

**BEFORE THE FAIR DISMISSAL APPEALS BOARD
OF THE STATE OF OREGON**

In The Matter of the Appeal of:

VIRGIL RUIZ,

Appellant,

v.

FOREST GROVE SCHOOL DISTRICT,

Respondent.

FDA CASE No. 17-04

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

INTRODUCTION

Appellant Virgil Ruiz (“Ruiz”), a teacher, was dismissed by the Forest Grove School District (“the District”) in August 2017. Ruiz timely appealed his dismissal to the Fair Dismissal Appeals Board (“FDAB” or the “panel”) in an appeal received on September 22, 2017. A two-day hearing on the merits was conducted in Forest Grove, Oregon on May 8 and 9, 2018. Ruiz was represented by Noah S. Warman of McKanna Bishop Joffe, LLP, and the District was represented by Nancy J. Hungerford of the Hungerford Law Firm. The hearing was conducted before the appointed panel consisting of Chair Karen Stratton and Board members John Hartstock and Victoria Purvine. The panel, having considered the evidence and the arguments of counsel, make the following rulings, findings, conclusion, and order.

PANEL RULINGS

Ruiz objected to testimony from the District’s witness Naomi Montelongo. Specifically, Ruiz objected, on grounds of relevancy, to her testifying whether she supported the Superintendent’s decision to dismiss Ruiz. This objection was over-ruled after the District asserted that the testimony was relevant because it would address the decision-making process on whether to return Ruiz to employment.¹

¹ TR 49

Also, Ruiz objected to testimony of the District's witness Brad Bafaro regarding the individual School Board member deliberations as improper corporate entity evidence going to the ultimate issue. This was overruled after the District asserted that the testimony would address whether the Board acted reasonably or not.² Generally, for administrative hearings, ORS 183.450(1) provides:

“Irrelevant, immaterial or unduly repetitious evidence shall be excluded but erroneous rulings on evidence shall not preclude agency action on the record unless shown to have substantially prejudiced the rights of a party. All other evidence of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs shall be admissible. Agencies and hearing officers shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record. Any part of the evidence may be received in written form.”

The FDAB has adopted the Attorney General's Uniform and Model Rules of Procedure under the Administrative Procedures Act. ORS 183.341; OAR 586-001-0005. As such, the admission of evidence in FDAB hearings is governed in part by OAR 586-030-0055(1), generally admitting evidence “commonly relied upon by reasonably prudent persons in the conduct of their serious affairs.”

In over-ruling the objections, the panel reasoned that (a.) Montelongo's testimony about the Superintendents' decision to dismiss and (b.), Bafaro's testimony about the School Board's deliberations, represented evidence commonly relied upon by reasonably prudent persons when conducting their serious affairs. Moreover, admission of the evidence did not substantially prejudice the rights of either party.

FINDINGS OF FACT

Ruiz's Work Experience and Work Environment

1. Ruiz's teaching experience spans more than 21 years and includes teaching kindergarten through grade 12. Over the last 10 years he worked for the District. Around the time the events referenced herein took place, Ruiz taught English Language Development at Fern Hill

² TR 104-108

Elementary School (“Fern”), for kindergarten and grades 1 through 4.³ No evidence in the record reflects that Ruiz was previously disciplined.

2. Ruiz taught multiple groups of students in 30 minute blocks that came into Ruiz’s class from their home rooms.⁴

3. Ruiz’s classroom was equipped with a sink, tables, chairs, and an overhead projector. It was also supplied with staplers, scissors, tacks, pencils, and paperclips.⁵

District Witnesses and Policies

4. Naomi Montelongo (“Montelongo”) has been the principal at Fern for fifteen years and supervised Ruiz for four years.⁶

5. Kevin Norcen (“Noreen”) is the District’s Human Resources Director and has held the position for the last three years.⁷

6. Consuelo Yvonne Curtis (“Curtis”) was the Superintendent for the Forest Grove School District at the time of the events involving the termination of Ruiz.⁸

