BEFORE THE FAIR DISMISSAL APPEALS BOARD

OF THE

STATE OF OREGON

In the Matter of the Appeal of BILL MARTIN, Appellant, *v.* GRESHAM-BARLOW SCHOOL DISTRICT, District.	**Case No.** FDA-24-02 **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

INTRODUCTION

Appellant, a contract teacher, was dismissed from his employment with the Gresham-Barlow School District ("District") on June 17, 2024. He timely appealed to the Fair Dismissal Appeals Board ("FDAB" or the "panel") on June 24, 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 Portland, Oregon on February 26, 2025. Appellant appeared *pro se*, 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 Chair Jim Westrick, Panelist Robert Sconce, and Panelist Tory McVay. The panel, having considered the evidence and the arguments of counsel, makes the following rulings, findings, conclusions of law, and order.

PANEL RULINGS

Partial Consolidation With Case No. FDA-24-06, *Laura Martin v. Gresham-Barlow School District*

During prehearing proceedings held pursuant to OAR 586-030-0037(9), the parties agreed that this case would be consolidated for hearing with Case No. FDA-24-06, *Laura Martin v. Gresham-Barlow School District*. Subsequently, the panel decided that the hearing in Case No. FDA-24-06

would take place first, on February 25, 2025, and the hearing in this case would take place second, on February 26, 2025. Appellant was present during the hearing in Case No. FDA-24-06.

Both parties in this case agreed that the record in Case No. FDA-24-06 would be part of the record in this case. *See* Tr. 28:12 to Tr. 29:23 (Appellant and the District agree that the evidence in the record in Case No. FDA-24-06 shall be included in the record in this case).

Evidentiary Rulings

The panel admitted Appellant's Exhibit A-1, comprised of documents, as well as Exhibit A-2 (excerpt from the video recording of the June 24, 2024 Gresham-Barlow School District Board meeting) and Exhibit A-3 (excerpt from the video recording of the May 9, 2024 pretermination meeting).

The panel admitted the District's Exhibits D-1 through D-5.

FINDINGS OF FACT

Appellant's Employment and Background Facts

1. Appellant was a science teacher at Sam Barlow High School. Appellant's letters of recommendation reflect that Appellant excelled at creating "hands-on learning experiences for his students" and a "classroom environment that is conducive to learning." Exh. A-1 at 91. According to a colleague, Appellant "eagerly" took up "extra responsibilities by teaching a multiple of science subject areas including Biology, Physical Science and Environmental Science[.]" The colleague also noted that Appellant's "ability to connect with his students and his talent at teaching simple concepts, as well as more advanced topics, are both truly superior." Exh. A-1 at 92.

2. On January 22, 2020, Appellant and his spouse, Laura Martin, also a teacher at SBHS, expressed concerns to Superintendent James Hiu about the work performed by the District with funds resulting from a bond issuance. Exh. D-3 at 36; Exh. D-3 at 46.

3. Over the course of his employment, Appellant submitted numerous complaints about his work environment. *See, e.g.*, Exh. A-1 at 48 (Appellant and his spouse notify Superintendent James Hiu in May 2019 that they intend to file complaints with Oregon Occupational Safety and Health

(OSHA) and the Oregon Bureau of Labor and Industries); Exh. A-1 at 75 (referring to a 2021 lawsuit filed by Appellant against the District alleging discrimination and retaliation claims); Exh. A-1 at 16 (referring to complaints filed in July 2022 by Appellant and his spouse with the Teacher Standards and Practices Commission against James Hiu, Bruce Schmidt, and District Board Member Mayra Gomez); Exh. A-1 at 2, 6 (September 2022 whistleblower complaint against Superintendent James Hiu submitted by Appellant and his spouse); Exh. A-1 at 66-67 (referring to 2022 complaint by Appellant and his spouse about Human Resources Specialist Noelle Thelen); Exh. A-1 at 19 (April 3, 2024 comments to the board by Appellant regarding "bond fraud and waste").

4. Ultimately, Appellant, along with his spouse, filed a lawsuit against the District, James Hiu, and Bruce Schmidt, Jr. in Multnomah County Circuit Court. Appellant alleged discrimination on the basis of family association under ORS 659A.309 and retaliation under ORS 659A.030, 659A.190, and 659A.203. Exh. D-4 at 9.

Events Related to 2022-2023 School Year

5. Appellant was absent from work at the beginning of the 2022-2023 school year. Exh. D-2 at 1. On September 20, 2022, the District provisionally granted Appellant medical leave under the Family and Medical Leave Act (FMLA) and the Oregon Family Leave Act (OFLA). Exh. D-2 at 1-6.

