 boundaries with students. Within the last four to five years, Susan Nesbitt, a former investigator
15 for the Teachers Standards and Practices Commission, provided a training to District staff which
16 addressed maintaining professional boundaries with students and cautioned teachers against the
17 use of social media and text messaging with students.¹¹ Appellant attended this training.¹² The
18 District also required teachers, including Appellant, to review various online trainings prior to
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20 ⁷ TR1 38 (Testimony of David Gianotti). *See also* A-6 (Search Institute's 40 Development Assets list).

21 ⁸ TR1 39 (Testimony of Gianotti). *See also* A-7 (Search Institute's "150 ways to Show a Child You Care"
22 pamphlet).

23 ⁹ Stip. ¶ 4.

24 ¹⁰ Stip. ¶ 5.

25 ¹¹ TR1 101-102 and TR2 330-331 (Testimony of Gianotti); 116 (Testimony of Russell Hobson).

26 ¹² TR2 307-308 (Testimony of Appellant. Appellant testified that he remembered the referenced training
but did not recall the trainer specifically discussing text messaging. Superintendent Gianotti and teacher Russell
Hobson, however, testified that the trainer did discuss social media and text messaging in the context of maintaining
professional boundaries with students. Both witnesses also testified that the trainer cautioned teachers against text
messaging students, which caused a lot of discussion among District staff members).

1 the beginning of the 2012-2013 school year offered through the Safe Schools Program.¹³ One of
2 the trainings District teachers were required to review provided training on sexual misconduct
3 laws.¹⁴ This training addressed maintaining professional boundaries with students.¹⁵

4 10. In the summer of 2012, Riddle Junior/Senior High School Principal, William
5 Starkweather, met with Appellant and talked with him about the dangers of sending text
6 messages to students. Principal Starkweather told Appellant that texting students was dangerous
7 and could lead to trouble, although he did not specifically direct Appellant not to text message
8 students. No record of this meeting or the conversation that took place was placed in Appellant's
9 personnel file. This meeting took place because of a report¹⁶ involving Appellant texting a
10 female Riddle High School student, KR.¹⁷ After investigation; Principal Starkweather found the
11 report to be without merit.¹⁸

12 11. On November 8, 2012, the District received a complaint regarding Appellant text
13 messaging a seventh grade Riddle Junior High student, AR.¹⁹ Principal Starkweather
14 investigated the complaint and provided an investigative report to Superintendent Gianotti.
15 Based on a review of the complaint and the investigative report from Principal Starkweather,
16 Superintendent Gianotti drafted a letter dated November 14, 2012, outlining his findings as
17 follows:

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19 ¹³ TR2 332-333 (Testimony of Gianotti).

20 ¹⁴ TR2 333 (Testimony of Appellant).

21 ¹⁵ TR2 332 – 333 (Testimony of Appellant).

22 ¹⁶ In this decision the Panel discusses a series of text messages that Appellant sent to student KR, which
23 Appellant admits he likely sent during KR's sophomore (2010-2011) and junior (2011-2012) years at Riddle High
24 School. The record does not establish, however, that the report referenced in Finding of Fact No. 10, which
25 occurred in the summer of 2012, related to Appellant's previous text messages to KR. Finding of Fact No. 10 is
26 included in this Panel's Findings of Fact to show that Appellant had received a verbal warning about the dangers of
text messaging students in the summer of 2012 from Principal Starkweather, his direct supervisor.

¹⁷ The Panel makes efforts to preserve student confidentiality to the extent possible. Thus, instead of using
students' full names in this decision, the Panel uses only initials.

¹⁸ TR1 156-157 (Testimony of William Starkweather).

¹⁹ Although the record did not specifically identify this student's full name, the Panel will use the initials
"AR" in referring to her.

1 While Mr. Bishop's intentions were to assist a student with
2 problems in a counseling capacity, and many of the incidents that
3 were brought out in the complaint were pre-approved by [Mrs. R],
4 Mr. Bishop crossed a line of professional distance that must be
5 maintained to be both an effective teacher and a good example of
6 an adult role model.

7 Specifically:

8 1. Mr. Bishop acted unprofessionally by sending an excessive
9 number of text messages to a junior high student named [AR].
10 (177 messages in 12 days) Some as early as 6:53 am and as late as
11 10:20 pm.

12 2. Mr. Bishop acted unprofessionally by using the statement,
13 "luv you" in these text messages, a phrase that is generally
14 acceptable to either close friends or family members, but not to
15 students under your general care.²⁰

16 12. In addition to outlining the investigative findings, Superintendent Gianotti's
17 November 14 letter also outlined the following directives and remedial actions:

18 1. Cease and desist from all electronic communications including
19 but not limited to: text messaging, Facebook communications,
20 or e-mailing students at Riddle School District.

21 2. No longer have any contact (other than emergency or safety
22 related) with [AR]. [AR] will be moved from all your classes
23 and other arrangements will be made for her instruction.

24 3. Submit resignation as basketball coach immediately and not be
25 allowed to coach at Riddle School District for a minimum of
26 two years (2012-2013 & 2013-2014) or longer until such time
as the District can determine that no repeated offences take
place.²¹

13. Appellant had coached the junior high school girls' basketball team since
approximately 2004.²²

14. Appellant reviewed and signed Superintendent Gianotti's November 14, 2012
letter on November 26, 2012.²³

²⁰ D-2; TR1 44 (Testimony of Gianotti).

²¹ *Id.*

²² Stip. ¶ 3.

²³ D-2, p. 2.

1 15. At some point during the meeting in which Appellant reviewed Superintendent
2 Gianotti's November 14 letter and signed it, Appellant asked for clarification regarding the scope
3 of the directive to "cease and desist from all electronic communications [with] students at Riddle
4 School District." Superintendent Gianotti clarified that the "cease and desist" directive applied
5 only to students at Riddle School District.²⁴

6 16. On November 14, 2012, Principal Starkweather also issued Appellant a written
7 reprimand which outlined the same findings and directives/remedial actions that Superintendent
8 Gianotti described in his November 14 letter.²⁵

9 17. Student KB, at various times, was a student at Riddle High School and attended
10 classes Appellant taught. Between February 18 and March 1, 2013, KB transferred from Riddle
11 to Roseburg High School.²⁶ KB informed Appellant she was transferring out of the District prior
12 to her last day attending Riddle High School.²⁷

13 18. At some point between Monday and Wednesday, March 4 through March 6,
14 2013, Appellant went to the Riddle High School administrative offices and inquired as to
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18 ²⁴ TR2 263-264 (Testimony of Appellant). *See also* TR2 343-344 (Testimony of Gianotti on rebuttal)

19 ²⁵ Compare D-1 with D-2.