7. Brad Bafaro (“Bafaro”) was and is the vice chair for the School Boards.⁹

8. This case concerns an alleged incident involving a small knife attached to a multi-tool belonging to Ruiz, and a student who claimed to have been nicked by it. The District did not provide evidence of any written policy or verbal direction prohibiting teachers from bringing knives into the school or classrooms, and did not provide evidence of written policies or criteria providing direction for when a teacher must report an incident to a principal, or when a teacher must contact a parent in the case of an injury or potential injury.¹⁰

³ TR 159-160

⁴ TR 30

⁵ TR 53, 136-137

⁶ TR 28, 31

⁷ TR-57

⁸ TR 126

⁹ TR 102

¹⁰ TR 51, 53, 81, 115-116, 136, 138-139

March 16, 2017 Incident

9. On March 16, 2017, Ruiz was teaching a classroom of about 20 second-grade students; between the ages of 7 and 8.¹¹

10. Ruiz carried a multi-tool in a leather pouch on his belt while at work. The multi-tool included a screw-driver and a blade of about 1.5 to 1.75 inches long. Ruiz regularly carried this multi-tool on his belt while at work for a number of years.¹²

11. Ruiz's multi-tool was visible to the naked eye. Montelongo had seen the leather pouch holding the tool on Ruiz's belt in passing. She assumed it was a pager or cell phone, but never asked Ruiz to confirm what it was.¹³

12. On the day in question, before class began, Ruiz found two left over cupcakes in the faculty lunch area and brought them into the classroom as a reward for participation. When he realized that he needed several pieces of cupcake to have enough rewards, he asked a student to use a popsicle stick to cut the cupcakes, but it didn't work. Ruiz then decided to use the knife from his multi-tool.¹⁴

13. A student (hereinafter, the "Student") got out of his seat and quickly came towards Ruiz while Ruiz was holding the multi-tool with the knife exposed.¹⁵

14. Ruiz directed the Student to return to this seat, and placed his hand over the knife to shield the blade from the Student when the Student approached.¹⁶

15. The Student later claimed to have had contact with the knife while Ruiz was holding the knife in his right hand and using his left hand to gesture to the Student to return to his seat. However, Ruiz did not notice a reaction from the Student at this point of presumed contact and does not have any recollection of the knife making contact.¹⁷

¹¹ TR 31, 161

¹² TR 62, 170-171, 185, and D-5, page 2

¹³ TR 45-46, 171

¹⁴ TR 45-46, 171

¹⁵ TR 45-46, 171

¹⁶ TR 173

¹⁷ TR 67, 172-173, 174, 191-192, 196-197, and Ex. D-6

16. The Student returned to his seat. Ruiz later noticed the Student was crying and touching his shoulder.¹⁸

17. Ruiz looked at the Student's shoulder and noticed a small indent, but no blood. Ruiz said to the Student, in front of others in the classroom, that "I must have been the one to poke you."¹⁹

18. No witnesses testified to directly observing the "poke" or "cut" to the Student from or by Ruiz. Ruiz testified that he assumed, but did not actually notice, he had poked the Student.²⁰

19. Ruiz asked the Student if he wanted to go to the office to get a Band-Aid or ice, but the Student did not wish to go to the office. Ruiz then directed the Student to wash his arm with soap and water. Ruiz observed the Student smile at this point.²¹

20. Ruiz did not direct the Student to go to the office to have his shoulder examined and Ruiz never informed the front office, principal or parent of the Student about the incident with the knife and the Student getting hurt.²²

21. At some point, Ruiz handed the knife to another second-grade student, whom he viewed as responsible and directed that student to wash the knife at the sink on one wall of the room. Ruiz testified that he could always see the student with the knife and that no other students touched the knife. Ruiz could not recall exactly when and how the knife got back into its holster.²³