6. In a letter dated December 2, 2022, District human resources employee Randall Bryant reminded Appellant that his paid leave would be exhausted on December 6, 2022 and he would enter exhausted paid leave status through December 20, 2022. Exh. D-2 at 10. The District noted that Appellant's provisionally designated FMLA leave would be exhausted on December 6, 2022 and his provisionally designated OFLA leave would be exhausted on December 8, 2022. Exh. D-2 at 10.

7. In the December 2, 2022 letter, the District asked Appellant to let the District know his intentions and asked him to share: "1. Is it your intention to seek sick leave from the Sick Leave Bank (Article 13 – Collective Bargaining Agreement); 2. Is it your intention to request an Unpaid Leave (Article 15 – Collective Bargaining Agreement); 3. Is it your intention to return to work." Exh. D-2 at 10. Mr. Bryant wrote, "It is extremely important that you reach out to me if you have any questions

regarding the content of this email, and your intentions moving forward when your protected leave has been exhausted. If we do not hear from you by December 20, 2022, we will be forced to consider other options." *Id*.

8. In a letter to Appellant dated January 4, 2023, Mr. Bryant explained that the District had sent communications to Appellant throughout the provisionally designated FMLA and OFLA leaves apprising Appellant of the leaves he had available and when they would exhaust. The letter recounted that the District had adjusted Appellant's unpaid leave absences to include the days for conferences that were not originally accounted for. Mr. Bryant reminded Appellant that, in his December 2, 2022 letter, Mr. Bryant had requested that Appellant notify the District "no later than December 20, 2022 if your intention was not return to work." Exh. D-2 at 12. "To date," wrote Mr. Bryant, "I have not received any communication from you on this matter." *Id*. The letter explained that if Appellant did not notify the District by January 20, 2023 of Appellant's intentions related to his employment, the District would "be forced to proceed with a recommendation for the termination of your employment." *Id.*

9. In a letter dated January 25, 2023, Executive Director of Human Resources Dr. Angela Freeman notified Appellant that she was recommending termination of Appellant's employment because, despite multiple communications, at "the current time, you have exhausted all statutory and contractual leave, and accordingly are considered to be absent without approval" and, as a result, the District was "forced to proceed with this recommendation for the termination of your employment." Exh. D-3 at 25.

10. In a letter dated February 1, 2023, Superintendent James Hiu notified Appellant that he had determined that Appellant had abandoned his position. Exh. D-3 at 26. Therefore, Superintendent Hiu intended to recommend to the District school board at its March 1, 2023 meeting that Appellant be dismissed. Superintendent Hiu explained, "The reasons for my consideration come from your lack of response to the communication from the Human Resources Department related to your intent of returning to your position. Currently, you have exhausted all statutory and contractual leave, and are

considered to be absent without approval. By your actions of not communicating with the District, you have abandoned your position." Exh. D-3 at 26.

11. In response, attorney Noah Barish, acting on Appellant's behalf, requested an unpaid leave of absence for Appellant. Exh. D-2 at 13. The District approved the unpaid leave of absence for the remainder of the 2022-2023 year. *Id.* In the March 1, 2023 letter notifying Appellant that the District approved the unpaid leave for the 2022-2023 school year, Mr. Bryant wrote, "A notification to the District of your intent to return to your active employment is needed by April 14, 2023." *Id*. The letter further informed Appellant that because the District was approving the unpaid leave requested by Attorney Barish, the District would "not be proceeding at this time with a recommendation for your termination from employment with the District." *Id*.

12. Appellant did not report to work for any portion of the 2022-2023 school year. Exh. D-3 at 45; Tr. 32:7-12.

Events Related to the 2023-2024 School Year

13. Appellant did not report to work at the beginning of the 2023-2024 school year. Tr. 40:4 to 41:7.

14. On September 14, 2023, Appellant and Attorney Barish attended a meeting with Principal Jason Bhear and Executive Director of Human Resources Dr. Freeman. Exh. D-3 at 13. The District believed that the purpose of the meeting was to discuss Appellant's return to work. Tr. 33:16 to 34:12; 38:1-13. Appellant believed that the purpose of the meeting was to begin the interactive process under the Americans With Disabilities Act to discuss reasonable accommodations for Appellant. *Id.*

15. On September 15, 2023, Appellant's health care provider sent the District a "Physician's Statement/ADA Accommodation." The form documented that Appellant had post-traumatic stress disorder and diabetes. Exh. D-3 at 8. Also on September 15, 2023, Attorney Barish asserted on Appellant's behalf that the District had sufficient information from Appellant's health care provider to engage in an interactive process to discuss whether reasonable accommodations existed to

enable Appellant to perform the essential functions of his job. Exh. D-3 at 11. Attorney Barish submitted a list of accommodations requested by Appellant. Exh. D-3 at 15.

