

# COMPILATION OF FAIR DISMISSAL APPEALS BOARD CASES

## Cases Interpreting Causes for Dismissal and Selected Procedural Matters

(Containing cases from 1972 through September 2004 and  
replacing 1996 compilation and all supplements)

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**A. INEFFICIENCY:**

**1. *Rogers v. Douglas County School District*, FDA 74-6 (1975):**

The teacher was dismissed for inefficiency and insubordination. The panel found the teacher both inefficient and insubordinate and upheld dismissal.

The order makes many findings of fact with regard to the charge of inefficiency (including instruction deficiencies, improper classroom conduct, failure to follow suggestions for improvement, etc.). However, it does not say which facts show and which facts do not show “inefficiency”; does not say why the cause of “inefficiency” is made out; and does not in any way define “inefficiency.”

**2. *Hausotter v. Douglas County School District No. 4*, FDA 76-9 (1977):**

The teacher was dismissed for inefficiency, insubordination, inadequate performance, and failure to comply with such reasonable requirements as the school board may prescribe to show normal improvement and evidence of personal training and growth. Dismissal was affirmed on the last three stated grounds.

The order did not mention “inefficiency,” beyond indicating that it was one of the charges, and it did not indicate in any way why dismissal was not upheld on the “inefficiency” ground.

**3. *Jones v. Vernonia School District No. 47J*, FDA 77-6 (1977).**

The teacher was dismissed for inefficiency, neglect of duty, inadequate performance, and failure to comply with such reasonable requirements as the school board may prescribe to show normal improvement and evidence of professional training and growth. The panel set aside the dismissal.

The order does not indicate what factual charges were made against the teacher. Apparently the principal felt the teacher’s science classroom should be better managed and that students should be busy working a greater percentage of the time. He also was of the opinion that the classroom was not as neat, orderly, and clean as it should have been. The order states that:

- a. The incidents do not show use of undue force or violation of the district’s corporal punishment policy.
- b. Most of the incidents were minor, not unusual, not a violation of the teacher and not a violation of district policy.
- c. Three incidents showed poor judgment on the part of the teacher.
- d. Lack of neatness and orderly disposition of classroom materials was largely corrected in 1977.

- e. “The panel believes that while there is room for improvement in the teacher’s performance that there is insufficient evidence to substantiate the statutory charges of inefficiency, neglect of duty, inadequate performance, and failure to comply with such reasonable requirements as the board may prescribe to show normal improvement and evidence of professional training and growth.”

The order does not indicate what facts are necessary to show “inefficiency”; does not indicate why the facts proven failed to show inefficiency; and does not in any way attempt to define “inefficiency.” (A dissenting panel member felt that the facts proven showed neglect of duty and failure to comply with reasonable requirements.)

- 4. ***Mayer v. Lincoln County School District*, FDA 77-11 (1978) reversed and remanded *Lincoln County School District v. Mayer, et al.*, 39 Or App 99 (1979).**

The teacher was dismissed for inefficiency, insubordination, neglect of duty, and inadequate performance. Dismissal was set aside by the panel. The district appealed to the Oregon Court of Appeals. The court reversed the board and directed entry of an order upholding the teacher’s dismissal.

The district based its case against the teacher on a multitude of performance criticisms, including instructional deficiencies, deficiencies in dealing with students, poor work habits, etc. The panel found the charged facts true and substantiated, but decided that they “did not justify the statutory grounds cited. The panel majority believed that many incidents were “minor” and did not “rise to the level of a conclusion that the teacher was inefficient\*\*\*.” The panel also indicated that the events occurred over a number of years and could not have been considered very serious, otherwise corrective action would have been taken long ago. Several areas of deficiency were briefly noted by the panel as failing to show any serious problems, but the vast bulk of the proven charges were not mentioned in the panel’s reasoning. The panel suggested that it believed the district strained to build a case for dismissal by collecting as many minor matters as possible against the teacher. In substance, it appears the panel felt the teacher’s deficiencies were not serious enough for dismissal. One panel member dissented.

On appeal, the court indicated that the board, once having found the facts true, could not set aside dismissal unless no reasonable school board would have found those facts sufficient for dismissal.