20 ²⁶ The exact date KB transferred from the District is not evident in the record; however, Appellant testified
21 that he began text messaging KB within a few weeks of when she discontinued attending the District. TR2 268.
22 Further, D-5, p. 1, which is a copy of the notes from the investigative interview with Appellant on March 14, 2013,
23 indicates that during the investigative interview, Appellant stated that after KB was "gone a week" he went to the
24 office to find out if there had been a records request to see when KB had transferred. In addition, D-5, p. 3, which is
25 a copy of the notes from the investigative interview with KB on March 15, 2013, indicates that during the
26 investigative interview, KB indicated Appellant began text messaging her "the Wednesday after [she] left Riddle
High School at 1:40 pm." Appellant reviewed, signed, and provided written responses to these investigative notes
and at no time challenged the accuracy of the timeframes they included. D-3, which provides a copy of the text
messages Appellant admits to sending KB after he confirmed she had transferred from the District, begin with text
messages on "Wednesday." (D-3, top of p. 3). Further, Superintendent Gianotti testified that Principal Goirigolzarri
contacted him on Thursday, March 7, 2013, to report concerns with Appellant's text messaging with KB. TR1 41-
42. Based on this evidence, the Panel concludes KB transferred between February 18 and March 1, 2013, and
Appellant began texting KB on or about Wednesday, March 6, 2013.

²⁷ TR2 266-267 (Testimony of Appellant).

1 whether another school district had requested KB's student records to determine where she had
2 transferred.²⁸ Office staff told Appellant Roseburg School District had requested KB's records.²⁹

3 19. On or about Wednesday, March 6, 2013, Appellant began texting KB on her
4 personnel cell phone.³⁰

5 20. On or about March 7, 2012, the principal of Roseburg High School, Karen
6 Goirigolzarri, contacted Superintendent Gianotti by telephone, informing him that she believed
7 Appellant had been exchanging text messages with KB, now a Roseburg High School student.
8 On or about March 8, 2013, Ms. Goirigolzarri faxed Superintendent Gianotti a copy of the text
9 messages Appellant and KB exchanged and a copy of a cell phone screen with text messages on
10 them.³¹

11 21. After receiving the report from Principal Goirigolzarri and a copy of the text
12 messages at issue, Superintendent Gianotti conducted an investigation which included
13 interviewing Appellant and KB.³² During Superintendent Gianotti's investigative interview
14 with Appellant on March 14, 2013, Appellant confirmed that the copies of the text messages and
15 cell phone screen Principal Goirigolzarri provided were copies of text messages he had sent to
16 KB.³³

17 22. When Superintendent Gianotti asked why Appellant had not told District
18 administrators that he was text messaging KB during the March 14, 2013 investigative interview,

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22 ²⁸ Again, the exact date that Appellant went to the office to inquire as to where KB had transferred is not
23 identified in the record. However, based on Appellant's testimony and the available exhibits, this Panel concludes
24 that Appellant went to the office early the week of March 4, 2013. TR2 267 (Testimony of Appellant). *See also* the
25 explanation at footnote 26 above.

26 ²⁹ TR2 267.

³⁰ D-3, p. 3; TR2 268 (Testimony of Appellant). *See also* D-5 and footnote 26 *supra*.

³¹ D-3; TR1 41-42 (Testimony of Gianotti).

³² D-5; TR1 45-46 (Testimony of Gianotti).

³³ D-5; TR1 46 (Testimony of Gianotti); TR2 268-269 (Testimony of Appellant).

1 Appellant responded that he did not know he needed to as KB was not a District student
2 anymore.³⁴

3 23. The copies of the text messages and cell phone screen showed that Appellant was
4 texting KB as early as 7:04 a.m. and as late as 9:43 p.m.³⁵ The text messages Appellant sent to
5 KB included inquiries in which Appellant asked: “did your phone die or werre you just tired of
6 me? :),”³⁶ and, “Where have you been today?”³⁷ The copies of the text messages also show a
7 text in which Appellant asked KB, “when do i get a hug.”³⁸ The copies of the texts messages also
8 show Appellant communicated a desire to take KB to dinner at a pub alone with him,³⁹ and texts
9 in which Appellant told KB “luv ya”⁴⁰ and stated “Good Morning! I hope you have an amazing
10 day! I love you.”⁴¹

11 24. Copies of the notes Superintendent Gianotti took during the investigative
12 interviews with Appellant and KB, as well as copies of the text messages and cell phone screen,
13 were placed in Appellant’s personnel file after Appellant signed them.⁴²

14 25. After Superintendent Gianotti conducted investigative interviews with Appellant
15 and KB, he issued a written notice to Appellant on March 18, 2013, indicating that he would
16 recommend that Appellant be dismissed from employment with the District.⁴³ The dismissal
17 notice stated in pertinent part:

18 You and I met with your representative, Echo Gordon on March
19 14, 2013, to discuss complaints regarding your conduct toward

20 ³⁴ TR1 46-47; D-5, p. 1.

21 ³⁵ D-3.

22 ³⁶ D-3, p. 3 (errors in original).

23 ³⁷ D-3, p. 8.

24 ³⁸ D-3, p. 6 (errors in original).

25 ³⁹ D-3, pp. 7 and 9.

26 ⁴⁰ D-3, p. 7.

⁴¹ D-3, p. 12.

⁴² D-5, pp. 2 and 4.

⁴³ D-6.

1 former Riddle student: [KB]. At that time, you and your
2 representative were told that I had copies of numerous text
3 messages between you and [KB]. I also told you that one of the
4 texts referenced meeting [KB] for dinner and another was signed
5 "luv ya."

6 You were given the opportunity to explain your conduct with
7 respect to [KB].

8 I have carefully considered your statements from the meeting held
9 on March 14, 2013. In addition, I have conducted interviews of
10 other witnesses. I find the information gathered to be reasonable
11 and accurate. I also reviewed the November 14, 2012 written
12 reprimand in your personnel file which addressed inappropriate
13 text messages to a Riddle High student.

14 Based upon my interviews, your statements and a review of the
15 November 14 reprimand, I conclude that your performance has
16 been such that I shall recommend to the Board that you be
17 dismissed from your teaching position at Riddle School District.
18 The statutory grounds for your dismissal are:

19 a. Inadequate performance (ORS 342.865(1)(a)): acting in a
20 manner that disrupts your professional relationships with students,
21 parents, and co-workers and prevents professional working
22 relationships from being established, which negatively impacts our
23 school;

24 b. Insubordination (ORS 342.865(1)(c): deliberately
25 engaging in conduct that you were previously directed to cease;

26 c. Neglect of duty (ORS 342.865(1)(d): failing to exercise
appropriate professional judgment by engaging in conduct you
were previously warned was unprofessional and unacceptable for a
teacher at Riddle School District; and

d. Any cause which constitutes grounds for the revocation of
a contract teacher's license (ORS 342.865(1)(i): failing to exercise
professional judgment required under the competent Educator
Standards of the Teachers Standards and Practices Commission
(TSPC) and engaging in conduct with a student that constitutes
gross neglect of duty under the TSPC Standards for the Ethical
Educator.⁴⁴

27 26. After Superintendent Gianotti issued the March 18, 2013 dismissal notice to
28 Appellant, on April 10, 2013, Principal Starkweather interviewed Riddle High School student
29 KR to determine whether Appellant had also been texting her.⁴⁵ Principal Starkweather's

30 ⁴⁴ Punctuation errors in original.

⁴⁵ TR1 148-149 (Testimony of Starkweather).