Report and Investigations

22. Neither the Student nor the Student's parent testified. The District provided evidence, through Montelongo's testimony, that the Student's mother found out about the incident from her son on the Friday afternoon of March 16, 2017. She reported the incident to the Forest Grove Police Department. She then reported the incident to Principal Montelongo the following Monday, March 20, 2017.²⁴

¹⁸ TR 68, TR178-179, 190, 194-195, and D-6, page 2

¹⁹ TR 68, 179, and D-6, pages 2 and 5

²⁰ TR 196-197

²¹ TR-69, 180, 181

²² TR 68, 71, TR 182, 183

²³ TR 68, 168, 177-178

²⁴ TR 32 and, 39

23. The Student's mother reported to Montelongo that the Student said that Ruiz pulled out a pocketknife, put it on the Student's arm, and the Student's mother could see a scratch on the arm.²⁵

24. Montelongo then interviewed the Student who reported that Ruiz told the Student to go to his seat and then Ruiz "poked" the Student with the knife. The Student said he started bleeding a little during the class because of the poke and Ruiz looked at the Student's arm.²⁶

25. Montelongo testified that she took a picture of the cut on the Student's arm. The photo shows a very faint mark.²⁷

26. Montelongo testified that she also interviewed two other students, Student-A and Student-B, who were in the classroom at the time. Neither Student-A nor Student-B told Montelongo that they saw Ruiz cut or poke the Student. Student-A saw the Student crying and heard Ruiz telling the Student to go to the office, but the Student did not want to go. Neither Student-A or Student-B told Montelongo that they saw the Student's arm bleeding. Student-A told Montelongo that he did not see a mark.²⁸

27. On March 20, 2017, Montelongo contacted District Human Resources Director Kevin Noreen and discussed the incident. That same day, Noreen, Montelongo, Ruiz, and Ruiz's union representative met. The District also removed Ruiz from the classroom and put him on paid administrative leave.²⁹

28. On March 21, 2017, in the presence of Montelongo, Forest Grove Police Officer Clarice Gordon interviewed Student A and Student B, who were present at the incident. The District did not present the Officer to testify. According to Montelongo's testimony and the police report, Student-A told Officer Gordon that Ruiz handed the knife to Student-D to wash the knife, cut the cupcake, and then wash it again. Officer Gordon also interviewed Student-D, who said that Ruiz

²⁵ TR 33

²⁶ T 36, D-3

²⁷ TR 37, D-5, page 1

²⁸ TR 37-38, D-3

²⁹ TR 38, 61

gave him the knife to cut the cupcakes. Neither Student-A nor Student-B told Officer Gordon that they saw Ruiz poke the Student with a knife and they did not see the Student bleeding.³⁰

29. The police, Montelongo, and Noreen did not interview Student-C regarding whether Ruiz gave her the knife.³¹

30. On March 24, 2017, Forest Grove Police Detective McCutchen interviewed Ruiz. In the interview, Ruiz demonstrated to Detective McCutchen how he covered the blade when the Student approached Ruiz. Ruiz thought that while he was motioning for the Student to return to his seat, the Student might have brushed Ruiz's hand that was holding the knife. Ruiz denied giving the knife to Student-D, a male student to wash, but said he gave the knife to Student-C, a female student, to clean and use. Ruiz also said he was uncertain how the tool made its way back into his holster. Minutes later, Ruiz noticed the Student crying. Ruiz said there was no bleeding at the time, only a small indent. Ruiz then told the Student that he must have poked the Student.³²

31. While the evidence shows that the Forest Grove Police referred the matter to the District's Office, no evidence in the record shows that criminal prosecution was pursued.³³

32. On April 28, 2017, Noreen conducted an investigatory meeting with Ruiz, along with the District's attorney, Brian Hungerford.