- 5. ***Carell v. Glide School District No. 12*, FDA 77-14 (1978), reversed and remanded by *Glide School District No. 12 v. Carell, et al.*, 39 Or App 727 (1979):**

The teacher was dismissed for inefficiency, insubordination, inadequate performance, failure to comply with reasonable requirements of the school board and cause which constitutes grounds for revocation of the teacher’s teaching certificate. The panel issued an order setting aside the dismissal. The district appealed to the Oregon Court of Appeals. The court reversed the order of the board and remanded the case to the board for adequate findings of fact and application of the proper standard of review of the district’s dismissal action. The parties thereafter settled the case.

The essence of the panel's decision was that a recommendation by the principal to renew the teacher's contract undercut the district's case for dismissal. The panel apparently felt that the recommendation of contract renewal by the principal precluded the district's relying on any then-known deficiencies of the teacher to support dismissal and that the fault of the teacher with respect to a student activities bank account, the only facts not known when the renewal recommendation was made, was not sufficient to prove any of the cited causes for dismissal.

On appeal, the court pointed out that the principal's recommendation of renewal in March of 1976 was not followed by the superintendent or by the district, that the district renewed him only when ordered by the county circuit court to do so, and, therefore, that the district was not precluded from relying on facts supporting the superintendent's recommendation against renewal. The court also interpreted the panel's conclusions that the facts were not sufficient to justify the statutory grounds as the panel's improper interjection of its own judgment into the case.

6. ***Smith (Beulah) v. Carlton-Yamhill School District No. 11***, FDA 79-10 (1979):

The teacher was dismissed, apparently (the order does not say) for inefficiency, insubordination, and inadequate performance. The panel set aside the dismissal.

The teacher was cited in December of 1978 for problems of choppy lessons, lack of classroom control, and inconsistency of instruction. Also, three 1979 incidents with students were cited against the teacher. In one the teacher slapped a boy on the back who was telling elephant jokes; in another the teacher pushed a boy's head down onto his desk while the students were to be resting; and in the third a boy's shirt tore as he jerked his arm away from the grasp of the teacher.

The panel found the charged facts not true and substantiated. Apparently it concluded that the evidence failed to show continuation, past 1978, of the classroom deficiencies and that the fault of the teacher in the three 1979 incidents was not significant.

7. ***Ross v. Springfield School District No. 19***, FDA 80-1 (1980), **affirmed**, 56 Or App 197 (1982), **reversed and remanded**, 294 Or 357 (1982), **order on remand** (1983), **affirmed**, 71 Or App 111 (1984), **reversed and remanded**, 300 Or 507 (1986), **order on second remand** (1987); **revised order on second remand** (1988).

The teacher, a librarian at two elementary schools in the district, visited an adult bookstore in the neighboring city of Eugene and engaged in sexual activities with another person in that establishment in a booth for viewing sexual movies. Undercover police officers observed the teacher, as well as others, engaging in such activity and the district attorney brought suit to enjoin the adult bookstore operation as a nuisance. The teacher was subpoenaed in that case. The Springfield community learned about the teacher's involvement with the adult bookstore and protested his being continued as a teacher in the district. The district then dismissed him for inefficiency, immorality, and gross unfitness.

The panel upheld the dismissal on the grounds of immorality and gross unfitness. However, the panel concluded that the facts did not show inefficiency. It characterized the evidence of inefficiency as “less than a scintilla.” The only evidence in support of the charge was that two district employees without a working relationship with the teacher or authority over him did not like his job performance and the district personnel director considered the teacher to be a “marginal teacher.”

The teacher appealed to the Oregon Court of Appeals. The court affirmed the order of the Fair Dismissal Appeals Board. The teacher appealed to the Oregon Supreme Court. The court reversed the dismissal on the gross unfitness ground and remanded the case to the Fair Dismissal Appeals Board for rationale to support the panel’s conclusion that the facts showed “immorality.”

On remand, a reconstituted panel issued its **Revised Ultimate Findings of Fact and Conclusions of Law** upholding dismissal on the ground of immorality. The teacher appealed again to the Oregon Court of Appeals and the court again affirmed. The teacher appealed again to the Oregon Supreme Court. The court reversed and sent the case back again to the Fair Dismissal Appeals Board because of the panel’s improper definition of “immorality.”

