BEFORE THE FAIR DISMISSAL APPEALS BOARD

OF THE

STATE OF OREGON

In The Matter of the Appeal of BROOKE DEATON, Appellant, *v.* SUTHERLIN SCHOOL DISTRICT, District.	**Case No.:** FDA-24-04 **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

INTRODUCTION

Appellant, a contract teacher, was dismissed from her employment with the Sutherlin School District ("District") on July 29, 2024. She timely appealed to the Fair Dismissal Appeals Board ("FDAB" or the "panel") on August 8, 2024. Both Appellant and the District waived the requirement that a contested case hearing be held by an FDAB panel within 100 days of the receipt by the teacher of the notice of dismissal. *See* ORS 342.905(5)(a). A hearing on the merits was conducted in Roseburg, Oregon on January 28, 29, and 30, 2025. Appellant was represented by Nathan Rietmann and Daemie Kim, Attorneys at Law, Reitmann and Kim LLP, and the District was represented by Nancy Hungerford, Attorney at Law, The Hungerford Law Firm. The hearing was conducted by a panel appointed from the FDAB, consisting of Joshua Wetzel, Laura Latham, and Sascha McKeon. The panel, having considered the evidence and the arguments of counsel, makes the following rulings, findings, conclusions of law, and order.

PANEL RULINGS

Appellant's Motion

On January 28, 2024, the first day of the hearing, Appellant submitted a motion entitled "Motion for Summary Judgment" ("Appellant's Motion").[1] Therein, Appellant argues that in reaching its decision to dismiss Appellant, the District considered evidence "neither referenced, nor present, in Appellant's personnel file" in violation of ORS 342.895(3)(a). The panel took Appellant's motion under advisement and proceeded with the hearing as scheduled.

Having considered Appellant's motion and the oral argument provided by Appellant in support of the motion and by the District in opposition to the motion, the panel denies Appellant's motion for the reasons set forth below.

Appellant's motion advances a narrower interpretation of ORS 342.895(3)(a) than has been applied by the Oregon Court of Appeals. ORS 342.895(3)(a) states, in relevant part:

> At least 20 days before recommending to a board the dismissal of the contract teacher, the district superintendent shall give written notice to the contract teacher by certified mail or delivered in person of the intention to make a recommendation to dismiss the teacher. The notice shall set forth the statutory grounds upon which the superintendent believes such dismissal is justified, and shall contain a plain and concise statement of the facts relied on to support the statutory grounds for dismissal. *If the statutory grounds specified are those specified in ORS 342.865 (1)(a), (c), (d), (g) or (h), then evidence shall be limited to those allegations supported by statements in the personnel file of the teacher on the date of the notice to recommend dismissal[.]*

ORS 342.895(3)(a) (emphasis added). The Oregon Court of Appeals analyzed this provision in *Sch. Dist. No. 48, Washington Cnty. v. Fair Dismissal Appeals Bd.*, 14 Or. App. 634 (1973).[2] In that case, the FDAB panel had interpreted the provision "as limiting the evidence at the hearing to testimony relating to the 'general subject' of those statements in the personnel file which were either made by or attributed to the testifying witness." *Id*. at 646. On appeal, the court rejected this interpretation,

[1] Appellant did not file this motion with the Executive Secretary as required. *See* OAR 586-030-0025(2). Nonetheless, the panel accepted Appellant's motion and the District did not object.

[2] At the time, this provision was found at ORS 342.895(2).

noting that the provision "require[s] a broader interpretation." *Id*. Instead, the court interpreted ORS 342.895(2) as imposing a limitation on the subject matters concerning which evidence can be received, and not as limiting admissibility to statements or other evidence that actually appears in the personnel file. *Id*. at 646-50; *see also Vrom v. David Douglas School Dist. No. 40*, 45 Or. App. 225, 231 (1980).

Here, as a preliminary matter, we note that Appellant's dismissal was based, in part, on particular conduct that had no predicate in documents in her personnel file. As discussed in greater detail below, Appellant was dismissed for specific conduct on specific dates. This conduct was distinct from any ongoing performance problems and was not the type that would typically be documented in Appellant's personnel file in advance of dismissal.[3]

Moreover, consistent with the court's interpretation of ORS 342.895(3)(a) in *Washington Cnty.*, Appellant's personnel file in fact does contain documentation supporting the subject matters of Appellant's dismissal: neglect of duty, inefficiency, and insubordination. *See generally* Exh. A-6 (Appellant's personnel file). For example, Appellant's 2015 and 2016 performance evaluations in her personnel file identify areas of concern related to the neglect of duty and inefficiency grounds of dismissal. *See* Exh. A-4, pp. 65, 70-71. Specifically, in 2015, Appellant was advised she "could be a little more vigilant to student behavior" including "monitoring transitions [after class] as much as possible." *Id*. at 65. In 2016, Appellant was advised to "be a little more vigilant during class time[,]" noting "[i]t would make her management easier if she would move about the gym a little more and check in with individual students on a more regular basis." *Id*. at 70-71. Appellant's personnel file also contains the April 2024 administrative leave letter, which is the alleged basis for the insubordination ground of dismissal. *See* Exh. A-6.

For the foregoing reasons, Appellant's motion is denied.

[3] Were the panel to apply Appellant's narrow interpretation of ORS 342.895(3)(a), then school districts would be prevented from dismissing teachers for a large swath of conduct, particularly sudden or unexpected conduct, simply because that conduct is not documented in the teacher's personnel file.

Evidentiary Rulings

Appellant's Amended Exhibit List includes Exhibits A-1 through A-82. At the hearing, Appellant moved to admit only Exhibits A-2, A-4, A-6, A-35, A-41, A-42, A-44, A-48, A-50, A-65, A-66, A-79, and A-83. Exhibits A-2, A-4, A-6, A-35, A-41, A-42, A-48, A-50, A-65, A-66, and A-83 were admitted without objection. The District objected to Appellant's Exhibits A-44 and A-79 on relevance grounds. Exhibit A-44 is a text message exchange between Appellant and Superintendent Terry Prestianni from 2022, regarding the boy's locker room door. Exhibit A-79 is a cell phone video recording of students pushing a school bus in snow. The panel sustained the objections, finding that neither exhibit was relevant to Appellant's dismissal.