1 interview of KR was not in response to a complaint or report, but rather was a follow-up
2 interview to the investigation that he previously conducted in the summer of 2012 involving a
3 report that Appellant was texting KR.⁴⁶ Although Principal Starkweather's previous
4 investigation found there was no merit to the summer 2012 report, due to the findings from the
5 March 2013 investigation involving KB, Principal Starkweather concluded it was appropriate to
6 interview KR again to make sure Appellant was not texting her inappropriately.⁴⁷

7 27. On April 12, 2013, Superintendent Gianotti and Principal Starkweather
8 interviewed Appellant in follow up to information Principal Starkweather received during the
9 interview with KR. During the interview, Appellant admitted, among other things, that (1) he
10 asked KR through a text message whether she kissed another student by texting, "Ya didn't kiss
11 him did ya?," and (2) that he had texted KR a message telling her to pass on to her brother that
12 he was a "piece of crap" because he did not show up to a meeting. Appellant indicated these text
13 messages likely occurred during KR's sophomore (2010-2011) and junior (2011-2012) years at
14 Riddle High School. Appellant also admitted that in relation to the text about kissing another
15 student, KR texted him back telling him she was not comfortable with his question, after which
16 he apologized to her.⁴⁸

17 28. The first time District administrators became aware of the text messages
18 described above in Finding of Fact No. 27 was in April 2013, following the investigative
19 interviews with KR and Appellant.

20 29. A copy of the interview notes from the interviews with KR and Appellant on
21 April 10 and 12, 2013, respectively, were placed in Appellant's personnel file after Appellant
22 signed them.⁴⁹

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⁴⁶ *Id.*

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⁴⁷ TR1 158-159 (Testimony of Starkweather).

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⁴⁸ D-8; D-15; TR2 271-274 (Testimony of Appellant).

⁴⁹ D-7; D-8.

1 30. On April 24, 2013, Superintendent Gianotti issued a revised dismissal notice to
2 Appellant again notifying Appellant of his intention to recommend that Appellant be dismissed
3 from employment with the District. Superintendent Gianotti issued the April 24 revised
4 dismissal notice due to the information regarding Appellant's admitted texts to KR that surfaced
5 after the March 18 dismissal notice.⁵⁰ The grounds cited for dismissal in the April 24 revised
6 dismissal notice were the same as those cited in the original March 18 dismissal notice.⁵¹

7 31. On April 26, 2013, Superintendent Gianotti issued a letter to Appellant in an
8 effort to correct two errors in the April 24 revised dismissal notice.⁵² The April 26 letter noted
9 that the first sentence of the April 24 revised dismissal should have read: "You and I have met
10 with your representatives on several occasions over the last two months to discuss complaints
11 regarding your conduct toward former and current students."⁵³ The April 26 letter also noted
12 that the third sentence of the April 24 revised dismissal notice should have read: "You were
13 given the opportunity to explain your conduct with respect to all the investigated incidents
14 involving your texting of students."⁵⁴ Superintendent Gianotti documented these corrections in
15 the April 26 letter an in effort to incorporate reference in the April 24 revised dismissal notice to
16 the investigative findings and subsequent discussions with Appellant and his union
17 representative surrounding the text messages to KR.⁵⁵

18 32. On or about May 1, 2013, Superintendent Gianotti issued a letter to Appellant
19 notifying him that his dismissal hearing would be heard by the District school board on June 19,
20 2013. The letter notified Appellant that during the hearing, he would have the opportunity to
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23 ⁵⁰ TR1 61-62 (Testimony of Gianotti).

24 ⁵¹ Compare D-6 with D-9.

25 ⁵² D-10.

26 ⁵³ Emphasis added.

⁵⁴ Emphasis added.

⁵⁵ TR1 65-66 (Testimony of Gianotti).

1 respond to Superintendent Gianotti's dismissal recommendation and substantiating
2 documentation.⁵⁶

3 33. On or about May 14, 2013, Appellant responded to Superintendent Gianotti's
4 original March 18, 2013 dismissal notice in writing. In his written response, Appellant argued
5 that the November 14, 2012 written reprimand only instructed him not to text District students.
6 Appellant argued that KB was not a student at the time he was texting her.⁵⁷

7 34. On or about May 14, 2013, Appellant also submitted written responses to the
8 interview notes from the interview with KB on March 15, 2013, and the interview with KR on
9 April 10, 2013.⁵⁸

10 35. On June 17, 2013, Appellant submitted a "Hearing Memorandum" for the School
11 Board's consideration. In the memorandum Appellant argued, among other things:

12 [T]he facts do not warrant Mr. Bishop's dismissal as [KB] was not
13 a Riddle student when she and Mr. Bishop were communicating
14 and his communications with [KR] took place well before
15 November 2012, when he was issued the letter of reprimand
16 instructing him not to electronically communicate with Riddle
17 students.⁵⁹

18 36. On June 19, 2013, Superintendent Gianotti recommended to the District School
19 Board at its regularly scheduled meeting that Appellant be terminated based on the statutory
20 grounds cited in the April 24, 2013 revised dismissal notice to Appellant as corrected by the
21 April 26, 2013 letter. Appellant did not appear at the meeting but did submit the hearing
22 memorandum referenced above in finding of fact No. 31 for the school board's consideration.

23 37. On June 19, 2013, the District school board voted to dismiss Appellant.
24 Superintendent Gianotti informed Appellant of the Board's decision by letter dated June 20,
25 2013.

26 ⁵⁶ D-11.

⁵⁷ D-16.

⁵⁸ D-14 and 15.

⁵⁹ D-13, pp. 1-2.

CONCLUSIONS OF LAW

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2 1. The District is a “fair dismissal district” under the Accountability for Schools for
3 the 21st Century Law. Appellant is a “contract teacher” entitled to a hearing before this panel.

4 2. The factual allegations surrounding Appellant’s text messages to KR during her
5 sophomore (2010-2011) and junior (2011-2012) school years at the District are true and
6 substantiated. Appellant admits that, among other text messages, he text messaged KR asking
7 her whether she had kissed another student and referring to her brother as a “piece of crap.”

8 3. The factual allegations surrounding Appellant’s text messages to KB in March
9 2013 are true and substantiated. Appellant admits that he sent the text messages evidenced in
10 Exhibit D-3, which include text messages referencing meeting KB for dinner and stating “luv
11 ya.” Appellant admits that he sent these text messages after receiving the November 2012 written
12 reprimand with the accompanying “cease and desist” directive.

13 4. The true and substantiated facts are adequate to support the charge of
14 insubordination as a ground for dismissal.

15 5. The true and substantiated facts are adequate to support the charge of neglect of
16 duty as a ground for dismissal.

17 6. The true and substantiated facts are inadequate to support the charge of
18 inadequate performance as a ground for dismissal.

19 7. The true and substantiated facts are inadequate to support the charge of any cause
20 which constitutes a ground for the revocation of such contract teacher’s teaching license as a
21 ground for dismissal.

22 8. Because this panel concludes that the true and substantiated facts are adequate to
23 support one or more of the statutory grounds, this panel considered whether the district’s
24 dismissal of appellant was arbitrary, unreasonable, or clearly an excessive remedy within the
25 meaning of ORS 342.905(6). There is no basis on which this Panel concludes that the dismissal
26 was arbitrary, unreasonable or clearly an excessive remedy.