On the second remand, the panel issued its **Findings of Fact, Conclusions of Law and Order on Remand No. 2**. The teacher then filed a petition for reconsideration and the panel directed a supplemental hearing. The panel then issued its **Revised Findings of Fact, Conclusions of Law and Order on Remand No. 2**, affirming the dismissal on the ground of immorality.

8. ***Keene v. Creswell School District No. 40***, FDA 80-7 (1981), **affirmed**  
***Keene v. Creswell School District No. 40***, 56 Or App 801 (1982):

The teacher was dismissed for inefficiency, insubordination, neglect of duty and inadequate performance. Dismissal was upheld on the grounds of insubordination and neglect of duty only. The teacher appealed to the Oregon Court of Appeals and the court affirmed the board’s order.

The teacher obtained a leave of absence for the 1979-80 school year. During that year he requested an additional year’s leave, which the district denied. The teacher was notified of the denial in April of 1980. In May he requested reconsideration of the denial. The superintendent also notified the teacher by letter that termination would be recommended if the teacher did not inform the superintendent whether he would be returning to teach by May 16, 1980. After the request for reconsideration was denied by the school board in May, the superintendent sent the teacher notice of the denial and a request that the teacher notify the superintendent whether he would be returning to work. The teacher did not respond and also did not respond to a June 24, 1980 letter of the superintendent that he planned to initiate dismissal proceedings unless the teacher wished to resign.

The order of the panel stated that the facts related to events occurring while the teacher was on leave rather than in the course of his teaching duties, which is insufficient to show the statutory cause of inefficiency.

9. ***Owen v. Junction City School District No. 69***, FDA 80-10 (1981):

The teacher was dismissed for inefficiency, insubordination, neglect of duty, and inadequate performance. The dismissal was upheld for inefficiency, insubordination, and inadequate performance.

The teacher, according to the facts of the case, did not submit certain plans required by her principal, failed to carry out certain instructional programs as directed in both math and in reading, failed to furnish certain information requested by parents, acted defensively toward parents, did not avail herself of certain assistance offered to her, did not follow schedules for phonics instructions, failed to meet timely with parents on one occasion, failed to respond to district concerns about her performance, has a number of parents request transfer of their children out of her classes, etc.

The order concluded that the proven facts showed inefficiency. The panel considered the teacher's defense that stress and depression interfered with her performance, but concluded that dismissal was not an excessive penalty.

10. ***Brown v. Astoria School District No. 1C***, FDA 81-20 (1982):

The teacher was dismissed for inefficiency, inadequate performance, and failure to comply with reasonable school board requirements. Dismissal was upheld by the panel on all three grounds.

The facts showed that the teacher, a physical education teacher, lacked adequate organization of her students and presentation of subject matter, displayed ineffective communication on some occasions, allowed students to make class activity decisions, generally lacked control of her students, on several occasions failed to require warm-up exercises to reduce the risk of injury, failed to utilize her class assistants adequately, was often late getting instruction or class activity started, sometimes failed to have equipment ready, argued extensively with students on one occasion, failed to provide some lesson plans, and failed to improve adequately during a plan of assistance.

The order does not indicate what facts are necessary to show "inefficiency"; does not indicate why the facts show "inefficiency"; and does not attempt to define "inefficiency."

11. ***Skeen v. Bethel School District No. 52***, FDA 81-21 (1982), **affirmed**, ***Bethel School District No. 52 v. Skeen***, 63 Or App 165 (1983):

The teacher was dismissed for inefficiency, insubordination, neglect of duty, and inadequate performance. The dismissal was set aside.

The teacher was an elementary teacher of fifteen years experience. Apparently dismissal was based on four incidents of improper discipline of students and inadequate compliance with, or performance under, a plan of assistance. The order contains lengthy discussions of the plan of assistance and evaluation of the teacher's classroom performance but never

indicates what, about the teacher's performance (other than the four discipline incidents), the district considered deficient.