The District moved to admit Exhibits D-1 through D-22. Exhibit D-1 and D-4 through D-22 were admitted without objection. Appellant initially objected to Exhibit D-3, then later withdrew that objection and Exhibit D-3 was admitted. Tr. 18:20-19:4, 21:22-23. Appellant objected to Exhibit D-2 on relevance and "overly prejudicial" grounds. Tr. 16:20-17:23. Exhibit D-2 is an investigation and reprimand of Appellant issued in 2019. The panel overruled Appellant's objection and admitted Exhibit D-2.

FINDINGS OF FACT

Appellant's Employment and Background Facts

1. Appellant was a teacher at Sutherlin Middle School ("SMS") in the Sutherlin School District ("the District"). During the 2023-2024 school year, she was a physical education teacher for combined classes of sixth, seventh, and eighth grade students. Each P.E. class period was 51 minutes, including several minutes at the beginning and end of the period for locker room changing. Tr. 387:18-388:3. The primary "classroom" for P.E. instruction was the SMS gym, but SMS P.E. classes also utilized the Sutherlin High School ("SHS") football field located across the street from SMS. Tr. 67:11-19. Each P.E. class had approximately 20-25 students. Tr. 101:10. Appellant taught each P.E. class with a co-teacher, Kyle Crane, who also had his own class of approximately 20-25 students. Tr. 65:10.

2. At the time of the events at issue in this case, Appellant had one prior discipline. On September 20, 2019, Appellant received a formal reprimand for having an inappropriate conversation with a student about Appellant's personal legal problems. Exh. D-2, p. 9. Prior to the conversation between Appellant and the student, Appellant had been advised by former SMS Principal Jon Martz not to discuss personal legal problems with students. Tr. 72:7-9; Exh. D-2, p. 9. The formal reprimand included the following admonishment: "From this day forward you are hereby directed to refrain from discussing legal matters from your personal life with any student or staff member in our district during your work time. You are also instructed to refrain from speaking about other district personnel in a negative or derogatory manner as outlined in your collective bargaining agreement." Exh. D-2, p. 9.

Relevant District Policies, Standards, and Expectations

3. The State's physical education grade level outcomes include five standards. Exh. D-22. Relevantly, at the sixth-grade level, Standard 4 includes the following:

> Standard 4. The physically literate individual exhibits responsible personal and social behavior that respects self and others.
>
> PE.4.6.4: Cooperates with a small group of classmates during all class activities *under teacher guidance*.

Exh. D-22 (emphasis added).

4. Middle school teachers are expected to supervise, instruct, manage, guide, and assure safety of students, and to develop procedures and routines for efficient use of class time. Exh. D-15, pp. 1-2. When an instructional activity is not working, teachers are expected to demonstrate flexibility and responsiveness in instruction by adjusting lessons or searching for alternative approaches. Exh. D-15, p. 2.

5. P.E. teachers are responsible for supervising students in locker rooms, in the gym, and on the field. Tr. 200:17-201:5, 382:11-383:3.

Video Recordings[4]

6. Video cameras were installed in the SMS gym and at the SHS football field.[5] *See generally* Exhs. D-17-21. The video camera system is motion-sensitive and records when motion is detected. Tr. 86:11-17. Video recordings are automatically retained for 30 days and then erased. Tr. 86:17-19. Video recordings can be manually preserved and archived, which saves them indefinitely. Tr. 96:13-16.

February 6, 2024, in SMS Gym[6]

7. The P.E. instructional period began at approximately 1:29 p.m. As the class began, approximately 30 students were wandering around the gym. Appellant and co-teacher Mr. Crane sat next to each other on a bench along one side of the gym in between the locker room doors. Appellant and Mr. Crane remained seated next to each other for the next fifteen minutes.

8. For the next fifteen minutes, students engaged in a variety of activities without direction or instruction from Appellant or Mr. Crane. Students shot balls at basketball hoops, kicked balls into walls, the air, and at other students, fought, and engaged in no activity at all.

9. At 1:30:55 p.m., bigger students surrounded Student A, a smaller student.

10. At 1:32:15 p.m., another student stole Student A's ball. Student A got a new ball and at 1:32:57 p.m., the same student kicked Student A's ball away.

11. At 1:33:08 p.m., another student threw a ball at Student A.

12. At 1:33:18 p.m., Student A threw a ball at one of the students who stole his ball earlier.

13. At 1:33:40 p.m., a bigger student took Student A's ball and held it in the air where Student A could not reach it. Student A tried to jump for the ball, missed, and fell to the ground. For

[4] The District offered video camera footage from the SMS gym and the SHS football field on February 6, 2024, as Exhibit D-17, on April 22, 2024, as Exhibit D-18, on April 2, 2024, as Exhibit D-19, on April 1, 2024, as Exhibit D-20, and on April 16, 2024, as Exhibit D-21. Findings of Fact 7 through 41 are based on the video camera footage, as narrated and explained by the witnesses at hearing.

[5] The video cameras are set up in these locations because the gym and football field are also used for sporting events, community events, and public meetings. The presence of the video cameras was not concealed.

[6] Exh. D-17.

the next minute, bigger students passed Student A's ball amongst themselves, playing keep away from Student A. At 1:35:12 p.m., a bigger student threw Student A's ball at his head.

14. Student A retrieved his ball, and a group of bigger students continued to follow him around the gym.

15. At 1:35:40 p.m., Student A was knocked to the ground by another student.

16. The bigger students took Student A's ball again and continued to play keep away.

17. At 1:36:26 p.m., Student A went into the equipment room and got another ball. He moved around the gym away from the bigger students, but the bigger students continued to follow him.