33. During the April 28 interview, Ruiz said he didn't "exactly know how, but that the Student's body brushed his hand that was covering his knife." Ruiz stated that he directed the Student back to his seat, and minutes later noticed the Student crying. Ruiz said there was no bleeding at the time, only a small indent. Ruiz then admitted that he must have poked the Student. Ruiz again stated that he gave the tool to Student-C to clean and use to cut the cupcake and was uncertain about how and when the tool made its way back into his holster.³⁴

³⁰ TR 42, D-3, p.3 and D-15, p. 5 (page 4 of the police report)

³¹ TR 43 and TR 70, D-3, p. 3, D-15, pages 10-11

³² D-15, pages 7-9

³³ TR 63-64, D-15, page 9 references "WCDA", presumably the Washington County District Attorneys' office.

³⁴ TR 64-65, D-6, pages 1-3 and 4-6

Comparable Discipline from 2015

34. In 2015, the District issued a reprimand and one-day suspension to a teacher involved in an incident that resulted in a child becoming physically hurt.³⁵

35. In that case, the teacher lifted a fourth-grade student off the ground to correct the child who was not listening to the teacher. Once lifted, the child's legs flailed and struck the teacher. The teacher responded by dropping the child. In doing so, the child hit his head against a wall and reported being in pain the rest of the day.³⁶

36. In that case, the teacher asked the child if he wanted to go to the office, but the child did not want to go to the office. The teacher did not report the incident to his supervisor or the child's parents.³⁷

Decision to Terminate Ruiz

37. In making its decision, according to Noreen's and Bafaro's testimony, the District did not take into consideration the comparable discipline issued by the District in 2015.³⁸

38. Noreen recommended to the Superintendent that Ruiz be discharged for neglect of duty and immorality.³⁹

39. Curtis accepted Noreen's recommendation that Ruiz be discharged, and likewise recommended Ruiz's termination to the School Board.⁴⁰

40. Neither Noreen or Curtis mentioned, in their respective recommendations, that Ruiz attempted to cover the blade from the Student during the incident. In his recommendation to Curtis, Noreen did not mention that Ruiz asked the Student if he wanted to go to the office.⁴¹

41. On September 12, 2017, the School Board accepted the recommendation, adopting the Superintendents' facts and conclusions, and decided to terminate Ruiz for neglect of duty.⁴²

³⁵ A-4, TR-131-132

³⁶ TR 144-145, 148, A-4

³⁷ TR 145-146, A-4

³⁸ TR 95, 111, 117, 121

³⁹ TR 75-76, D-9

⁴⁰ D-1

⁴¹ TR 94, 137, D-9

⁴² D-14.

42. By letter dated September 20, 2017, Ruiz appealed to the Fair Dismissal Appeals Board from the District's decision to dismiss him from employment.

CONCLUSIONS OF LAW

1. The District is a "fair dismissal district" under the Accountability for Schools for the 21st Century Law.⁴³ Appellant is a "contract teacher" and entitled to a hearing before this panel.⁴⁴

2. The facts are not true and substantiated that Ruiz struck or poked a student with a knife that caused the student to bleed from the arm and that Ruiz saw that the Student had bled from his arm.

3. The facts are not true and substantiated that Ruiz saw that the Student was bleeding and therefore required medical attention, or reporting to Ruiz's supervisor or the Student's parents.

4. The true and substantiated facts are not adequate to support the charge of neglect of duty which constitutes a ground for the contract teacher's dismissal.

5. This panel concludes that the true and substantiated facts are not adequate to support the grounds for dismissal relied upon by the District. It is therefore unnecessary for this panel to consider whether the dismissal of Appellant was arbitrary, unreasonable, or clearly an excessive remedy within the meaning of ORS 342.905(6).

Discussion

I. Applicable Legal Standard

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

⁴³ ?

⁴⁴ ?

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).