The facts of the case do show that the teacher was charged with using force on a student in February of 1976 but was not disciplined for the incident; that a roll of tape the teacher tossed, in 1976, hit the cheek of a student; that the teacher placed a student and his desk outside the room, in September of 1979, and upset the desk in order to get the student to clean it; that the head of a student she was holding hit the wall when she raised his head to look him in the eye, in 1980; that she was placed on a plan of assistance in February of 1981 after the assistant principal had already recommended the teacher's dismissal; that evaluation procedures were generally ignored by the assistant principal; that an independent evaluator's favorable reports about the teacher were disregarded; that the teacher improved her performance in a number of areas; that the principal began to work toward her dismissal in 1976; that the superintendent, in requiring a plan of assistance, designated four areas of concern but the plan of assistance as implemented identified 19 deficiency areas; that the assistant principal destroyed his evaluation notes; etc.

The order of the panel indicates that the discipline incidents were minor, were unrelated, and did not occur after the teacher was put on the plan of assistance; that the plan of assistance, as carried out, was too complex and had too many factors to help the teacher demonstrate professional growth; and that the evaluations by the principal and assistant principal were not done appropriately and violated district policies.

The order does not indicate what facts are necessary to show "inefficiency"; does not indicate why the facts fail to show "inefficiency"; and does not attempt to define "inefficiency."

The school district appealed to the Court of Appeals. On appeal, the court noted that the board determined that dismissal should be set aside because the facts that were shown to be true and substantiated did not show any of the four cited causes for dismissal. The court approved the board's rejection of much of the district's evidence as unpersuasive.

12. ***Holcomb v. Jefferson County School District no. 509-J***, FDA 82-6 (1982):

The teacher was dismissed for inefficiency, inadequate performance and failure to comply with reasonable school board requirements to show improvement and growth. Dismissal was upheld on all three grounds.

The findings of fact discuss many things but do not indicate, except in a few instances, just what the teacher did wrong. The ultimate findings of fact indicate, however, that the teacher failed to comply with requirements for preparing and filing of records; failed to organize PAC's; failed to send individual progress reports home to parents; failed to maintain a classroom environment conducive to learning; failed to use appropriate teaching techniques; failed to observe techniques used by other teachers in remedial situations; failed to obtain timely assistance on lesson planning; and failed to complete IEP updating on a timely basis even after repeated warnings. The order does not indicate the extent of these deficiencies.

The order of the panel indicates that the teacher, with the knowledge and background in her program (Title I) and in the district resource center for learning disabled children “should have been more aggressive in pursuing the objectives of her duties.” It also noted that the teacher may have been justified in her actions, but the emerging pattern was not acceptable because of a possible loss of revenues to the district.

As to the definition of “inefficiency,” the panel commented that inefficiency and inadequate performance were closely related and could be difficult to distinguish.

The order does not indicate what facts are necessary to show “inefficiency”; does not indicate just why the facts of the case show “inefficiency”; and except as stated above does not attempt to define “inefficiency.”

13. ***Boehm v. Klamath Falls School District No. 1***, FDA 83-8 (1984):

The teacher was dismissed for inefficiency, insubordination, neglect of duty and inadequate performance. Dismissal was upheld for inefficiency, neglect of duty and inadequate performance.

The facts of the case show that the teacher, and elementary school teacher, had a history of reacting emotionally and at times physically toward disruptive or disrespectful students, lacked the ability to control his classroom adequately, had poor rapport with his students and at times an adversarial relationship with them, argued with students and focused on their fault in incidents where his own conduct was criticized, mislaid student papers, violated instructions regarding use of the area behind the office secretary’s desk, accused his principal of being unprofessional and playing games with him, etc. The teacher received repeated warnings about the need to correct his performance deficiencies. His conduct violated many of the district’s written performance standards.

The order of the panel states that, though the teacher worked very hard, his reactions to student misbehavior showed a deficiency in his ability to establish rapport with his students, which caused him problems. Further, appellant was not effective at preventing student misbehavior, supervising his students, and acting as a model of mature and professional behavior. Therefore, the facts of this case show inefficiency.

The order does not indicate, except as indicated above, what facts are necessary to show “inefficiency”; does not, except as quoted above, say why the facts of the case show “inefficiency”; and does not attempt to define “inefficiency.”