18. At 1:40:48 p.m., one of the bigger students took Student A's ball again. The bigger students played keep away again.

19. At 1:41:14 p.m., Student A went into the equipment room again. The group of bigger students followed him and closed the equipment room door with Student A inside. One of the bigger students, Student J, leaned against the door, preventing Student A from getting out.

20. Appellant and Mr. Crane did not move from their seated positions next to each other, did not attempt to intervene, and did not engage with Student A or the other students.

21. At 1:43:05 p.m., a fight broke out between two other students and punches were thrown.

22. During this fifteen-minute period, students continued to go in and out of the locker rooms. Neither Appellant nor Mr. Cane attempted to supervise the locker rooms. Tr. 201:18-22.

23. At 1:43 p.m., almost fifteen minutes after the P.E. instructional period began, Appellant and Mr. Crane began instructing the students to stretch.

24. Following this incident, Student A reported to Dean of Students Bret Prock what happened during this P.E. period. Tr. 414:22-25. Mr. Prock is the SMS Dean of Students, and his primary responsibility is student behavior and discipline. Tr. 405:10-22.

25. Mr. Prock testified that in response to Student A's report, he met with the involved students and their parents. Tr. 414:19-25; Tr: 417:7-8; 419:14-19.

26. The involved students received discipline ranging from detention to in-school suspension. Tr. 419:20-21.

April 1, 2024, in SMS Gym[7]

27. At the end of first period, students exited the gym for the locker rooms to change for second period. For the next five minutes, while students were in the locker rooms, Appellant remained in the gym with Mr. Crane and did not supervise the locker rooms. Appellant and Mr. Crane walked in circles around the gym, talking with one another. Tr. 119:22-120:13.

April 2, 2024, in SMS Gym[8]

28. Appellant was in the upstairs portion of the gym. Appellant spent several minutes repairing and expanding structural walls of a structure made out of gymnastics mats that the witnesses referred to as the "fort." Tr. 116:17-25.

29. Gymnastics mats were used for the "fort" walls and obstructed Appellant's view of the gym below and obstructed the view of anyone in the gym looking up. Tr. 84:22-85:3.

30. A student entered the gym and Appellant remained in the upstairs fort.

April 16, 2024, in SMS Gym[9]

32. The contract day began at 7:45 a.m.

33. At 7:44 a.m., Mr. Crane walked onto the gym floor from the upstairs gym area, briefly entered the boy's locker room, and returned upstairs at 7:45 a.m.

34. At 7:50:50 a.m., Appellant walked onto the gym floor from the upstairs gym area and walked into the girl's locker room.

[7] Exh. D-20.
[8] Exh. D-19.
[9] Exh. D-21.

35. At 7:55 a.m., Appellant exited the girl's locker room. Appellant and Mr. Crane sat next to each other on a bench in the gym. They stood up and walked across the gym floor together when students entered the gym from the locker rooms.

April 22, 2024, at SHS Track and Field[10]

36. On April 22, 2024, Appellant and Mr. Crane's combined gym classes used the SHS track and field for class. The field is about 200 yards away from the SMS building. Tr. 112:18-20. Fourth Street runs between the field and the SMS building, requiring students and staff to cross the street to access the field. Tr. 112:23-25.

37. A class of high school students taught by Tracie McKnight from SHS also used the field for P.E. class. Tr. 555:3. Ms. McKnight testified that she often shared the SHS track and field with Appellant and Mr. Crane and had the opportunity to observe Appellant's class and instruction. Tr. 575:5-12. Ms. McKnight testified that Appellant provided limited instruction to students: students often ran a lap or two and then played with equipment strewn on the field without instruction. Tr. 575:13-23.

38. At 1:17 p.m., Appellant and Mr. Crane exited the track walking side by side with their backs to the field. Their students remained on the track and field behind Appellant and Mr. Crane. Appellant and Mr. Crane continued walking up the hill away from the field area in the direction of Fourth Street and SMS. A different camera angle not provided to the panel showed Appellant and Mr. Crane walking into the SMS gym. Tr. 477:9-13.

39. At 1:18 p.m., students in Appellant and Mr. Crane's combined classes began to exit the field area and walk unsupervised in the direction of Fourth Street and the SMS building.

40. For the next few minutes, SMS students in Appellant and Mr. Crane's combined classes continued to exit the track and field area and walk unsupervised in the direction of Fourth Street and the SMS building.

[10] Exh. D-18.

41. Multiple students crossed Fourth Street without either Appellant or Mr. Crane escorting them across the street or watching them cross the street.

42. Students later reported to former SMS Principal Michael Narkiewicz that they were late to their next class because Appellant and Mr. Crane left them at the track. Tr. 475:1-4, 478:19-479:1.

Investigation

43. On or around April 18, 2024, Principal Narkiewicz informed Superintendent Terry Prestianni about a possible inappropriate relationship between Appellant and Mr. Crane. Exh. D-1, p. 1; Tr. 85:18-20.

44. Superintendent Prestianni reviewed various video recordings from the gym and field security cameras and "was extremely concerned." Tr. 89:20-21.

45. On April 22, 2024, Superintendent Prestianni interviewed Appellant and Mr. Crane together regarding the concerns raised. Tr. 89:14-90:19. Bob Sconce, SEA Union Representative, was present. Tr. 90:10-13.

46. The investigation continued, revealing concerns about Appellant's lack of student supervision. Tr. 94:7-15.

47. On April 25, 2024, Superintendent Prestianni issued a letter placing Appellant on paid administrative leave. Exh. D-4; Tr. 138:7-8. The letter instructed Appellant, in relevant part, "During the period of this investigation, you are directed to not have conversations with students, staff, community members or others regarding the investigation."[11]

48. Thereafter, Appellant sent a message to Principal Narkiewicz and SMS Secretary Tina Halligan stating she was taking the next two days off and indicating she may not return. Tr. 138:11-22. In response, Principal Narkiewicz hired a long-term substitute teacher. Tr. 138:23-139:17.