16. Appellant and the District ultimately met on October 13, 2023 to discuss Appellant's requested accommodations. Exh. D-3 at 20, 22; Tr. 39:14-24; 41:25 to 42:5. Appellant requested the following accommodations:

a. Cap Appellant's classes at a maximum of 24 students to reduce stress;

b. Agree that Appellant's room would not be used by outside classes or groups and that no class would be held during Appellant's prep period;

c. Notify Appellant by email if the building administration was aware that Bruce Schmidt or James Hiu was in the building;

d. Permit Appellant to have a snack at any time (including during student contact time) to take care of his health needs;

e. Agree that Appellant could call the office for class coverage if he had a medical need to leave students unattended;

f. Grant one to two days of unpaid leave per month for three months for six episodes of mental health crisis when all other leaves had been exhausted;

g. Approve a flexible schedule, including periodic breaks within the day as needed to provide a period of mental rest to refocus and reorient to work, as well as coverage during those breaks;

h. Remove Bruce Schmidt and Jason Bhear from Appellant's supervisory chain of command and replace with Dr. Tim Collins;

i. Provide an extra preparation period in the morning before school to reduce stress caused by inadequate preparation time;

j. Block Appellant's classes by class type (*e.g.*, schedule all physical science classes in a row and all biology classes in a row) to eliminate additional stress from multiple transitions back and forth between two sets of teaching equipment in one day;

k. Align prep periods and lunch for Appellant and his spouse;

l. Provide Appellant any accrued or other leave available under the collective bargaining agreement during the ADA interactive process and provide additional leave as an accommodation under the ADA.

17. The District granted or partially granted seven of the accommodations. *See* Exh. D-3 at 23. Specifically, the District granted or partially granted the following accommodations:

a. The District agreed that if SBHS administrators were aware that Bruce Schmidt or James Hiu was in the SBHS building, they would notify Appellant by email. The District noted that if administrators were not aware of Schmidt or Superintendent Hiu's presence, such as if they entered the building before signing in at the front office, administrators would not be able to notify Appellant.[1]

b. The District agreed that Appellant could have a snack at any time (including during student contact time) to take care of his health needs;

c. The District agreed that Appellant could call the office for class coverage if he had a medical need to leave students unattended;

d. The District agreed to approve one to two days of unpaid leave per month for three months for six episodes of mental health crisis when all other leaves had been exhausted;

e. In response to Appellant's request that Bruce Schmidt and Jason Bhear be removed from Appellant's supervisory chain of command and be replaced with Dr. Tim Collins, the District agreed that Assistant Principal Bethany Wilson would be Appellant's supervisor with support from Dr. Collins[2];

f. In response to Appellant's request that his prep periods and lunch be aligned with his spouse's prep period and lunch, the District noted that Appellant's lunch period was already the same

[1] At this time, Bruce Schmidt was no longer the principal of SBHS. Tr. 37:18-21. He was working in the District office. Tr. 49:11-14.

[2] Dr. Collins was the secondary level Director of Curriculum and Instruction and worked at the District's main office. He did not work at SBHS. Tr. 139:8-14. The District concluded that it would have been an undue burden for Dr. Collins to supervise Appellant when Dr. Collins did not work at SBHS and did not see Appellant on a day-to-day basis. Tr. 49:20 to 50:9.

as his spouse's lunch period. The District declined to align their prep periods because that change would involve a complete revision of the high school master schedule;

g. In response to Appellant's request for accrued or other leave available under the collective bargaining agreement during the ADA interactive process and additional leave as an accommodation, the District explained that Appellant could apply for any leave provided by state or federal law and could apply for leave available in the sick leave bank pursuant to the provisions of the collective bargaining agreement.

18. The District declined to cap Appellant's class size at a maximum of 24 students because capping class size results in other teachers having larger classes and, if the District's enrollment continued to increase, would result in the District needing to hire additional teachers to equalize class sizes and ensure that students had access to graduation-required classes. Exh. D-3 at 23; Tr. 133:2-23; *see also* Exh. LM D-6 at 11; LM Tr. 154:22 to 155:6.[3] The District explained that there "is a teacher shortage so any additional FTE would be in the form of a substitute which puts the burden on our students." Exh. D-6 at 23. In addition, capping the class size for one teacher affects the master schedule, which limits the class options available for students, including classes needed for graduation. *See* LM Tr. 60:1-23.