14. ***Thomas v. Cascade Union High School District No. 5***, FDA 84-7 (1985), **reversed and remanded**, ***Thomas v. Cascade Union High School District No. 5***, 80 Or App 736 (1986), **order on remand** (1987) (remanding to district), **order on appeal after remand** (1987), **affirmed**, ***Thomas v. Cascade Union High School District No. 5***, 98 Or App 679 (1989), **disavowed by *Bergerson v. Salem-Keizer School District***, 194 Or App 301 (2004):



The teacher was dismissed for inefficiency, neglect of duty, inadequate performance and cause constituting grounds for revocation of the teacher's teaching certificate. Dismissal was upheld for neglect of duty.

The teacher was a girls' physical education teacher who had six years experience with the district, prior to her dismissal in June of 1984, and six years before that with another district. She had good rapport with her students, had a record of acting professionally and with self-control and was fair in dealing with students. On April 18, 1984, however, she reacted in anger to a girl who hit her intentionally from behind with a volley-ball during a dodge-ball game. She grabbed the girl and kicked her twice in the back of her leg. In the locker room area after the game, when some of the girls voiced protests of the kicking, the teacher made statements indicating that the girl who was kicked was also at fault in the matter. The kicking incident was the only instance of loss of control by the teacher in her 12 years of teaching. There was no reason other than the incident to believe that physical abuse of a student by the teacher would recur in the future.

The factual charges against the teacher were essentially two, namely, (1) that she kicked the girl during the dodge-ball game and (2) that she engaged in a shouting match in the locker room with some of the girls after the game. The panel found the second charge not proven and upheld dismissal on the kicking incident alone.

The order of the panel stated that "inefficiency," as used in the statute, is usually shown by a series of incidents which demonstrate a teacher's inability, over time, to meet necessary standards, rather than by an isolated instance of misconduct in a period of otherwise satisfactory conduct. The order does not indicate just what facts are necessary to show "inefficiency" and does not, except as quoted above, attempt to define "inefficiency."

The teacher appealed and the Court of Appeals remanded the case to the Fair Dismissal Appeals Board for remand to the district because a number of the factual charges were not substantiated. Thereafter, in its *Order on Remand* (1987), the panel held that the one proven charge did not rise to inefficiency because it showed no underlying inability to perform teaching duties in an efficient manner. The case came back to the panel, again, after the remand to the district. In its *Order on Appeal after Remand*, the panel upheld the district's decision to stand by its original action of dismissal.

The Oregon Court of Appeals affirmed the order of the panel on appeal after remand. It concluded that the teacher was not entitled to reinstatement and back pay pending the district's decision on remand and that a new superintendent's recommendation of dismissal was not required for the district's reconsideration of the case on remand.

15. ***Hoover v. Hermiston School District No. 8***, FDA 87-1 (1988):

The teacher in this case, after 18 years as the high school's choral instructor, asked to be reassigned to teaching of mathematics. He was dismissed after three years as a mathematics instructor because he could not stop student misbehavior in his classes; tolerated student profanity and disrespect; failed to achieve a classroom environment

conducive to learning; allowed the problem of students not on task to continue; and insufficiently monitored student understanding of the subject matter.

In upholding the dismissal on the ground of inefficiency the panel stated that “inefficiency” may be shown by an accumulation of incidents and situations, none of which alone would be sufficient for dismissal. The panel also stated that “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.

The panel held that cause for dismissal based on “inefficiency” existed due to the teacher’s lack of use of the extensive training and counseling he had received in classroom control and teaching technique, as well as his lack of use of his many years of teaching experience. The panel held that this lack of use of training and experience contributed to the teacher’s inability to meet the district’s requirements.

16. ***Ballman v. Warrenton-Hammond School District No. 30***, FDA 89-4 (1990):

The teacher was dismissed for inefficiency, inadequate performance, and failure to comply with school board requirements to show improvement, training, and growth. Dismissal was upheld by the panel for inefficiency and inadequate performance.

The teacher was a high school science teacher who was 64 years old and had taught for 33 years for the district at the time of his dismissal. He had developed a number of programs for students in the science area over the years and was well-liked by students, staff, and parents. However, he ran a free-structured, loose-disciplined classroom and tolerated considerable movement of students within the room, talking, socializing, and off-task behavior.