In *Bergerson*, the Court reversed and remanded an FDAB reinstatement order based on its failure, in the third step of the review process, to articulate and apply a rational connection between the true and substantiated facts and its conclusion that the teacher’s dismissal was unreasonable and excessive. *Bergerson*, 341 Or. at 415. In *Bergerson*, the Oregon Supreme Court affirmed the Court of Appeals.⁴⁵ While the Court of Appeals held that the FDAB could not “substitute its judgment” for the district, the Oregon Supreme Court instead held that the FDAB’s “findings did not support its order.”⁴⁶

⁴⁵ 194 Or.App. 301 (2004)

⁴⁶ *Bergerson*, 194 Or.App. 301; 341 Or. 401, respectively

As explained below, as part of the first and second part of the review process, the panel concludes that the District failed to establish critical alleged facts, and therefore did not establish that Ruiz engaged in a neglect of duty.

II. The Facts Relied Upon by the District are not True and Substantiated

The panel finds that critical alleged facts relied upon by the District to support Ruiz’s dismissal are not true and substantiated. The District did not prove, and therefore did not establish as true and substantiated that Ruiz struck a student with a knife and *caused* bleeding. For related reasons, the District did not prove, and therefore did not establish as true and substantiated that Ruiz was aware that the student was harmed from the knife in such a manner that required Ruiz to seek medical attention, report the incident to his supervisor, or report the incident to the parents.⁴⁷

The District must prove its factual allegations under a preponderance of the evidence. OAR 586-030-0055(5). The Appellant’s witness credibility regarding a singular incident can determine whether alleged facts are true and substantiated.⁴⁸ Direct witness testimony must be analyzed against unsworn hearsay evidence. However, hearsay evidence may comprise substantial evidence in administrative hearings. *See, Cole v. Driver and Motor Vehicle Services Branch*, 336 Or. 565, 585 (2004), *citing to, Reguero v. Teachers Standards and Practices Com’n*, 312 Or. 402, 418 (1991). Hearsay evidence must be sufficiently reliable and probative to form a basis for a finding of fact. *Cole*, 336 Or. at 586-587. Otherwise, the hearsay evidence will not constitute substantial evidence. *Id.*, at 591-592.

It is the statutory duty of the FDAB to resolve evidence conflicts and resolutions to conflicting evidence do not constitute error. *Bergerson*, 194 Or.App. at 323, *citing to, Bethel School Distr. V. Skeen*, 63 Or.App. 165, 171, *rev.den.* 295 Or. 617 (1983). This can include

⁴⁷ D-1, page 2

⁴⁸ *See, Meier v. Salem-Keizer School District*, 284 Or.App. 497, 503 (2017) and *Thyfault v. Pendleton School District, No. 16R, FDA 90-4*, pages 21-22 (1991).

circumstances in which an appellant-teacher's testimony becomes more persuasive and credible than contradictory evidence before the panel.⁴⁹

Ruiz was the only one at the hearing that testified as a direct witness of the incident on March 16, 2017 involving the allegations about the knife making contact with the Student. Ruiz's prior statements to the police on March 24, 2017 and to Noreen on April 28, 2017, were remarkably consistent; that Ruiz was attempting to shield the knife when the Student rapidly approached Ruiz; that Ruiz gestured for the Student to return to his seat, and did not perceive any contact between the blade and the student.⁵⁰ In both interviews, Ruiz admitted that he only later thought he must have "poked" the Student accidentally at the time, but did not see any blood, only a small indentation.⁵¹ The District argued that Ruiz did not have a clear recollection of the order of events in his testimony. However, Ruiz's testimony was consistent with his prior admissions and reflected a genuine lack of recall; that he never perceived how the alleged contact with the knife happened.⁵² For these reasons, the evidence supporting the allegation that Ruiz *caused* a cut or poke to the Student was not established through Ruiz's prior admissions or testimony.