1 **DISCUSSION**

2 **I. Applicable Legal Standard.**

3 The applicable legal standard that guides this Panel’s analysis is set forth in ORS
4 342.905(6), which provides:

5 The Fair Dismissal Appeals Board panel shall determine whether
6 the facts relied upon to support the statutory grounds cited for
7 dismissal or nonextension are true and substantiated. If the panel
8 finds these facts true and substantiated, it shall then consider
9 whether such facts, in light of all the circumstances and additional
10 facts developed at the hearing that are relevant to the statutory
11 standards in ORS 342.865(1), are adequate to justify the statutory
12 grounds cited. In making such determination, the panel shall
13 consider all reasonable written rules, policies and standards of
14 performance adopted by the school district board unless it finds
15 that such rules, policies and standards have been so inconsistently
16 applied as to amount to arbitrariness. The panel shall not reverse
17 the dismissal or nonextension if it finds the facts relied upon are
18 true and substantiated unless it determines, in light of all the
19 evidence and for reasons stated with specificity in its findings and
20 order, that the dismissal or nonextension was unreasonable,
21 arbitrary or clearly an excessive remedy.⁶⁰

22 The “degree of proof of all factual determinations by the panel shall be based on the
23 preponderance of the evidence standard.”⁶¹ At the hearing, evidence of “a type commonly relied
24 upon by reasonably prudent persons in the conduct of their serious affairs” is admissible.⁶²

25 ORS 342.905(b) creates a three-step review process this panel must follow:

26 First, the [FDAB] panel determines whether the facts upon which
the school board relied are true and substantiated. Second, the
panel determines whether the facts found to be true and
substantiated constitute a statutory basis for dismissal. Third, even
if the facts constitute a statutory basis for dismissal, the panel may
reverse the school board’s dismissal decision if the decision
nonetheless was ‘unreasonable, arbitrary [,] or clearly an excessive
remedy.’⁶³

27 ⁶⁰ Emphasis added.

28 ⁶¹ OAR 586-030-0055(5).

29 ⁶² OAR 586-030-0055(1).

30 ⁶³ *Bergerson v. Salem-Keizer Sch. Dist.*, 341 Or 401, 412, 144 P3d 918 (2006) (footnote omitted).

1 If the panel “finds the facts are not true and substantiated, or even if true and substantiated, are
2 not relevant or adequate to justify the statutory grounds cited by the district, the appellant shall
3 be reinstated with any back pay that is awarded in the order.”⁶⁴

4 **II. The Notice of Dismissal is Statutorily Sufficient**

5 This Panel concludes that Superintendent Gianotti’s notice of recommendation of
6 dismissal to Appellant was sufficient to meet the statutory standard in ORS 342.895(3)(a). The
7 Panel rejects Appellant’s argument made at hearing that the dismissal notice was defective
8 because it did not contain a plain and concise statement of the facts relied on to support the
9 statutory grounds for dismissal.⁶⁵

10 ORS 342.895(3)(a) requires that the dismissal notice (a) set forth the statutory grounds
11 the superintendent believes justify dismissal; and (b) contain a plain and concise statement of the
12 facts relied on to support the statutory grounds for dismissal. Under the Fair Dismissal Law,
13 ORS 342.805 *et seq.*, the notice of dismissal serves to inform the teacher of the facts the school
14 board will consider when deciding whether to dismiss the teacher under ORS 342.895(1).⁶⁶ Thus,
15 the written notice “must contain a statement of facts which expressly sets out the nexus between
16 the teacher’s conduct and his teaching responsibilities or from which such a connection may
17 obviously be inferred” such that the teacher can prepare an adequate defense.⁶⁷

18 In the present case Superintendent Gianotti issued two separate dismissal notices to
19 Appellant. The first notice was issued on March 18, 2013, after the investigation into
20 Appellant’s text messages to KB in early March 2013. This notice stated that Superintendent
21 Gianotti had met with Appellant and his representative to discuss a complaint regarding
22 Appellant’s conduct toward a former Riddle student, KB. This notice also stated that at the time
23 Superintendent Gianotti met with Appellant, Superintendent Gianotti informed Appellant of

24 _____
25 ⁶⁴ OAR 586-030-0070(3). (emphasis added).

26 ⁶⁵ TR2 360-362 (Appellant’s closing argument).

⁶⁶ *Shipley v. Salem Sch. Dist.*, 64 Or App 777, 781-82 (1983).

⁶⁷ *Id.* at 781.

1 numerous text messages between Appellant and KB and that they contained questionable
2 communications such as references to meeting KB for dinner and a text stating “luv ya.” The
3 notice went on to note that Superintendent Gianotti reviewed the available evidence, including
4 the directives contained in the November 2012 written reprimand, and concluded that he would
5 recommend dismissal based on the statutory grounds specified in the notice. For each statutory
6 ground listed, the Superintendent included a description of why he concluded that Appellant’s
7 conduct established the statutory ground for dismissal.⁶⁸

8 Superintendent Gianotti issued a second, revised dismissal notice to Appellant on April
9 24, 2013, after additional investigation into Appellant’s text messages to KR. These texts likely
10 occurred during KR’s sophomore (2010-2011) and junior (2011-2012) school years at Riddle
11 High School.⁶⁹ The April 24 revised dismissal notice was issued to incorporate the information
12 that surfaced regarding Appellant’s text messages to KR into the factual allegations supporting
13 the statutory grounds cited for dismissal. The April 24 revised notice cited the same statutory
14 grounds and reasons why Superintendent Gianotti felt Appellant’s conduct established each
15 statutory ground cited in the original March 18 dismissal notice.

16 After issuing the April 24 revised dismissal notice, Superintendent Gianotti issued the
17 April 26 clarifying letter. The April 26 letter was provided to Appellant to clarify that
18 Appellant’s text messaging to both KR and KB were the facts the superintendent was relying on
19 to support the statutory grounds for dismissal listed in the April 24 revised dismissal notice.

20 After reviewing the original March 18 and revised April 24 dismissal notices, and the
21 April 26 clarifying letter, this Panel concludes that the District provided Appellant notice of
22 dismissal consistent with ORS 342.895(3)(a). It is clear that the District provided notice at least
23 20 days before the superintendent recommended dismissal to the school board consistent with
24 ORS 342.895(3)(a). Even if the Panel calculates the 20-day timeframe beginning with the April
25

26 ⁶⁸ See D-6.

⁶⁹ D-8; D-15, TR2 271-272 (Testimony of Appellant).

1 26 clarifying letter, the school board meeting during which the superintendent recommended
2 dismissal was not until June 19, nearly two months later.

3 This Panel also concludes that the District's dismissal notices provide a plain and concise
4 statement of the facts relied on to support the statutory grounds cited. These facts were
5 Appellant's admitted text messages to KB after Appellant received the November 2012 written
6 reprimand, and Appellant's text messages to KR discovered in April 2013 after the follow-up
7 investigative interviews with KR and Appellant. Further, an obvious connection may be inferred
8 from the charges at issue identified in the notices and Appellant's teaching responsibilities.
9 These responsibilities included cultivating effective relationships with parents and students,
10 maintaining professional student-teacher boundaries in communications with students, and
11 following District directives.