49. On April 26, 2024, Appellant sent a text message to School Board Chair JR Guthrie stating, "I guess I'm getting fired? No one told me." Exh. D-9 at 11; Tr. 611:6-13. Board Chair Guthrie did not respond to the text.

[11] Exh. D-4.

50. On April 29, 2024, Superintendent Prestianni interviewed Appellant again. SEA Union Representative Sconce was also present. Tr. 137:6-10.

51. On May 2, 2024, Superintendent Prestianni offered Appellant a resignation agreement. Exh. D-6, pp. 1-3. On May 3, 2024, Appellant signed the resignation agreement. Exh. D-6, p. 3. On May 9, 2024, Appellant withdrew her resignation. Exh. D-6, p. 4.

52. On June 7, 2024, Superintendent Prestianni completed an investigation report and provided a copy of the report to Appellant. Exh. D-7, pp. 1-2. Therein, Superintendent Prestianni informed Appellant that the investigation supported allegations that Appellant engaged in "inappropriate and unprofessional behavior by using district resources to construct a private space" to spend time with her co-teacher, "engaged in inappropriate behavior with a co-teacher during the school day," and "failed to supervise students on multiple occasions." Exh. D-7, pp. 1-2. Additionally, the report noted "a pattern of behavior in which [Appellant] failed to provide any organized instruction during P.E. time[.]" Exh. D-7, p. 2.

53. On June 10, 2024, Superintendent Prestianni met with Appellant and SEA Union Representative Sconce regarding the investigation report. Exh. D-7, pp. 3-7. Appellant denied the allegations during the meeting and subsequently provided a written response to the investigation report. Exh. D-7, pp.3, 8-39.

54. During the June 10 meeting, Superintendent Prestianni, SEA Union Representative Sconce, and Appellant discussed the directive in the April 25, 2024 administrative leave letter. Superintendent Prestianni confirmed that the directive in the April 25, 2024 letter that Appellant could not have conversations with students, staff, community members or others regarding the investigation was still in force. Exh. D-7 at 6. SEA Union Representative Sconce agreed that the directive remained in place. Appellant acknowledged that, even though the June 10 meeting was taking place on the last day of the contracted teaching year, "tomorrow I still have a gag order," acknowledging that she understood that she was expected to comply with the directive over the summer months. Exh. D-7 at 6.

55. On June 18, 2024, Appellant sent a text message to Board Chair Guthrie. Board Chair Guthrie testified at hearing that he is a personal friend of Appellant and her spouse and was the best man at their wedding. Tr. 587:22-23. In her text, Appellant stated that she had "some concerns" and listed several people she had tried to contact, including SEA Union Representative Sconce, who were either unavailable or declined to talk to her. She wrote, "I am still an employee of the district and should be treated as one. Can you please give me some guidance on who I can talk to about my concerns." Before Board Chair Guthrie responded, Appellant sent an additional text message stating, "Never mind. Bob [Sconce] got ahold of me." Exh. D-9 at 11.

56. On June 20, 2024, Superintendent Prestianni sent Appellant a letter entitled, "Investigation Report—Insubordination and Lack of Professional Judgment." Under the heading, "Insubordination," the letter states, "On April 26, 2024, you contacted two board members about issues including this situation and the ongoing investigation[,]" and, "On May 1, 2024, you contacted and spoke with a building administrator about the investigation and a possible settlement." Exh. D-8 at 40.

The District's Recommendation, the Second Investigatory Meeting, and the School District's Decision

57. On June 25, 2024, Superintendent Prestianni met with Appellant and SEA Union Representative Sconce to review and discuss the investigation report. At the conclusion of the meeting, Superintendent Prestianni issued Appellant a 20-day termination notice. Exh. D-8. The notice notified Appellant that Superintendent Prestianni would recommend Appellant's termination to the school board. Exh. D-8. The notice stated the reasons for termination as inefficiency under ORS 342.865(a), insubordination under ORS 342.865(c), and neglect of duty under ORS 342.865(d). Exh. D-8.

58. On June 26, 2024, Appellant posted a comment in response to a post in a Facebook group entitled, "Sutherlin and Oakland Community Information." Exh. D-9 at 3-5; Tr. 142:5-10. Appellant's post acknowledged that Superintendent Prestianni had handed her the June 25, 2024 20-day letter, which she referred to as her "termination letter," the day before. In her post, Appellant

wrote, "The principal at the Middle School has a history of running teachers out, I think he got 10 out in his 2 years at the Middle school." She also wrote, "I will be terminated on July 15th at the school board meeting. The board could choose to disagree with [Superintendent Prestianni's] decision but I know they won't. After the last board meeting it is clear they have every intention to cover up the district's wrongdoing." Appellant described in detail the two bases for the recommended termination (insubordination and neglect of duty). She invited "[a]nyone that wants or needs to hear it with their own ears or see it with their own eyes" to come. Exh. D-9 at 4-5.

59. On June 27, 2024, Kelly Wright, Executive Assistant to Superintendent Prestianni, sent an email to Appellant notifying her that Superintendent Prestianni wanted to schedule a second investigatory meeting "regarding possible further violations of your paid administrative leave." Exh. D-9 at 1-2. Appellant responded asking whether the restrictions in the paid administrative leave letter still applied. Wright replied the same day, stating that the restrictions still applied. Exh. D-9 at 1.

60. On July 2, 2024, Superintendent Prestianni had a second investigatory meeting with Appellant. Superintendent Prestianni asked Appellant about a phone call Appellant had with Parent J, a parent whose child had been interviewed as part of the investigation. Exh. D-9 at 6; Tr. 144:10-11.

61. On July 15, 2024, the Sutherlin School District Board of Directors ("the Board") met to consider Superintendent Prestianni's recommendation to dismiss Appellant. Exh. D-10. The Board is made up of five members. Tr. 66:4-6. The hearing was public pursuant to Appellant's request. Exh. D-10; Tr. 157:1-6.