19. The District declined to agree that Appellant's room would not be used by outside classes and declined to agree that classes would not be held during Appellant's prep period. The District explained that SBHS often used classrooms for staff professional development and, on occasion, a part-time teacher might need to use Appellant's room. The District explained that "flexibility is especially important in the Science Department as they are specialized classrooms given the nature of the content and instruction." Exh. D-3 at 23; Tr. 134:16-135:3. Moreover, all the science classrooms at SBHS have a prep room between them, so without this accommodation Appellant had a dedicated space to do his preparation. Tr. 135:4-13.

[3] "Exh. LM" and "LM Tr." denote the exhibits and the hearing transcript, respectively, in the case of *Laura Martin v. Gresham-Barlow School District*, Case No. FDA-24-06, which was partially consolidated with this case. Both Appellant and the District agreed at the prehearing conference and on the record at hearing that the evidence in the record in Case No. FDA-24-06 would be included in the record in this case. Tr. 28:12 to Tr. 29:23.

20. The District declined to provide Appellant with a flexible schedule, including periodic breaks within the day. The District explained that it did not have adequate staffing to cover for absences from the classroom if this request were granted. Exh. D-3 at 23; Tr. 137:12 to 138:21; Tr. 48:16 to 49:1. In addition, permitting to Appellant to take breaks at times he chose would result in the District needing to cover Appellant's intermittent absence from his classroom, which would impact student learning and consistency of instruction. Tr. 137:12 to 138:21.

21. The District declined to provide an extra preparation period in the morning before school to reduce stress caused by inadequate preparation time. The District explained that SBHS does not have enough staff to cover rest breaks or extra prep periods. Exh. D-3 at 23. Moreover, the District would be unable to require another teacher to cover Appellant's class to give Appellant an extra prep period; a teacher would have to voluntarily agree to do so. Tr. 141:17 to 148:4. Further, there was a shortage of science teachers; therefore, hiring a teacher to cover only one period would be impracticable. Tr. 50:20 to 51:16.[4]

22. The District declined to block Appellant's schedule by type (*e.g.*, schedule all physical science classes in a row, and all biology classes in a row). The District explained that this accommodation would "involve a complete revision of the building schedule." Exh. D-3 at 23. When courses are "stacked"—meaning all courses of a like type are grouped together—it is more difficult for students to access those courses because the schedule must be constructed so that students can access the courses they need. Tr. 142:21-25; Tr. 143:15-25; Tr. 52:7-23. Therefore, Appellant's request for blocked classes, if granted, would adversely affect student access to courses.

23. In an email dated October 17, 2023, Human Resources Specialist Noelle Thelen asked Appellant to reply by October 20, 2023 at 5:00 p.m. to inform the District of Appellant's intent to (1) accept the accommodations as presented and report to work; (2) reject the accommodations as

[4] Teachers at SBHS teach six out of the seven periods in a day. Tr. 136:1-3. However, teachers participating in the freshman house model taught only five periods. Appellant was part of that model and, if he had reported to work, would have been teaching only five out of the seven periods. Tr. 136:4-16.

presented and request an unpaid leave of absence; or (3) reply to offer questions or clarifications regarding the listed accommodations. Exh. D-3 at 22.

24. On October 20, 2023, Appellant emailed Human Resources Specialist Thelen asserting that, in his view, the District "could, and should, approve" all the accommodations Appellant had requested. Exh. D-3 at 20. Appellant declined the offered accommodations because, in his view, they were not sufficient to enable him to do his job. Appellant wrote that he was "not interested" in "requesting a year of unpaid leave because I don't see what that accomplishes for anyone." *Id.*

25. On October 24, 2023, Dr. Freeman replied to Appellant's October 20 email. She explained that "[t]ypically, in situations such as these, the District would place the employee on unpaid leave if the employee was asserting that they could not perform the duties of their job. However, given your explicit rejection of an unpaid leave of absence, the District sees no alternative but to move forward with separating [you] from employment." Exh. D-3 at 21. Dr. Freeman wrote, "Please respond by 5:00 p.m. on Wednesday, October 27, 2023 to let us know if you: Intend to apply for OFLA/FMLA/PLO or the sick leave bank through the GBEA CBA process [or] Would like to request unpaid leave."[5] *Id.*

26. Appellant did not respond to the October 24, 2023 email from Dr. Freeman. Tr. 57:18-22; Tr. 60:2-11; Tr. 94:21 to 95:7; Tr. 105:9-12.

27. On the advice of the District's legal counsel, the District chose not to pursue a pretermination meeting related to Appellant's absence from work without approved leave while Appellant's litigation was pending. Tr. 95:8 to 96:10; Tr. 101:22 to 102:7.