12 In addition to the obvious inferences that may be drawn from the March and April 2013
13 dismissal notices themselves, the evidence presented at hearing also established that Appellant
14 had ample notice of the charges at issue sufficient to allow him to respond to the charges before
15 the school board. On May 14, 2013, Appellant submitted written responses to the interview
16 notes from the investigative interviews of KB and KR.⁷⁰ Appellant also submitted a written
17 response to the dismissal notice that argued that he had not violated the November 2012 written
18 reprimand because KB was not a student of the District at the time he was texting her.⁷¹
19 Furthermore, Appellant submitted a hearing memorandum for the school board's consideration
20 that included arguments regarding both the texts sent to KB and those sent to KR.⁷² All of these
21 documents demonstrate that Appellant had adequate notice and understanding of the conduct at
22 issue sufficient to respond to the charges before the school board.

23 Based on the foregoing, this Panel concludes that the District provided Appellant notice
24 of dismissal consistent with ORS 342.895(3)(a).

25 ⁷⁰ D-14; D-15.

26 ⁷¹ D-16.

⁷² D-13.

1 **III. The Facts Relied Upon by the District are True and Substantiated.**

2 This Panel concludes that the facts relied upon by the District to support Appellant's
3 dismissal are true and substantiated. Appellant does not dispute the core facts at issue, but rather
4 argues that they are insufficient to establish the statutory grounds the District cited to justify his
5 dismissal. Appellant admits (1) that he sent text messages to KR likely during her sophomore
6 and junior years at Riddle High School that included, among other messages, a text message
7 asking whether KR had kissed another student, and a text message referring to KR's brother as a
8 "piece of crap" because he did not show up to a meeting; and (2) that he sent the text messages
9 evidenced in Exhibit D-3 to KB in March 2013, soon after she transferred from the District,
10 including text messages referencing meeting KB for dinner and stating "luv ya." It is undisputed
11 that Appellant sent these text messages to KB after he received the November 2012 written
12 reprimand and "cease and desist" directive.

13 **IV. The True and Substantiated Facts Are Adequate to Justify Two of the Four**
14 **Statutory Grounds Cited by the District.**

15 **A. The Panel's Conclusions Regarding the Statutory Grounds of**
16 **Insubordination and Neglect of Duty Are Based Solely on the Facts**
Surrounding Appellant's Text Messages to KB in March 2013.

17 This Panel's conclusions regarding the statutory standards of "insubordination" and
18 "neglect of duty," under ORS 342.865(1)(c) and (d) respectively, are based solely on the true and
19 substantiated facts surrounding Appellant's text messages to KB in March 2013. The Panel
20 recognizes that Superintendent Gianotti cited Appellant's admitted text messages to KR that
21 occurred prior to the 2012-2013 school year as facts the school board should consider in
22 determining whether dismissal was warranted. While the school board may have considered the
23 text messages to KR, this Panel concludes that the true and substantiated facts surrounding
24 Appellant's text messages to KB are alone sufficient to support dismissal based on
25 "insubordination" and "neglect of duty." Furthermore, this Panel finds that even considering the
26 true and substantiated facts surrounding Appellant's text messages to both KB and KR, the facts

1 do not support the statutory grounds of “inadequate performance” and “any conduct constituting
2 ground for revocation of a teacher’s license.” The Panel’s reasoning relating to each statutory
3 ground the District for Appellant’s dismissal follows.

4 **B. The Charged Facts Are Adequate to Justify Dismissal for Insubordination.**

5 The Panel concludes that the true and substantiated facts are adequate to support
6 dismissal on the basis of insubordination. Insubordination within the meaning of ORS
7 342.865(1)(c) means “disobedience of a direct order or unwillingness to submit to authority,”
8 and must be accompanied by a defiant intent or attitude on the part of the teacher.⁷³
9 Insubordination may support the statutory ground for dismissal where an employee’s choices
10 “show a defiant attitude and unwillingness to submit to authority, whether that authority is the
11 District, the law, or ethical principles.”⁷⁴ A District may consider a pattern of previous behavior
12 in determining whether a specific action constitutes insubordination.⁷⁵

13 In this case, the District contends that Appellant was insubordinate when he texted KB
14 after having received the November 2012 written reprimand, which included the directive to
15 “cease and desist from all electronic communications with students at Riddle School District,
16 including but not limited to: text messaging * * * .” Appellant argues that since KB was no
17 longer a student of the District, Appellant was not insubordinate when he texted KB after
18 receiving the November 2012 “cease and desist” directive.

19 This Panel concludes that the evidence at hearing shows that Appellant deliberately
20 disobeyed the district’s direct order to stop texting District students, exhibited an unwillingness
21 to submit to authority, and did so with defiant intent. In considering the ground of
22 insubordination, the Panel considered important the facts preceding Appellant’s decision to text
23 message KB in March 2013, which were established at hearing. These established facts include
24 that (1) Appellant, as an experienced licensed teacher in Oregon, was required to be familiar with

25 ⁷³ *Bellairs v. Beaverton Sch. Dist.*, 206 Or App 186, 199, 136 P3d 93 (2006).

26 ⁷⁴ *Robbins v. Brookings-Harbor Sch. Dist.*, FDA 11-09 at 14 (2011).

⁷⁵ *Bellairs*, 206 Or App at 199.

1 TSPC standards, which include obligations as an “ethical educator” to maintain appropriate
2 professional student-teacher relationships and communications with students;⁷⁶ (2) Appellant had
3 received District sponsored training about maintaining professional student-teacher boundaries
4 through appropriate communications with students. These trainings touched on the potential
5 dangers of crossing professional boundaries through electronic communications with students,
6 including text messaging; (3) Appellant had been verbally warned by Principal Starkweather in
7 the summer of 2012 about the dangers of text messaging students and that doing so “could lead
8 to trouble”; and (4) Appellant had received the November 2012 written reprimand for “crossing a
9 line of professional distance” with AR by text messaging her excessively and using the phrase
10 “luv you” in text messages to her.

11 This Panel notes that in addition to the “cease and desist” directive included in the
12 November 2012 written reprimand, AR was transferred from all of Appellant’s classes and
13 Appellant was required to resign from coaching the junior high girls’ basketball team. Appellant
14 had coached this team for the District since 2004. Appellant admitted at hearing that the
15 November 2012 reprimand and the District’s related remedial actions had a significant impact on
16 his life, career, and personal life, and the reprimand was not something he took lightly.⁷⁷

17 The above facts establish that Appellant was on notice of the District’s expectations that
18 he fulfill his obligation to maintain professional boundaries with his students and that he refrain
19 completely from text messaging students. Under the circumstances, this Panel believes
20 Appellant knew that sending text messages to KB, a student recently enrolled in the District,
21 would violate the District’s expectations and the “cease and desist” directive. Further, this Panel
22 believes that Appellant knew that many of the text messages he sent to KB crossed the line of
23 professional student-teacher communications.

24

25 ⁷⁶ OAR 584-020-0035(c) (See OAR 584-020-0035(c)(A), “Not demonstrating or expressing professionally
26 inappropriate interest in a student’s personal life; and OAR 584-020-0035(c)(D), “Honoring appropriate adult
boundaries with students in conduct and conversation at all times.”).

⁷⁷ TR2 297-298 (Testimony of Appellant).