62. The Board was provided with and considered Appellant's written statement,[12] Oregon Education Association's written statement, an investigation packet provided by Superintendent Prestianni, documents regarding supervision expectations, and security camera video recordings. Exhs. D-10, D-12-D-14; Tr. 157:15-158:4, 159:11-160:15. The Board asked Appellant questions. Exh. D-10; Tr. 592:3-4.

[12] Appellant also orally presented her written statement.

63. The Board's deliberations were public. Tr. 176:19-25. The Board voted 5-0 to accept Superintendent Prestianni's recommendation and dismiss Appellant on the statutory grounds of neglect of duty, inefficiency, and insubordination. Exh. D-10; Tr. 174:3.

CONCLUSIONS OF LAW

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

2. The factual allegation that Appellant was expected to supervise students during P.E. class, including in locker rooms, it true and substantiated.

3. The factual allegation that Appellant was expected to provide instruction to students during P.E. class is true and substantiated.

4. The factual allegation that Appellant did not provide adequate supervision and instruction to students during P.E. class is true and substantiated as demonstrated by Appellant's conduct on February 6, 2024, April 1, 2024, April 2, 2024, and April 22, 2024.

5. The factual allegation that Appellant had communications with two board members and an administrator regarding the investigation in violation of the April 25, 2024 administrative leave letter is not true and substantiated.

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

7. The true and substantiated facts are adequate to support the charge of inefficiency as a ground for dismissal.

8. The true and substantiated facts are not adequate to support the charge of insubordination as a ground for dismissal.

9. The District's dismissal of Appellant was not arbitrary, unreasonable, or an excessive remedy within the meaning of ORS 342.905(6).

DISCUSSION

I. Applicable Legal Standard.

In Oregon, the permissible grounds for terminating a contract teacher are as follows:

(a) Inefficiency;

(b) Immorality;

(c) Insubordination;

(d) Neglect of duty, including duties specified by written rule;

(e) Physical or mental incapacity;

(f) Conviction of a felony or of a crime according to the provisions of ORS 342.143;

(g) Inadequate performance;

(h) Failure to comply with such reasonable requirements as the board may prescribe to show normal improvement and evidence of professional training and growth; or

(i) Any cause which constitutes grounds for the revocation of such contract teacher's teaching license.

ORS 342.865. At the conclusion of a hearing appealing a district's dismissal decision, the panel reviews the evidence pursuant to the legal standard set forth in ORS 342.905(6), which provides:

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

ORS 342.905(6) (emphases added). The "degree of proof of all factual determinations by the panel shall be based on the preponderance of the evidence standard." OAR 586-030-0055(5). At the hearing, evidence of "a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs" is admissible. OAR 586-030-0055(1). Thus, ORS 342.905(6) creates a three-step review process this panel must follow:

> 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.'

Bergerson v. Salem-Keizer School District, 341 Or. 401, 412 (2006) (footnote omitted). If the panel determines "the facts are not true and substantiated, or even if true and substantiated, are not relevant or adequate to justify the statutory grounds cited by the district, the appellant shall be reinstated with any back pay that is awarded in the order." OAR 586-030-0070(3).

II. The True and Substantiated Facts Are Adequate to Justify the Statutory Ground of Neglect of Duty.

The panel concludes the District established facts adequate to support the statutory ground of neglect of duty. The Fair Dismissal Appeals Board has defined neglect of duty to mean a teacher's failure to engage in conduct designed to bring about a performance of his or her responsibilities, either by engaging in "repeated failures to perform duties of relatively minor importance" or "a single instance of failure to perform a critical duty." *Meier v. Salem-Keizer School District*, FDA-13-01 at 30 (2013), *aff'd,* 284 Or. App. 497, 508-509 (2017), *rev den*, 362 Or. 175 (2017).

The panel concludes that the true and substantiated facts in this case are adequate to show that Appellant repeatedly failed to perform two critical duties: supervising students and instructing students. Appellant was aware of these duties as an experienced licensed educator in Oregon and through directives and performance evaluations she received from supervisors.

Physical education teachers, like Appellant, are expected to supervise students in the locker room, in the gym, and on the field. Tr. 200:17-201:5. Many behavioral issues can arise in the locker room, including physical altercations and theft, and making a teacher's presence known, even periodically, mitigates those issues. Tr. 200:17-201:5, 390:1-4, 486:6-11. Superintendent Prestianni testified that P.E. teachers can effectively supervise both the locker room and gym by standing in or near the doorway connecting the two spaces. Tr. 200:17-201:5. Principal Narkiewicz testified that he had multiple conversations with Appellant and Mr. Crane about their lack of supervision in the locker rooms and admonished them that they needed to supervise the locker rooms. In the gym and on the field, P.E. teachers are expected to move among and interact with their students. Tr. 387:1-6. For co-teachers, like Appellant and Mr. Crane, the expectation is for the teachers to be spaced apart to better supervise two classes worth of students. Tr. 387:1-6. By moving amongst the students, teachers are in a better position to step in and help with conflict resolution and other behavioral problems. Tr. 423:21-25.

Appellant was counseled about her student supervision in her 2015 and 2016 performance evaluations. *See* Exh. A-4, pp. 65, 70-71. Specifically, in 2015, Appellant was advised she "could be a little more vigilant to student behavior" including "monitoring transitions [after class] as much as possible." *Id*. at 65. In 2016, Appellant was advised to "be a little more vigilant during class time[,]" noting "[i]t would make her management easier if she would move about the gym a little more and check in with individual students on a more regular basis." *Id*. at 70-71.