In addition, the evidence introduced by the District to show that Ruiz poked or cut the Student was unreliable for multiple reasons. First, as mentioned, no-one testified to directly witnessing either the poking or the cutting. Second, the direct eye-witness testimony of Ruiz directly contradicted the allegation that he cut or poked the Student. Ruiz only assumed later that he poked the Student. Third, in their hearsay statements, Student-A and Student-B did not see a poke or cut *with or by* the knife when previously interviewed by Montelongo and the police.⁵³ This is important for a fourth reason: because the Student's hearsay statements appeared to identify Student-A and Student-B as witnessing the alleged event.⁵⁴ For this reason, the Student's

⁴⁹ For example, see *Skeen*, 295Or. at 171-172, and, for some allegations *Kibee v. Bethel School District*, FDA-13-09, page 19 (2014). In *Kibee*, additional substantiated evidence was sufficient to uphold the dismissal.

⁵⁰ D-6, pages 1-2; D-15, pages 7-8 (pages 6-7 on pages of police report)

⁵¹ D-6, p.2; D-15, page 8 (page 7 on police report)

⁵² TR 191-197

⁵³ TR 37-38; D-3, page 2; D-15, page 3 (page 4 of police report)

⁵⁴ D-3, page 1

hearsay statements were unreliable, and since the Student did not testify, his unsworn statements were also not probative to establish that Ruiz *caused* the cutting or poking.

On a related and second alleged and critical fact, the panel does not find the allegation true and substantiated that contact between Ruiz holding the knife and the Student caused the Student to bleed. Again, this is based on multiple reasons. Similar to above, Ruiz as a direct witness testified explicitly that he did not perceive any bleeding. This testimony was consistent with his prior admissions. Again, in their prior hearsay statements, Student-A and Student-B denied seeing the Student bleeding.⁵⁵ This is again important because the Student identified Student-A and Student-B as having seen the alleged event.⁵⁶ The photograph evidence of a small mark on an arm was taken four days after the alleged incident and was based on the Student's hearsay statement that he was cut by Ruiz. The photograph also did not demonstrate any clear signs of present or past bleeding; the mark was faint and minuscule.⁵⁷

For these reasons, the unsworn hearsay statements of the Student were not reliable and probative and therefore insufficient to establish that Ruiz *caused* the Student to bleed. This evidence must be contrasted against Ruiz's credible and consistent testimony that there was no blood. Moreover, the unsworn hearsay statements of Student-A and Student-B corroborated Ruiz's testimony of an absence of blood.

III. The True and Substantiated Facts Are Not Adequate to Justify Dismissal for Neglect of Duty

"Neglect of duty, including duties specified by written rule" is a permissible ground for terminating a contract teacher under ORS 342.865(1)(d). This panel concludes that the true and substantiated facts are inadequate to support a dismissal for neglect of duty within the meaning of ORS 342.865(1)(d). Neglect of duty means the "failure to engage in conduct designed to

⁵⁵ TR-37-38; D-3, page 1; D-15, page 3 (page 4 on police report)

⁵⁶ D-3, page 1

⁵⁷ D-3, page 1. The date of the notes reference the date of the photo.

result in proper performance of duty.” *Meier v. Salem-Keizer School District*, FDA-13-01, page 30 (2013), *affirmed*, 284 Or.App. 497, 508-509 (2017), *review denied*, 362 Or. 175 (2017).⁵⁸

“Neglect of duty, as used in the statute, could occur through repeated failures to perform duties of relatively minor importance, on the one hand, or could occur through a single instance of failure to perform a critical duty, on the other hand.”

Meier, FDA-13-01, page 31, *citing to Wilson*, at p. 10, *citing Enfield v. Salem-Keizer School District*, FDA-91-1 (1992), *affirmed without opinion*, 118 Or.App. 162 (1993), *rev. denied*, 316 Or. 142 (1993).⁵⁹

Establishing a teacher’s neglect of duty for a singular incident obligates the FDAB to review the evidence carefully. The conduct will unlikely rise to the level of neglect of duty if the employer “has not previously considered the conduct at issue as grounds for immediate termination.” *Meier*, FDA-13-01, page 31. In *Meier*, the teacher’s dismissal was set aside based, in part, on the district’s previously issuing a lesser discipline to a prior employee that failed to report possible sex abuse. *Id.*⁶⁰

Subsequent courts have recognized FDAB cases could apply the neglect of duty standard to singular incidences; from a teacher spanking a child, buying drugs on school grounds, and from a teacher kicking a student.⁶¹ The correct focus for the neglect of duty standard is on the propriety of a teachers’ conduct in the light of the teacher’s responsibilities to the district and his students. *Jefferson County School Dist. No. 509-j v. FDAB*, 102 Or.App. 83, 90 (1990).