28. On or about January 29, 2024, Multnomah County Circuit Court Judge Katharine von Ter Stegge granted summary judgment in favor of the District in the litigation filed against it by Appellant and his spouse alleging retaliation and discrimination claims. *See* Exh. D-4 at 1; Exh. A-1 at 75; Tr. 60:2 to 61:8; L.M. Tr. 112: 1-5.

[5] PLO refers to paid leave under Paid Leave Oregon.

29. With the litigation resolved, the District decided to proceed with a pretermination meeting. In a memo dated April 29, 2024, Superintendent Hiu informed Appellant that, due to his failure to report to work or accept ADA accommodations, the District had scheduled a virtual pretermination meeting for May 9, 2024. Exh. D-3 at 28.

30. The District held the pretermination meeting on May 9, 2024. Deputy Superintendent John Koch, Dr. Freeman, and Appellant attended. Tr. 61:9-21; Tr. 97:3-14.

31. In a letter dated May 24, 2024, Superintendent Hiu notified Appellant that he would recommend to the school board at its June 17, 2024 meeting that Appellant be dismissed on the grounds of neglect of duty and insubordination. The letter informed Appellant that by not reporting for work, accounting for his absence, or providing notice to the District of his intentions, Appellant had abandoned his position with the District. Exh. D-1 at 3.

32. The May 24, 2024 letter also stated that, in response to the District's October 17, 2023 directive to report for duty, Appellant refused to request an unpaid leave of absence, or to engage in further dialogue with the District to clarify the accommodations the District offered. *Id*. The letter also stated that Appellant did not respond to the District's October 24, 2023 directive to communicate with the District to account for Appellant's ongoing absence. The letter notified Appellant that this conduct constituted insubordination. Exh. D-1 at 4.

33. On June 17, 2024, the Gresham-Barlow School District Board considered Superintendent Hiu's recommendation that Appellant be dismissed from employment. The Board met via videoconference. Exh. D-3 at 31. The hearing took place in public session at Appellant's request. Exh. D-3 at 35. Deputy Superintendent Koch presented the Superintendent's recommendation to the Board. Exh. D-3 at 35. He explained that Appellant was offered reasonable accommodations, chose not to accept the accommodations, and rejected an unpaid leave of absence. He explained that Appellant had not been in contact with the District since the District's October 24, 2023 communication. Exh. D-3 at 43. Appellant had not applied for days from the sick leave bank available under the collective bargaining agreement, had not requested an unpaid leave of absence, and had not

given any indication that he intended to report to work. *Id.* Deputy Superintendent Koch explained that Appellant had been absent from work without approved leave since October 2023, and by doing so had made a choice to abandon his position. Exh. D-3 at 44.

34. Appellant also made a presentation at the meeting. Appellant expressed his concerns about purportedly improper use of bond funds, explaining that, in his view, the District did not increase the number of classrooms at SBHS despite having informed the public that the bond would relieve overcrowding. Exh. D-3 at 46. Appellant asserted that this choice, and others made by the District about bond funds, constituted fraud. *Id.*[6] Appellant told the Board that Bruce Schmidt falsely accused him of talking with students about Appellant's litigation against the District. Appellant told the Board that he filed a complaint of harassment with the District and the District took no action on it. Exh. D-3 at 48.

35. Appellant did not address the District's concerns that he had been absent without approved leave since October 2023 and that he had not informed the District whether he intended to return to work.

36. The Board gave Deputy Superintendent Koch an opportunity to respond to Appellant's presentation. Deputy Superintendent Koch explained that Appellant's concerns about the work environment, including harassment and discrimination, were considered by the court and dismissed on

[6] In a May 13, 2024 letter to Appellant from Deputy Superintendent John Koch, the District explained its response to Appellant's assertions of "bond fraud." The District wrote:

> "A Bond Oversight Committee composed of community and board members was assembled and tasked with overseeing the bond planning and expenditures. This oversight body identified no concerns or findings of fraudulent activity. Community involvement and oversight was also ensured through 16 focus groups aimed at obtaining as much stakeholder input as possible. One of the focus groups included parents and community partners. Student, staff, and administrators also participated in these focus groups. All staff were invited to participate in focus groups of their choice. You did not participate in any of these groups. Each focus group met a minimum of three times. Some met as many as five times. Finally, the District obtained approvals for expenditures associated with the bond project in public meetings with the Board. The District is unaware of any findings of fraudulent activities associated with its bond projects. As for your questions about Sam Barlow High School, the bond project resulted in significant improvements to the campus, including the following: 25 new classrooms, 23 instructional rooms, a new band room, a new black box theater, relocation of the choir rooms, and renovation of the auditorium. There was no net loss of classroom space, as the high school had 64 classrooms before the remodel and 64 classrooms after the remodel." Exh. A-1 at 74.