The evidence in this case demonstrates that Appellant neglected her duty to supervise students on multiple occasions. On February 6, 2024, Appellant remained seated next to her co-teacher on one side of the gym for fifteen minutes during unstructured free time rather than positioning herself amongst her students and away from her co-teacher. Exh. D-17. During this time, a group of bigger students followed Student A around the gym, repeatedly stole Student A's ball, hit Student A with balls, knocked Student A to the ground, and ultimately involuntarily confined him in an equipment room, yet Appellant did not move from her seated position or attempt to engage with Student A or the

bigger students. *Id*. On April 1, 2024, Appellant remained in the gym and made no attempt to supervise the students in the locker room. Exh. D-20. Instead, Appellant walked in circles around the gym, engaged in conversation with her co-teacher. *Id*. On April 2, 2024, Appellant remained in the upstairs "fort" with an obstructed view of the gym below while students were in the locker rooms and when they entered the gym. Exh. D-19. And on April 22, 2024, Appellant left students unsupervised on the SHS track while she and her co-teacher walked back to the SMS building. Exh. D-18. Appellant also did not supervise the students as they walked back from the track and when they crossed Fourth Street to reach the SMS building. *Id*.

Appellant's lack of supervision created an unsafe environment that increased the risk of harm to students. When students are left unsupervised in the locker rooms, in the gym, or on the track, there is potential for a multitude of problems, including harm from cars while crossing the street, and poor or unsafe student behavior. Indeed, on February 6, 2024, Appellant's lack of supervision resulted in bigger students following and hitting Student A for fifteen minutes and involuntarily confining him in an equipment closet. Exh. D-17. Although true that P.E. instruction requires supervising students in multiple dispersed environments, Appellant, along with her co-teacher, had available options for effective supervision. When students were in the locker room and the gym at the same time, Appellant could have stood at or near the connecting door. When students were in the gym, Appellant could have moved amongst the students and positioned herself away from her co-teacher. And when students were on the track and needed to cross Fourth Street to return to the SMS building, Appellant and her co-teacher could have positioned one teacher on the track and one teacher at the Fourth Street crosswalk. In taking none of these approaches, Appellant neglected a critical duty.

Appellant also neglected her duty to instruct students. As a middle school teacher, Appellant was expected to instruct, manage, and guide students, and to develop procedures and routines for efficient use of class time. Exh. D-15, pp. 1-2. When an activity was not working, Appellant was expected to demonstrate flexibility and responsiveness in instruction by adjusting lessons or searching for alternative approaches. Exh. D-15, p. 2. Additionally, one of the sixth grade P.E. standards states

that students should cooperate with a small group of classmates "during all class activities *under teacher guidance*." Exh. D-22 (emphasis added).

The evidence in this case demonstrates that Appellant neglected her duty to instruct students. Each P.E. class period was only 51 minutes, including several minutes at the beginning and end of the period for locker room changing. Yet on February 6, 2024,[13] Appellant allotted the first fifteen minutes of class for unstructured free time, leaving little time remaining in the class period for instruction. Exh. D-17. During this free time on February 6, some students shot or dribbled balls, other students kicked balls into walls, the air, and at other students, some students fought with other students, and other students engaged in no activity at all. Exh. D-17. Ms. McKnight, a high school teacher who often shared field space with Appellant, testified that Appellant provided limited instruction to students on the field, observing that Appellant's students often ran a lap or two and then played with equipment strewn on the field without instruction. In response to the investigation report outlining these allegations, Appellant explained that the unstructured time gave students an opportunity to practice conflict management skills and other prosocial behaviors. Exh. D-7, p. 8. However, this practice did not align with the District's expectations. Superintendent Prestianni testified that teachers are expected to provide instruction even during periods of free play and should step in and provide instruction on appropriate behavior and conflict resolution. Tr. 355:24-356:6. Ms. McKnight testified that when she notices an issue with students, she moves toward those students to see what is going on and intervenes if necessary depending on the circumstances. Tr. 571:8-572:7. Furthermore, Superintendent Prestianni testified that on February 6, 2024, Appellant should have changed her teaching method when it became clear that her unstructured time approach was not working, given that many students were wandering aimlessly in the gym or fighting with and hitting other students. Tr. 374:18-375:7. By failing to provide instruction and failing to change her unsuccessful teaching approach, Appellant neglected a critical duty.

[13] Based on Appellant's response to the investigation report, the "unstructured time" was not a singular occurrence on February 6, 2024, but a regular part of Appellant's class. Exh. D-7, p. 8 (The "unstructured time" is "time that has been built into the daily routine and curriculum of physical education.").

In keeping with previous FDAB cases involving neglect of duty, the panel also examines the degree of intentionality or "fault" on the part of the teacher engaged in problematic conduct. *See Wilson v. Grants Pass School District,* FDA 04-07 at 10 (2008), *citing Enfield v. Salem-Keizer School District*, FDA 91-1 (1992), *aff'd without opinion*, 118 Or. App. 162 (1993), *rev den.* 316 Or. 142 (1993). Many neglect of duty cases concern an underlying act that involves some type of intentionality or wrongdoing, designed to injure or harm someone else. *See, e.g*. *Kristen Kibbee v. Bethel School District*, FDA 13-09 (2013) (dismissal of administrator for neglect of duty upheld where administrator with prior history of discipline, grabbed a student's forearm in frustration and then initially lied to her supervisor about the incident); *Thomas v. Cascade Union High School No. 5*, FDA 84-7 (1987) (dismissal of teacher for neglect of duty upheld, where the teacher reacted to a student who had thrown a ball at her by intentionally kicking the student in anger); *Thyfault v. Pendleton School District*, FDA 90-4 (1992) (dismissal of teacher for neglect of duty upheld, where teacher forcefully spanked, grabbed and pulled student in anger); *Webster v. Columbia Education School District,* FDA 96-1 (1998) (neglect of duty upheld for teacher who purchased narcotic drugs on campus and then lied); *Bergerson v. Salem-Keizer School Distr*., 194 Or. App. 301, 324 (2004) (neglect of duty found where educator intentionally drove her van into estranged husband's truck).