1 The record shows, however, that even though Appellant knew his text messages to KB
2 violated the District's expectations and his responsibilities as an educator, he chose to send them
3 anyway. If Appellant was concerned for KB's wellbeing after she transferred from the District,
4 he could have sought guidance from District administrators under the circumstances to ensure he
5 would not violate the District's expectations. Appellant testified that he had asked for
6 clarification regarding the District's directive previously, and nothing precluded him from doing
7 so again. Instead, the record shows Appellant began texting KB within weeks of the time she
8 discontinued attending the District without telling District administrators or KB's foster parents.
9 Moreover, Appellant's text messages to KB included the same type of concerning content for
10 which Appellant had previously been reprimanded, including text messages in which Appellant
11 told KB "luv ya" and "I love you," and text messages indicating a desire to take KB to dinner
12 alone with him. This Panel concludes that these facts show disobedience to the District's direct
13 order not to text District students and an unwillingness to submit to the District's reasonable
14 expectations for maintaining professional boundaries.

15 Furthermore, this Panel concludes that the fact that Appellant deliberately went to the
16 Riddle High School administrative office to seek out where KB had transferred without notifying
17 District administrators he was doing so or his intentions for doing so, shows a defiant intent or
18 attitude. Appellant exerted effort to determine whether KB had transferred from the District, but
19 deliberately chose not to tell his principal or the superintendent before doing so. Further,
20 Appellant chose not to seek clarification from District administrators as to whether the "cease
21 and desist" directive applied under the circumstances. These circumstances included that (1) the
22 only reason Appellant had contact with KB was his student-teacher relationship with her and (2)
23 KB was "a student at the Riddle School District" and had only recently transferred from the
24 District. The record shows that the only reason Appellant had a relationship with KB was by
25 virtue of his position as a teacher with the District, not as a consequence of connections with her
26 outside of his role as an educator for the District, such as through a familial connection or church

1 association. The record also shows that the only reason Appellant had access to information
2 about where KB transferred was by virtue of his teaching position with the District.

3 Moreover, as noted above, when Appellant began texting KB she had only recently
4 transferred from the District. Although the record is not clear as to the exact timeframe between
5 when KB transferred from the District and when Appellant began text messaging her, it is clear
6 that Appellant began texting KB within a few weeks of the time she stopped attending Riddle
7 High School. It is also clear that within days, and possibly only hours, from the time Appellant
8 verified that KB had transferred to Roseburg High School, he began texting her.⁷⁸ This Panel
9 concludes that the fact that Appellant had asked for clarification regarding the scope of the
10 “cease and desist” directive previously, but failed to do so even though KB was “a student at
11 Riddle School District” and had only recently transferred, shows defiant intent.

12 In addition to and/or in the alternative to the above facts related to Appellant’s failure to
13 seek clarification from District administrators under the circumstances of KB’s transfer, this
14 Panel also concludes that Appellant’s *justification* for not telling District administrators shows a
15 defiant attitude. Appellant’s justification for not telling administrators about his text messaging
16 with KB both during the District’s March 2013 investigation and at hearing was a narrow
17 reading of the “cease and desist” directive; i.e., that KB was no longer a “student at Riddle
18 School District.” As noted above, the Panel believes Appellant knew his conduct violated the
19 District’s “cease and desist” directive and that is why he did not notify District administrators of
20 his text messaging with KB. Thus, the Panel concludes that despite Appellant’s knowledge that
21 his actions violated the District’s directive, he nevertheless defiantly argued he did not violate
22 the directive based on a narrow reading of the directive.

23 Moreover, the Panel concludes that Appellant’s argument based on a narrow
24 interpretation of the District’s directive is a defiant attempt to divert attention from the fact that

25 _____
26 ⁷⁸ The record is not clear as to exactly when Appellant went to the office to inquire as to whether there had been a
student records request from another District, but based on Appellant’s testimony and the exhibits in the record, it is
clear that Appellant began texting KB the same week he went to the office, and possibly the same day he went to the
office.

1 Appellant knew the core concern and reason the directive was given. This Panel concludes that
2 Appellant knew that the core concern and reason he was issued the November 2012 written
3 reprimand and “cease and desist” directive was because he had crossed professional boundaries
4 in his text messaging with AR. Yet, despite his knowledge of the District’s core concern,
5 Appellant turned around and again crossed professional boundaries in his text messaging with
6 KB. Then, once Appellant’s text messaging with KB was uncovered, Appellant argued his
7 actions were justified because KB had recently transferred from Riddle School District. Thus,
8 the Panel concludes that Appellant’s argument based on a narrow reading of the directive
9 represents a defiant attempt to divert attention from his knowing violation of the core expectation
10 behind the directive; i.e., the expectation that Appellant maintain professional boundaries with
11 students.

12 Based on the above facts and reasoning, this Panel concludes that Appellant’s admitted
13 actions in texting KB in March 2013 are adequate to justify dismissal for insubordination.

14 **C. The Charged Facts Are Adequate to Justify Dismissal for Neglect of Duty.**

15 This Panel concludes that the true and substantiated facts are adequate to support
16 dismissal for neglect of duty within the meaning of ORS 342.865(1)(d). Neglect of duty means
17 the “failure to engage in conduct designed to result in proper performance of duty.”⁷⁹ A school
18 district may identify the duties of its teachers in view of “broad considerations such as providing
19 for the comprehensive education of its students, providing for the efficient operation of its
20 schools, and maintaining favorable community/school relationships.”⁸⁰ Such duties can include
21 a teacher’s responsibility to maintain effective relationships with students and parents.⁸¹ Neglect
22
23
24

25 ⁷⁹ *Wilson v. Grants Pass Sch. Dist.*, FDA 04-7, p. 9 (2005).

26 ⁸⁰ *Bellairs*, 206 Or App at 196, quoting *Jefferson County Sch. Dist. No. 509-J v. FDAB*, 311 Or 389, 397 (1991).

⁸¹ *Jefferson County Sch. Dist. No. 509-J v. FDAB*, 311 Or 389, 396-397 (1991).

1 of duty can be demonstrated through evidence of “repeated failures to perform duties of a
2 relatively minor importance or a single instance of a failure to perform a critical duty.”⁸²

3 This Panel concludes that the true and substantiated facts in this case are adequate to
4 show that Appellant repeatedly failed to perform a critical duty, exercising appropriate
5 professional judgment to maintain professional boundaries with his students. As discussed
6 above in relation to the charge of insubordination, Appellant was aware of this duty as an
7 experienced licensed educator in Oregon, through District sponsored training he received, and as
8 a result of the counseling and written reprimand he received in 2012. Indeed, Appellant’s
9 testimony at hearing showed that he understood that the reason duties like maintaining
10 professional boundaries with students exist is to protect students from people that would “do evil
11 things to [them].”⁸³ Despite his knowledge of the purpose for the duty to maintain appropriate
12 boundaries with students, the record shows Appellant chose not to comply with this duty.