summary judgment in the District's favor. Exh. D-3 at 49. Accordingly, the District considered Appellant's complaints resolved. *Id.*

37. The Board offered Appellant an opportunity to present rebuttal. A representative for Appellant read a statement by legal counsel provided by the Gresham-Barlow Education Association. The statement asserted that the District was retaliating against Appellant for raising concerns about the District's use of bond funds and the reconstruction of Sam Barlow High School. Exh. D-3 at 50. The statement also asserted that Appellant was being terminated because he stood up for his rights and for his spouse's rights to be free from retaliation by their supervisors and District leadership, and because Appellant declined to accept the District's legally insufficient accommodations. *Id.*

38. After the presentations, the Board asked questions. During the Board discussion, Board Chair Kris Howatt instructed the board members that the only topic for discussion was whether Appellant's absence constituted neglect of duty and insubordination. Board Chair Howatt instructed the board that board members' questions should not concern the bond. Exh. D-3 at 37, 51.

39. The Board voted unanimously to accept Superintendent Hiu's recommendation and dismiss Appellant on the grounds of neglect of duty and insubordination. Exh. D-3 at 38.

40. On June 21, 2024, Gresham-Barlow School District Board Chair Howatt sent Appellant a letter dismissing Appellant from employment, effective June 17, 2024, on the grounds of neglect of duty and insubordination. Exh. D-3 at 56.

41. On or about July 19, 2024, the Multnomah County Circuit Court entered a general judgment of dismissal in favor of Gresham-Barlow School District, James Hiu, and Bruce Schmidt, Jr. and against Appellant and his spouse, Laura Martin, in the case entitled *Laura Martin and William Martin v. Gresham-Barlow School District, et al.,* Multnomah County Circuit Court Case No. 22C21885. Exh. D-4 at 1.

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 did not return to work after the interactive process in September 2023 and October 2023 is true and substantiated.

3. The factual allegation that Appellant was absent without approved leave after the interactive process in September 2023 and October 2023 is true and substantiated.

4. The factual allegation that Appellant was unwilling to request or accept an approved unpaid leave of absence for the 2023-2024 school year is true and substantiated.

5. The factual allegation that Appellant did not respond to the October 24, 2023 communication from the District asking Appellant whether he would apply for leave through the sick leave bank or accept the District's offer of an unpaid leave is 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 not adequate to support the charge of insubordination as a ground for dismissal.

8. 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). 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 that 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 failed to perform the critical duty of reporting to work (unless on District-approved leave, such as legally protected medical leave or leave approved as a reasonable accommodation). The true and substantiated facts are also adequate to show that Appellant failed to perform the critical duty of communicating with the District about whether he intended to report to work. Appellant was aware of these duties as an experienced licensed educator in Oregon and through the repeated requests from the District that he tell the District whether he intended to report for work.

It is fundamental that teachers are expected to report to work unless on approved leave. Teachers' reliable attendance is critical to planning for and providing continuous instruction to students. This duty is straightforward and critical. A teacher who fails to fulfill this duty during a school year can cause substantial interference with student supervision and instruction. In addition, teachers have a duty to communicate with their school about whether they will be at work. School administrators need to know whether a particular teacher will report to work so that a substitute teacher can be put in place.

The panel finds, without difficulty, that Appellant neglected both these duties. To begin, at the beginning of the 2023-2024 school year, after an interactive process as required by the Americans With Disabilities Act and parallel state law, Appellant unambiguously declined the multiple workplace modifications offered by the District, such as one to two days of unpaid leave per month for three months; the ability to have a snack at any time; permission to call the office for class coverage if

needed; and a change in Appellant's supervisor to Assistant Principal Bethany Wilson. Exh. D-3 at 23. Appellant also declined to request or accept an unpaid leave of absence as an accommodation. Exh. D-3 at 20. And, after Dr. Freeman explained that if Appellant did not request unpaid leave, the District would move forward with separating him from employment, Appellant simply did not respond. In short, after exhausting any applicable paid leave, Appellant was absent without leave or approval for the 2023-2024 school year. By failing to report to work after declining all the District's offered accommodations and declining to request or accept unpaid leave as an accommodation, Appellant neglected the critical duty of reliable attendance.[7]