The true and substantiated facts are not adequate to demonstrate that Ruiz repeatedly failed to perform minor duties or failed to perform a singular critical duty. There is evidence from Ruiz’s non-hearsay testimony that the Student rushed up to Ruiz while Ruiz held the knife

⁵⁸ *Citing to, Wilson v. Grants Pass School District*, FDA-04-7, p. 9 (2005). Also cited by *Thomas v. Cascade Union High School, Dist., No 5*, 80 Or.App. 736, 740 (1986).

⁵⁹ The *Thomas* court reversed the FDAB for failing to remand the case to the school district for further consideration, but adopted the neglect for duty definition. *Thomas*, 80 Or.App. at 333. *Bergerson* abrogated the *Thomas* court in regards to the remand requirement. *Bergerson*, 194 Or.App. at 322-323. However, *Bergerson* recognized the neglect of duty standard in *Thomas*. *Bergerson*, 194 Or.App. at 316.

⁶⁰ See also, *Wilson*, FDA-04-07, at pages 10-11

⁶¹ *Thyfault v. Pendleton School District, No. 16R*, FDA 90-4 (1991); *Webster v. Columbia Education Service District*, FDA 96-1 (1998); *Thomas v. Cascade Union High School District No. 5*, FDA 84-7 (1987).

and that Ruiz took steps to shield the Student from the knife.⁶² Neither Ruiz nor any other witness testified to actually witnessing the alleged poke or cut with the knife. As this was a singular alleged incident, the lack of evidence showing causation means that Ruiz did not fail to perform a critical proprietary duty in light of his responsibilities.

There is also insufficient evidence that the Student was later bleeding and that Ruiz knew the child was bleeding and therefore knew he should report the hurt child to his supervisor, the parent of the child, or seek medical attention for the child. From Ruiz's testimony, and the hearsay statements from students that were present and interviewed, the Student was not bleeding.⁶³ Ruiz also testified that after he asked whether the crying Student wanted to go to the office, the Student refused and later even smiled. As Ruiz credibly testified:

O: [By Ruiz's counsel]: Why not send him to the office whether or not he wanted to go?

A: [By Ruiz]: *Well, for one, there was no blood. It wasn't serious. He was smiling. And I just took it that it was on the level of a paper cut, something that because there's no bloodborne pathogen so therefore Band Aids would not have done anything.*⁶⁴

[Emphasis added.] The evidence does not support the conclusion that Ruiz would reasonably know, or even could know, that the Student was hurt enough to require medical attention, a report to Ruiz's supervisor, or a report to the Students' parents. Based on this evidence, the evidence is insufficient to show that Ruiz failed to perform a critical duty because the evidence did not establish the circumstances requiring a critical duty.

Failure to report an incident does not constitute a neglect of duty when the teacher does not have a reasonable basis to believe an incident as alleged occurred. *Meier v. Salem-Keizer School District*, FDA-13-01, pages 30-31 (2013), *affirmed*, 284 Or.App. 497, 508-509 (2017), *review denied*, 362 Or. 175 (2017). Here, based on Ruiz's observations that there was no serious injury and conclusion that there was nothing to report was reasonable.

⁶² TR 173

⁶³ TR 37-38, 179; D-3, page 1; D-15, page 3

⁶⁴ TR 181 (emphasis added). See also TR 180

Even assuming the critical allegations described above were found true and substantiated, there is also evidence that the District has previously issued a reprimand and one day suspension of a teacher that *intentionally* grabbed, picked-up, dropped and hurt a student. The teacher also did not report the incident to his supervisor or the student's parents.⁶⁵ In this case, however, the evidence supporting causation was not sufficiently established as described above.