13 Appellant’s repeated failure to comply with his duty to maintain professional boundaries
14 with KB is demonstrated through his text messages to KB the week of March 4, 2013. The
15 copies of Appellant’s text messages to KB found at Exhibit D-3 show that on Wednesday, March
16 6, 2013,⁸⁴ Appellant text messaged KB eight times from 9:17 p.m. to 9:43 p.m. These text
17 messages included text messages indicating Appellant’s propensity to manipulate KB, such as
18 when Appellant asked “did your phone die or werre you just tired of me? :)”⁸⁵ A pattern
19 Appellant repeated the next day when he texted KB, “where have you been today” and “haha
20 welllll, its hard to take you to dinner if you don’t answer your texts.”⁸⁶ The text messages on the
21 night of March 6 also included Appellant asking KB, “when do i get a hug,”⁸⁷ a question that

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23 ⁸² *Id.*, p. 10, citing *Enfield v. Salem-Keizer Sch. Dist.*, FDA-91-1 (1992), *affirmed without opinion*, 118 Or
App 162 (1993), *rev. denied*, 316 Or 142 (1993).

24 ⁸³ TR1 292 (Testimony of Appellant).

25 ⁸⁴ *See* footnote 26, *supra*.

26 ⁸⁵ Errors in original.

⁸⁶ Errors in original.

⁸⁷ Errors in original.

1 could easily be misinterpreted by a student or parents. The March 6 texts also included
2 Appellant telling KB he wanted to take her to dinner at a pub and ended with Appellant stating,
3 “luv ya.” The time of day these text messages were sent, the number of text messages sent in a
4 short period of time, and the content of the text messages show Appellant’s repeated failure to
5 comply with the important duty of maintaining appropriate boundaries with KB.

6 Appellant’s inappropriate communications continued on March 7, 2013. The copies of
7 the text messages Appellant sent KB on March 7 show Appellant sent KB another eight text
8 messages from 6:52 p.m. to 8:50 p.m. that evening. These text messages included the texts
9 discussed above in which Appellant asked KB where she had been and indicated a desire to take
10 her to dinner.

11 Exhibit D-3 also includes a copy of a screen shot of KB’s cell phone showing that at 7:08
12 a.m. on an unidentified day, Appellant texted KB, “Good morning! I hope you have an amazing
13 day! I love you!”

14 Despite having received a written reprimand for similar misconduct just months earlier,
15 Appellant again breached his critical duty of maintaining appropriate boundaries with a student.
16 Moreover, Appellant’s text messages to KB the week of March 4, in the time of day they were
17 sent, their frequency, and their content, justifiably caused concern for KB’s safety in the minds
18 of KB’s foster parent, KB’s principal in at Roseburg High School, and District administrators.
19 Thus, Appellant also failed to comply with his duty to maintain effective relationships with
20 parents and students.

21 For the above reasons this Panel finds the true and substantiated facts are adequate to
22 justify dismissal based on the statutory ground of neglect of duty.

23 **D. The Charged Facts Are Not Adequate to Justify Dismissal on the Grounds of**
24 **Inadequate Performance.**

25 This Panel concludes that the true and substantiated facts are not adequate to support
26 dismissal on the basis that Appellant has engaged in conduct constituting inadequate

1 performance. Addressing performance duties alleged to be unacceptable under this ground
2 requires proof of (a) the failure to perform job duties in conformance with district standards or
3 requirements when the teacher has been given notice of deficiencies and an opportunity to
4 correct and the failure is repeated or otherwise substantial, or (b) the failure to perform results in
5 some substantial detriment to the district.⁸⁸ FDAB case law establishes that this latter statutory
6 ground focuses on actual performance of duties directly connected with teaching.⁸⁹ Thus, to
7 meet this standard, the evidence must show that the conduct caused inadequate performance
8 specifically in the technical aspects of teaching.⁹⁰ Here, the conduct is not acceptable but did not
9 directly relate to the technical aspects of Appellant's teaching. Furthermore, the District admits
10 and the evidence confirms that Appellant was never given notice of deficiencies in his
11 performance in the technical aspects of teaching and Appellant performed his teaching duties in a
12 satisfactory manner.

13 For the above reasons this Panel concludes that the true and substantiated facts are not
14 adequate to support dismissal on the basis that Appellant has engaged in conduct constituting
15 inadequate performance.

16 **E. The Charged Facts Are Not Cause Constituting Grounds for the Revocation**
17 **Of a Contract Teacher's License Under ORS 342.865(1)(i).**

18 This Panel concludes that the true and substantiated facts are not adequate to support a
19 dismissal on the basis that Appellant has engaged in conduct constituting a ground for the
20 revocation of his teaching license, within the meaning of ORS 342.865(1)(i). The Teacher
21 Standards and Practices Commission may revoke an educator's license for "gross neglect of
22 duty."⁹¹ Gross neglect of duty is "any serious and material inattention or breach of professional
23

24 ⁸⁸ *Packard v. Corvallis Sch. Dist. No. 509J*, FDA-97-4, at 20 (Jan. 5, 1998).

25 ⁸⁹ *Thyfault v. Pendleton Sch. Dist. No. 16R*, FDA 90-4 (1991) (citing *Thomas v. Cascade Union High Sch.*
Dist. 5, FDA 84-7: 80 Or App 736 (1987), Order on Remand (1987), Order on Appeal after Remand (1987). Appeal
on other grounds after Order on Remand, 98 Or App 679 (1989)).

26 ⁹⁰ *Vilches v. Multnomah Education Service Dist.*, FDA 02-03, at 21 (June 25, 2002).

⁹¹ OAR 584-020-0040(3)(c).

1 responsibilities.”⁹² Conduct may constitute neglect of duty under ORS 342.865(1)(d), but not
2 “gross neglect of duty” under OAR 584-020-0040(3)(c) as that standard has been interpreted by
3 TSPC.

4 While this Panel does find that Appellant’s actions in texting KB constituted
5 insubordination and neglect of duty as discussed above, this Panel does not find that Appellant’s
6 actions rise to the level of “gross neglect of duty” as that term has previously been interpreted
7 and applied by the TSPC. This Panel finds persuasive Appellant’s argument based on past TSPC
8 licensure revocation orders, that “gross neglect of duty” has been applied by TSPC primarily in
9 situations where there was communication of a romantic and/or sexual nature or physical contact
10 of an intimate nature.⁹³ While Appellant’s admitted text messages to KB and KR clearly crossed
11 professional boundaries, this Panel does not find that they were overtly romantic or sexual in
12 nature, and there is no reliable evidence that Appellant engaged in inappropriate physical contact
13 with students.⁹⁴

14 For the above reasons, this Panel does not believe that Appellant engaged in conduct
15 constituting a “gross neglect of duty” as that standard has been interpreted by the TSPC.

16 **V. Arbitrary, Unreasonable or Clearly Excessive**

17 If the facts are true and substantiated and are adequate to support one or more of the
18 statutory grounds cited for dismissal, the Panel can reverse the District’s decision only if it
19 determines, in light of all the evidence, that the dismissal is arbitrary, unreasonable or clearly an
20 excessive remedy.⁹⁵ As long as the facts justify the grounds cited for dismissal, the Panel may
21 engage in “only a deferential review” of the School Board’s decision to dismiss.⁹⁶ The Panel may

22 ⁹² OAR 584-020-0040(4)(n); OAR 584-020-0040(4)(o).

23 ⁹³ Exhibit A-27.