The panel also finds, without difficulty, that Appellant neglected the duty of informing school administrators about whether he intended to report to work. There is no serious question that Appellant was well-aware that he needed to keep the District informed about whether he would report to work. He received multiple communications over two school years emphasizing the importance of informing the District of his intentions about reporting to work. *See* Exhs. D-2 at 10; D-2 at 11-12; D-3 at 21-22. Despite these communications, Appellant did not notify the District by October 27, 2023 or thereafter whether he would report to work for the remainder of the 2023-2024 school year. Tr. 57:18-22; 60:2-11; Tr. 94:21 to 95:7; Tr. 105:9-12. By failing to tell the District whether he would return to work for the remainder of the 2023-2024 school year, Appellant neglected the duty of keeping the

[7] To the extent that Appellant contends that his absence was somehow excused because the District was obligated to grant him the accommodations he preferred, Appellant is incorrect. It is well-accepted that an employer is not required to grant the employee's preferred accommodations; it is required only to provide reasonable accommodations. *Zivkovic v. Southern California Edison Co*., 302 F3d 1080, 1089 (9th Cir 2002) ("[a]n 'employer is not obligated to provide an employee the accommodation he requests or prefers, the employer need only provide some reasonable accommodation.'") (quoting *E.E.O.C. v. Yellow Freight Sys. Inc*., 253 F.3d 943, 951 (7th Cir 2001) (en banc) (citation and internal quotation marks omitted)). Here, the District offered reasonable accommodations, such as intermittent leave and the ability to have snacks at any time. The District even offered to change Appellant's supervisor. The District informed Appellant that typically it would place an employee on unpaid leave as an accommodation. An unpaid leave may be a reasonable accommodation. *See, e.g., Nunes v. Wal-Mart Stores, Inc*., 164 F3d 1243, 1247 (9th Cir 1999) ("[u]npaid medical leave may be a reasonable accommodation under the ADA"); 29 CFR pt. 1630 app. § 1630.2(o) (accommodations include permitting the use of accrued paid leave or providing additional unpaid leave); U.S. Equal Employment Opportunity Commission, "Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA" ("employer does not have to provide paid leave beyond that which is provided to similarly situated employees"). However, here, Appellant rejected out of hand the suggestion that he request and accept an unpaid leave, and simply failed to respond after Dr. Freeman explained to him on October 24, 2023 that if he did not request unpaid leave, the District would proceed to separate him from employment. Appellant's choice to decline to report to work rather than request or accept additional leave meant that Appellant was absent without approval.

District informed about whether he would come to work—information the District needed to ensure that it had adequate teacher staffing to instruct its students.

The panel is not persuaded that Appellant's concerns, first stated in 2020, about the District's use of funds from a bond issuance played any role in the District's decision to end Appellant's employment. Appellant was simply absent for the 2023-2024 school year after any applicable approved leave expired. It is likewise clear that on this record that Appellant failed to tell the District by October 27, 2023 or thereafter whether he would return for the remainder of the 2023-2024 school year. There is nothing in the record to indicate that the District's dismissal decision was motivated by anything other than Appellant's absence in 2023-2024 without approved leave and failure to tell the District whether he would return to work.

In keeping with previous FDAB cases involving neglect of duty, the panel 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 prove Appellant's intentionality or "fault." The panel is persuaded that Appellant was aware of the importance of reporting to work. The duty of reporting to work (except to the extent the employer has approved a leave) is a fundamental duty. The instruction of students depends, in the very first instance, on a teacher's presence in the classroom. There is also no serious question that Appellant was aware of the duty *to tell the District* whether he intended to report to work. He received multiple communications from the District about the importance of telling the District whether he would report to work during both the 2022-2023 and 2023-2024 school years.

Despite knowing these duties, Appellant disregarded them. At the outset of the 2023-2024 school year, the District clearly communicated the accommodations that it could offer and those that it could not. The District also reminded Appellant that he could request an unpaid leave of absence. Appellant continued to assert that the District should grant all his requested accommodations, which certainly was his right. On October 24, 2023, the District put Appellant on clear notice that, in situations such as this where the employee declines reasonable accommodations, typically the employee goes on unpaid leave. The District gave Appellant an opportunity—until October 27, 2023—to request unpaid leave. He did not do so by the date or at any time after that. That decision indicates sufficient intentionality or fault within the meaning of FDAB's precedent.

For all the reasons discussed above, the panel concludes that the District met its burden to demonstrate that Appellant neglected his critical duties to report to work (unless on an approved leave) and to communicate with the District about whether he would report to work.

III. 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).

The District relies on two purported directives—its communication on October 17, 2023 and its communication on October 24, 2023. For the following reasons, the panel concludes that Appellant's conduct in response to these communications does not rise to the level of insubordination.