Here, the panel concludes that the District met its burden to offer persuasive evidence relating to Appellant's intentionality or "fault." The panel is persuaded that Appellant's decisions and actions, or inactions, rise to the level of intentionality or fault required by FDAB precedent. The evidence establishes that Appellant was aware of her responsibility to supervise students, and received specific counseling to move amongst her students, separate herself from her co-teacher, and supervise the locker rooms. Yet, Appellant chose not to obey these directives, choosing instead to remain on the side-lines, away from students, with her co-teacher. The evidence also establishes that Appellant was expected to provide organized instruction, yet Appellant chose to begin her P.E. classes with unstructured free time during which she provided no instruction. The panel finds that Appellant was aware of her responsibilities and expectations, had readily available alternatives, yet chose a course of

conduct that did not align with her responsibilities and District expectations. Accordingly, the panel finds that Appellant's conduct rises to the level of intentionality or fault in the context of the FDAB's neglect of duty caselaw.

For all the reasons discussed above, the panel concludes that the District met its burden to demonstrate that Appellant neglected her critical duties to supervise students and provide instruction on multiple occasions.

III. The True and Substantiated Facts Are Adequate to Justify the Statutory Ground of Inefficiency.

As FDAB has recognized, "inefficiency" refers to a teacher's use of time, training, and resources to meet the requirements of the job, and inefficiency exists where that use is defective or lacking. *Ferguson v. Dayton School Dist.*, FDA 04-06 at 23 (2004), *affirmed without opinion*, Or. App. A127323 (2006). Inefficiency may be proven through an accumulation of incidents and situations; a series of incidents which demonstrate a teacher's inability, over time, to meet necessary standards; a failure to use his or her abilities, training, and resources to maximize student productivity and minimize classroom disruptions; or a failure to improve despite "great effort by the District" to assist the teacher. Here, the District based its dismissal for inefficiency on the allegations that Appellant failed to supervise students and provide instruction to students.

As discussed above, Appellant's job as a middle school P.E. teacher required her to supervise, instruct, manage, guide, and assure safety of students, and to develop procedures and routines for efficient use of class time. Exh. D-15, pp. 1-2. When an instructional activity is not working, Appellant was required to demonstrate flexibility and responsiveness in instruction by adjusting lessons or searching for alternative approaches. Exh. D-15, p. 2. Appellant failed to meet these requirements by not supervising students and not providing instruction to her students.

Instead of supervising students, Appellant spent time next to or talking to her co-teacher, unengaged with the students she was responsible for supervising. Instead of instructing students, Appellant began class with fifteen minutes of unstructured free time. As a result of Appellant's failure to supervise and failure to provide instruction during this fifteen-minute period, some students did not

participate in any meaningful physical activity and some students behaved poorly, including hitting and fighting other students.

The panel concludes that supervising students and providing effective instruction are necessary job requirements that Appellant failed to perform.

IV. The True and Substantiated Facts Are Not Adequate to Justify the Statutory Ground of Insubordination.

Insubordination within the meaning of ORS 342.865(1)(c) means "disobedience of a direct order or unwillingness to submit to authority," and must be accompanied by a defiant intent or attitude on the part of the teacher. *Bellairs v. Beaverton Sch. District*, 206 Or App 186, 199, 136 P3d 93 (2006). To establish insubordination, there must be credible evidence that the District imposed a lawful order or directive, that it clearly communicated that order or directive, and that the teacher willfully refused to obey the order. *Sherman v. Multnomah Education Service Dist*., FDA-95-4, 22-23 (1996).

Here, the record demonstrates that on September 20, 2019, in a formal written reprimand, the District directed Appellant "to refrain from discussing legal matters from your personal life with any student or staff member in our district during your work time." Exh. D-2 at 10. The reprimand also directed Appellant, as relevant here, to "refrain from speaking about other district personnel in a negative or derogatory manner as outlined in your collective bargaining agreement." *Id*. Later, on April 25, 2024, in the administrative leave letter it issued, the District directed Appellant not to "have conversations with students, staff, community members or others regarding the investigation." The next day, on April 26, Appellant sent a text to Board Chair Guthrie, with whom she had a friendship, "I guess I'm getting fired? No one told me." Later, in the interim between the first investigation report (June 7) and the second investigation report (June 20), Appellant texted Board Chair Guthrie again. This time, on June 18, she expressly stated that she was contacting him in his capacity as board chair. After listing several people she had unsuccessfully tried to contact, including SEA Representative Sconce, she asked, "Can you please give me some guidance on who I can talk to about my concerns?"

On this record, the panel concludes that the true and substantiated facts are not adequate to justify the statutory ground of insubordination. To begin, the 20-day termination notice alleges, "When placed on paid administrative leave, pending investigation into the allegations made regarding your inappropriate conduct, you were directed not to contact anyone regarding the investigation." Exh. D-8 a1 1. The 20-day termination letter does not refer to the 2019 reprimand. The District nonetheless relied at hearing on the 2019 reprimand. Tr. 724:18-24. Because the 20-day notice relied only on the April 2024 administrative leave letter as the lawful directive allegedly disobeyed by Appellant, this panel declines to rely on the 2019 reprimand to justify the insubordination basis for dismissal. *See* ORS 342.895(3)(a) (the 20-day notice "shall contain a plain and concise statement of the facts relied on to support the statutory grounds for dismissal").

The 20-day notice does allege that the April 2024 administrative leave letter constituted a directive and lawful order. Assuming that the April 2024 letter was a lawful order, Appellant's two communications with Board Chair Guthrie were not about the investigation—the only topic prohibited by the directive. In the first text, sent the day after she received the administrative leave letter, Appellant inquired whether she was being fired, presumably in reaction to her daughter's statement that a teacher had said that Appellant would not be returning to work for the rest of the year. In the second text, Appellant stated that she wanted to "voice" some unidentified "concerns," and asked for "guidance" about who she could speak with. Before Board Chair Guthrie responded, Appellant rescinded her question because SEA Representative Sconce had contacted her. Appellant's text merely asked a question about who could receive Appellant's concerns; it was not a communication about the investigation. Therefore, even assuming that the administrative leave letter was a lawful order, Appellant did not willfully refuse to obey it.