24 ⁹⁴ Evidence was introduced at hearing that Appellant may have engaged in “front-to-front” hugs with
25 female students at school. However, the evidence only consisted of hearsay statements from KB, unsupported by
26 testimony at hearing. Further, no one testified that they had ever seen Appellant give KB, or any other student a
“front-to- front” hug, while multiple witnesses testified to seeing Appellant give side-arm hugs to multiple students.

26 ⁹⁵ ORS 342.905(6).

⁹⁶ *Ross v. Springfield Sch. Dist.*, 294 Or 357, 363 (1982).

1 not set aside a dismissal unless it can say, as a matter of law, that no reasonable school board
2 would have found the relevant facts sufficient for dismissal.⁹⁷

3 In the present case the facts are true and substantiated and are adequate to support the
4 statutory grounds of insubordination and neglect of duty. Either of these grounds is sufficient to
5 justify dismissal. Based on the evidence submitted to the Panel, we cannot say that no
6 reasonable school board would have found the relevant facts sufficient for dismissal. The core
7 facts before the school Board, as discussed throughout this decision, centered on Appellant's
8 choice to text message KB after the November 2012 written reprimand and "cease and desist"
9 directive. While the school board may have also considered Appellant's text messages to KR,
10 this Panel believes that even setting aside the texts to KR, the school board acted reasonably in
11 deciding to dismiss Appellant.

12 To present an argument that the District's decision was arbitrary and unreasonable,
13 Appellant produced evidence at hearing showing that District administrators were aware that
14 other District teachers were text messaging students during the timeframe at issue in this case. It
15 is undisputed that the District had no policy against teachers' text messaging students during the
16 timeframe in question. It is also undisputed that prior to the 2013-2014 school year, the District
17 had not directed staff, verbally, through policy, or otherwise, that they were prohibited from
18 using text messaging to communicate with students. Moreover, Appellant produced evidence of
19 situations in which other District teachers may have blurred the lines of professional student-
20 teacher relationships with students, but were not disciplined for doing so. There was also
21 evidence that the District fostered a familial environment in which students and teachers
22 established personal parent-like relationships with students. Appellant cited the District's
23 endorsement of the Search Institute's 40 Developmental Assets program and the "150 ways to
24 Show Kids You Care" pamphlet distributed to teachers. Appellant cited the above evidence,
25

26 _____
⁹⁷ *Bergerson v. Salem-Kaiser Sch. Dist.*, 194 Or App at 313, *aff'd* 341 Or 401 (2006); *Lincoln County Sch. Dist. v. Mayer*, 39 Or App 99 (1979).

1 and other related evidence, to argue that the district was arbitrary when it disciplined him for
2 behavior the District encouraged and behavior that other District teachers engaged in.

3 Despite this evidence, however, this Panel concludes Appellant's situation was different
4 from other teachers who may have text messaged students or whose conduct might have blurred
5 the lines of professional student-teacher relationships. The Panel reaches this conclusion
6 because there was no evidence that other teachers were in the same circumstances as Appellant
7 when he began texting KB in March 2013. For example, there was no evidence that parents had
8 complained about other teachers on multiple occasions due to their texting students excessively
9 or with questionable messages. Further, there was no evidence that other teachers had been
10 personally warned against texting students, reprimanded, or told to discontinue texting students
11 as Appellant had been specifically directed.

12 Moreover, while the evidence showed that the District fostered a familial environment
13 and encouraged teachers to support students in positive ways, none of the teachers who testified
14 at hearing, including Appellant, considered these facts as justification for engaging in
15 unprofessional or boundary-crossing behaviors with students. While it is true that in some cases
16 the line between professional and unprofessional communications with students may be difficult
17 to assess, this Panel believes that at the time Appellant sent the text messages to KB in March
18 2013, he knew that they violated the District's expectations, its cease and desist directive, and
19 Appellant's duty to maintain professional boundaries with students.

20 Based on the above reasoning, this Panel concludes that the District's decision to dismiss
21 Appellant was not arbitrary, unreasonable, or excessive.

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1 **ORDER**

2 The dismissal of Appellant is sustained and the appeal is dismissed.

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4 DATED this _____, 2013

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6 _____
7 Dennis Ross, Panel Chair

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9 _____
10 Michael Cosgrove, Panel Member

11 _____
12 Bob Sconce, Panel Member

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14 **NOTICE OF RIGHT TO APPEAL**

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16 Under ORS 342.905(9), this order may be appealed in the manner provided for in ORS
17 183.480, and any appeal must be filed within 60 days from the date of service of this Order.

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ORDER

The dismissal of Appellant is sustained and the appeal is dismissed.

DATED this 9th of DECEMBER 2013



Dennis Ross, Panel Chair

Michael Cosgrove, Panel Member

Bob Sconce, Panel Member

NOTICE OF RIGHT TO APPEAL

Under ORS 342.905(9), this order may be appealed in the manner provided for in ORS 183.480, and any appeal must be filed within 60 days from the date of service of this Order.

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ORDER

The dismissal of Appellant is sustained and the appeal is dismissed.

DATED this 12/9, 2013

Dennis Ross, Panel Chair

Michael Cosgrove

Michael Cosgrove, Panel Member

Bob Sconce, Panel Member

NOTICE OF RIGHT TO APPEAL

Under ORS 342.905(9), this order may be appealed in the manner provided for in ORS 183.480, and any appeal must be filed within 60 days from the date of service of this Order.

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ORDER

The dismissal of Appellant is sustained and the appeal is dismissed.

DATED this 12/9th, 2013

Dennis Ross, Panel Chair

Michael Cosgrove, Panel Member



Bob Sconce, Panel Member

NOTICE OF RIGHT TO APPEAL

Under ORS 342.905(9), this order may be appealed in the manner provided for in ORS 183.480, and any appeal must be filed within 60 days from the date of service of this Order.

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2013, I served a true and correct copy of FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER by the method indicated below:

| | | |
|--|---|---|
| <p>Dan W. Clark DOLE COALWELL CLARK ET AL PO Box 1205 Roseburg OR 97470</p> <p>Erin A. Fennerty LUVAAS COBB PO Box 10747 Eugene OR 97440</p> | <p><input type="checkbox"/></p> <p><input checked="" type="checkbox"/></p> <p><input type="checkbox"/></p> <p><input type="checkbox"/></p> <p><input checked="" type="checkbox"/></p> <p><input type="checkbox"/></p> <p><input checked="" type="checkbox"/></p> <p><input type="checkbox"/></p> <p><input type="checkbox"/></p> <p><input type="checkbox"/></p> <p><input checked="" type="checkbox"/></p> | <p>HAND DELIVERY</p> <p>REGULAR U.S. MAIL</p> <p>OVERNIGHT MAIL</p> <p>TELECOPY (FAX)</p> <p>ELECTRONICALLY</p> <p>HAND DELIVERY</p> <p>REGULAR U.S. MAIL</p> <p>OVERNIGHT MAIL</p> <p>TELECOPY (FAX)</p> <p>ELECTRONICALLY</p> |
|--|---|---|

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General

Thomas C. Lenox, OSB #094199
Assistant Attorney General
of Attorneys for Fair Dismissal Appeals Board

cc via email only:
Cindy Hunt, ODE