The panel concludes that the October 17, 2023 communication was not a direct order. Human Resources Specialist Thelen's email stated, "We are *requesting* that you inform the District by replying to this email of your intent to do one of the following by 5:00 p.m. on October 20, 2023: (1) Accept the accommodations as presented and report to work. (2) Reject the accommodations as presented and request an unpaid leave of absence. (3) Reply to the email to offer questions or clarifications regarding the listed accommodations." Exh. D-2 at 22 (emphasis added). This communication, properly understood, was a request. It was the District's attempt to understand what Appellant wanted as part of the interactive process. Although it was a directive to the extent it sought certain conduct from Appellant (*e.g*., a response by a stated deadline), it was not a directive to engage in or refrain from engaging in particular conduct. On the facts in this particular case, the panel concludes that the October 17, 2023 communication was the District's attempt to induce Appellant to disclose whether he wanted unpaid leave or the offered workplace modifications, such as the intermittent leave and change in supervisor. It did not constitute an order or directive sufficient to support dismissal on the basis of insubordination.

Likewise, the District's October 24, 2023 email also requested that Appellant provide the District with a response to specific questions by a deadline. This communication, unlike the October 17 communication, referred to the termination process. The District informed Appellant that if he did not respond by the October 27 deadline, the District would "begin the termination process." Exh. D-3 at 21. This communication, properly understood, was *notice* to Appellant, not a directive. With this communication, the District was informing Appellant that it would proceed to separate his employment if he did not take action to ensure that his absence was either (1) approved as leave under

OFLA, FMLA, Paid Leave Oregon, or the collective bargaining agreement process, or (2) unpaid leave requested by Appellant and approved by the District. *Id*. This communication, like the October 17 communication, did not constitute an order or directive sufficient to support dismissal on the basis of insubordination. It was notice.

In addition, the panel finds that the District did not meet its burden to prove disobedience by Appellant or unwillingness to submit to authority. In response to Human Resource Specialist Noelle Thelen's October 17 letter, Appellant communicated, by the 5:00 deadline on October 20, as the District requested. He informed the District that he was not interested in continuing the interactive process, writing that he did not think "that asking more questions is going to be productive given the district's latest responses." Exh. D-3 at 20. Thus, Appellant did respond. In his response, Appellant expressed that he disagreed with the District's position and did not want to ask further questions in the interactive process because he believed that asking further questions would not be productive. Essentially, Appellant withdrew from further engagement with the District in the interactive process. The panel does not conclude that his decision to do so was tantamount to unwillingness to submit to authority. It was merely Appellant's choice not to engage further in the interactive process, which is a voluntary process for the employee's benefit.

The panel also finds that Appellant's silence in response to the October 24, 2023 communication was not disobedience or unwillingness to submit to authority. By its own terms, the October 24 communication notified Appellant that if he did not respond, the District would begin the termination process. In other words, the District conveyed that Appellant's nonresponse would be interpreted to have a specific meaning—*e.g.*, a decision to not request leave. Appellant chose to be silent, conveying that he was not requesting leave. Appellant made a choice to communicate with the District through his silence. On this record, the panel does not interpret Appellant's decision to be silent—which resulted in the separation of his employment—as unwillingness to submit to authority. Rather, Appellant simply chose not to request leave, which meant that his absence was absence without approved leave.

IV. 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 ground of neglect of duty, 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 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 report to work (unless on approved leave) and to let the District know whether and when he would report to work, two critical duties that he neglected to perform. Ultimately, in October 2023, Appellant faced the choice of whether to request leave to cover his absence during the 2023-2024 school year. Appellant chose not to request leave. Based on the evidence in the record, the panel cannot say that no reasonable school board would have found the facts sufficient for dismissal.

The panel understands Appellant to argue that his dismissal was unreasonable, arbitrary, and/or clearly an excessive remedy because, according to Appellant, the real reason for his termination was that he had expressed concerns about the way the District used funds from a bond issuance. Appellant refers to the District's choices as "bond fraud." The problem with Appellant's argument is that he presented no evidence in support of it. To the contrary, the record is clear that the District told Appellant on October 24, 2023 that if he did not request leave, the District would begin the termination process. Appellant chose to be silent and did not request leave. That silence resulted in the District dismissing Appellant. There is no evidence in the record that in any way ties or connects

Appellant's dismissal to his expressed concerns about "bond fraud." Consequently, the panel does not find that his dismissal was unreasonable, arbitrary, or clearly an excessive remedy.

ORDER

The appeal is dismissed.

DATED this 23rd day of April 2025 */s/ Jim Westrick*
Jim Westrick, Panel Chair

DATED this 23rd day of April 2025 */s/ Robert Sconce*
Robert Sconce, Panel Member

DATED this 23rd day of April 2025 */s/ Tory McVay*
Tory McVay, 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 23, 2025, I served a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** by email:

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