Moreover, the panel finds that Appellant's two texts do not demonstrate the type of defiant intent or attitude required by FDAB precedent. In the April 26 text and the June 18 text communications, Appellant did not persist in her communication—such as by sending follow-up texts—when Board Chair Guthrie did not respond. In the first text, Appellant merely stated, briefly,

her assumption that she was fired and noted that no one told her. In the second text, she rescinded her question about who she should contact after SEA Representative Sconce contacted her. The panel finds that the second text demonstrates that Appellant was seeking guidance, rather than seeking to communicate about the investigation. The panel does not find any contextual or other evidence sufficient to conclude that Appellant's texts evince a defiant intent.

On this record, the panel concludes that the District did not meet its burden to prove that Appellant contacted two board members and an administrator "to discuss the ongoing investigation," as alleged in the 20-day termination notice. *See* Exh. D-8 at 1. The District did not offer evidence of communications with the other board member or the administrator contacted by Appellant, as described in Superintendent Prestianni's 20-day termination notice. Appellant's texts to Board Chair Guthrie are insufficient to prove insubordination with a defiant intent or attitude, as required by FDAB precedent.[14]

V. The Dismissal Decision Was Not Unreasonable, Arbitrary, or Clearly an Excessive Remedy.

Because the panel finds that the true and substantiated facts are adequate to support the statutory grounds of neglect of duty, inefficiency, and insubordination, the panel next considers whether the dismissal was arbitrary, unreasonable, or clearly an excessive remedy. If so, the panel may reverse the dismissal for reasons stated with specificity in this opinion. ORS 342.905(6). When the facts justify the grounds stated for dismissal, however, the panel may engage in "only a deferential review" of the school board's decision to dismiss. *Ross v. Springfield Sch. Dist*., 294 Or. 357, 363 (1982). The panel may not set aside a dismissal unless it can say, as a matter of law, that no reasonable school board would have found the relevant facts sufficient for dismissal. *Bergerson*, 194

[14] The District also relied at hearing on a June 26, 2024 social media post as an insubordinate communication. Appellant made that social media post, however, after the District issued its 20-day termination notice. The District did not amend or update the 20-day notice to include the June 26, 2024 social media post as a basis for the insubordination ground for termination. *See* ORS 342.895(3)(a) (the 20-day termination notice must contain a plain and concise statement of the facts relied on). Moreover, the social media post was not in the packet of information provided to the school board. *See* Exh. D-10 at 14-38. On this record, the panel declines to conclude that the social media post is adequate to support the statutory ground of insubordination.

Or. App. At 313, *aff'd*, 341 Or. 401 (2006); *Lincoln County Sch. Dist. v. Mayer*, 39 Or. App. 99 (1979).

Here, the panel does not conclude that the dismissal was unreasonable, arbitrary, or clearly an excessive remedy. As discussed above, Appellant was expected to supervise and instruct her students, two critical duties which she neglected to perform on more than one occasion. Based on the evidence submitted to the panel, we cannot say that no reasonable school board would have found the facts sufficient for dismissal.

Appellant argues that dismissal was unreasonable, arbitrary, and/or clearly an excessive remedy because she was not given notice and an opportunity to correct the conduct at issue and because other teachers have not been dismissed for similar conduct. For the following reasons, Appellant's arguments are unavailing.

While Appellant argues that she was not given notice and an opportunity to correct the conduct at issue, the evidence before the panel suggests otherwise. Appellant is an experienced teacher and her position description clearly states she is required to "supervise, instruct, evaluate, manage, guide, and assure safety of students." Exh. D-15, p. 1. Appellant was specifically counseled about her student supervision in her 2015 and 2016 performance evaluations. *See* Exh. A-4, pp. 65, 70-71. Specifically, in 2015, Appellant was advised she "could be a little more vigilant to student behavior" including "monitoring transitions [after class] as much as possible." *Id*. at 65. In 2016, Appellant was advised to "be a little more vigilant during class time[,]" noting "[i]t would make her management easier if she would move about the gym a little more and check in with individual students on a more regular basis." *Id*. at 70-71. Principal Narkiewicz testified that he had multiple conversations with Appellant about her lack of supervision in the locker room and admonished her that she needed to supervise the locker room. Ms. McKnight and Mr. Prock, also experienced teachers, testified that P.E. teachers are expected to supervise locker rooms and to move amongst students. Based on Appellant's years of experience as a P.E. teacher and the specific counseling and directives she received, Appellant was on

notice of the conduct expected of her. Despite this notice, Appellant did not provide instruction and supervision to her students as demonstrated in the evidence offered at hearing.

Appellant also argues that other teachers were not dismissed for comparable conduct. Appellant offered evidence that a teacher at SHS allowed high school students to drive the school's mini truck. Exhs. A-41-42. The teacher received discipline but was not dismissed. Tr. 379:12-17. Appellant contends this evidence shows the District arbitrarily dismissed her for similar conduct.

The panel concludes this is not a factually comparable scenario to Appellant's conduct. Based on the limited evidence before the panel regarding this teacher, it appears he was disciplined for poor judgment, not for neglect of duty, inefficiency, or insubordination. Of concern to the District was the teacher's decision to permit students to drive the mini truck, not his failure to supervise or instruct his students. Appellant offered no evidence that the teacher was directed verbally, through policy, or otherwise, that high school students were not permitted to drive the mini truck. Because the conduct is not factually comparable to the conduct at issue in this case, Appellant's arguments are unpersuasive.[15]

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

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[15] The most similar comparator is her co-teacher, and information about discipline for that teacher does not exist because he chose to resign.

ORDER

The appeal is dismissed.

DATED this 9th day of April 2025 — */s/ Joshua Wetzel*
Joshua Wetzel, Panel Chair

DATED this 9th day of April 2025 — */s/ Laura Latham*
Laura Latham, Panel Member

DATED this 9th day of April 2025 — */s/ Sascha McKeon*
Sascha McKeon, Panel Member

Notice: 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 April 9, 2025 I served a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** by email:

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