IV. Whether the Dismissal was Unreasonable, Arbitrary or Excessive

As cited above, ORS 342.905(6) requires a three step review process. The first step requires the FDAB to determine whether the facts relied upon to support the statutory grounds for dismissal are true and substantiated. On the most critical alleged facts, the FDAB does not find the facts relied upon support a statutory ground for dismissal. For this reason, the FDAB does not reach the final step of review as to whether the dismissal was unreasonable, arbitrary or excessive.

ORDER

The dismissal of Appellant is set aside. Appellant shall be reinstated to his position and shall be paid full back pay from the date of dismissal to the date of reinstatement.

DATED this _____, 2018

Karen Stratton , Panel Chair

DATED this _____, 2018

John Hartstock, Panel Member

DATED this _____, 2018

Victoria Purvine, 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.

⁶⁵ A-4.

Even assuming the critical allegations described above were found true and substantiated, there is also evidence that the District has previously issued a reprimand and one day suspension of a teacher that *intentionally* grabbed, picked-up, dropped and hurt a student. The teacher also did not report the incident to his supervisor or the student's parents.⁶⁵ In this case, however, the evidence supporting causation was not sufficiently established as described above.

IV. Whether the Dismissal was Unreasonable, Arbitrary or Excessive

As cited above, ORS 342.905(6) requires a three step review process. The first step requires the FDAB to determine whether the facts relied upon to support the statutory grounds for dismissal are true and substantiated. On the most critical alleged facts, the FDAB does not find the facts relied upon support a statutory ground for dismissal. For this reason, the FDAB does not reach the final step of review as to whether the dismissal was unreasonable, arbitrary or excessive.

ORDER

The dismissal of Appellant is set aside. Appellant shall be reinstated to his position and shall be paid full back pay from the date of dismissal to the date of reinstatement.

DATED this Oct. 11, 2018

Karen Stratton
Karen Stratton, Panel Chair

DATED this _____, 2018

John Hartstock, Panel Member

DATED this _____, 2018

Victoria Purvine, Panel Member

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⁶⁵ A-4.

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ORDER

The dismissal of Appellant is set aside. Appellant shall be reinstated to his position and shall be paid full back pay from the date of dismissal to the date of reinstatement.

DATED this _____, 2018

Karen Stratton, Panel Chair

DATED this October 11, 2018

John Hartsock

John Hartstock, Panel Member

DATED this _____, 2018

Victoria Purvine, Panel Member

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ORDER

The dismissal of Appellant is set aside. Appellant shall be reinstated to his position and shall be paid full back pay from the date of dismissal to the date of reinstatement.

DATED this _____, 2018

Karen Stratton, Panel Chair

DATED this _____, 2018

John Hartstock, Panel Member

DATED this Oct 11, 2018

Victoria Purvine
Victoria Purvine, Panel Member

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⁶⁵ A-4.

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2018, I served a true and correct copy of the Findings of Fact, Conclusions of Law and Order the method indicated below:

Noah S. Warman Attorney at Law McKanna Bishop Joffe LLP 1635 NW Johnson Street Portland, OR 97209 Email: nwarman@mbjlaw.com	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/>	HAND DELIVERY U.S. MAIL OVERNIGHT MAIL TELECOPY (FAX) ELECTRONICALLY
Nancy J. Hungerford Attorney at Law The Hungerford Law Firm LLP 653 S Center Street Oregon City, OR 97045 Email: nancy@hungerfordlaw.com	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/>	HAND DELIVERY U.S. MAIL OVERNIGHT MAIL TELECOPY (FAX) ELECTRONICALLY

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General

Jonathan Groux, OSB# 981555
Senior Assistant Attorney General
Jonathan.groux@state.or.us