With regard to inefficiency the panel stated that the teacher’s failure to use his abilities, training, and resources to maximize student productivity and minimize classroom disruptions constituted “inefficiency” under ORS 342.865.

The evidence showed that the teacher let students consume class time arguing with him over directives or assignments; allowed students to leave the room to get drinks of water, go to the library or otherwise be outside the teacher’s supervision; had trouble getting the students to start their work after the tardy bell rang; continually failed to have all students paying attention when he talked; allowed students to avoid participating in class exercises; allowed students to interrupt when another student was speaking; failed to apply misbehavior consequences; and failed to maximize student on-task time. The panel recognized that despite the teacher’s style of “loose” supervision for some 30 years, the district had the right to change its standards, or enforcement of its standards, by requiring maximum on-task time and avoidance of nonproductive use of class time. The teacher then had the obligation to meet these requirements.

The panel explained that “inefficiency” was demonstrated by the evidence because the continuing classroom conditions allowed by the teacher constituted a failure of the teacher to meet his job requirements.

17. ***Enfield v. Salem-Keizer School District No. 24-J***, FDA 91-1(1992), **affirmed without opinion**, 118 Or App 162 (1993), **review denied** 316 Or 142 (1993):

The teacher was dismissed for inefficiency, insubordination, neglect of duty, and inadequate performance. The panel found the facts insufficient to support the statutory grounds and set aside the dismissal.

The teacher was a high school mathematics teacher and had taught for the district for 23 years before his dismissal in March of 1991. He was effective in his instruction of students and was considered an excellent mathematician. On the other hand, for some six years he had had trouble with negative, sarcastic, or otherwise inappropriate remarks to students and occasional confrontations with students. These problems had generated complaints against him from students and parents. However, except for a plan of assistance on which he was placed for several months in 1988 in order to help him become more courteous toward students and more supportive, the only remedial measures taken by the district to address these problems were occasional discussions with the teacher, annual goal statements, and comments on the teacher's evaluations.

An incident in the fall of 1990 precipitated the dismissal. The teacher, in his freshman algebra class, grabbed a student by the shoulder after the student threw a wad of paper. The force of the grip caused pain to the student, though the teacher intended no pain or injury. The teacher then required the student to do 15 pushups, as punishment, in the presence of the other students. The student was greatly embarrassed from having to do the pushups but they did not cause him any pain. Because of the incident the student's parents filed a complaint for assault against the teacher at the local police station.

The teacher had never used physical force on a student before this incident. The district, however, dismissed the teacher on the basis of both the incident and the teacher's record of inappropriate remarks and confrontational behavior. With regard to inefficiency, the panel stated, that the facts did not show cause for dismissal for inefficiency because one instance of the teacher's use of physical force was insufficient to prove that the teacher was unable or unwilling to meet the district's requirements.

In its discussion of the charge of inefficiency, the panel quoted the definition of "inefficiency" from ***Hoover v. Hermiston School District No. 8***, FDA 87-1, and then stated that the occasional misbehavior of the teacher over the years had caused no major concern to the administrators and that the one later isolated incident was insufficient to show "inefficiency." The panel held that the district could not use the previous misconduct of the teacher, which is what not greatly concerned about, to bolster a later case for "inefficiency" which is actually based only on an isolated incident rather than a pattern of behavior.

18. ***Packard v. Corvallis School District No. 509J***, FDA 97-4 (1998):

The teacher was dismissed for inefficiency and inadequate performance. The panel upheld the dismissal on both grounds.

The teacher taught for approximately 28 years for the same district before her dismissal in March of 1997. She was identified as a teacher with great concern for the social, emotional, and academic welfare of children. The appellant spent many hours outside of class engaged in supportive activities for her students and in some instances, their families. She individually helped many students who had learning, emotional, or motivational difficulty in school. She strove to find a learning “hook” for each student in order for them to become life-long learners. She focused on each student’s strengths and progress in an open-ended teaching process. She was generally observed to be a nurturing, empathetic, kind, approachable, and dedicated person. These characteristics were her strengths but also exacted a toll on her teaching methods in the areas of academic planning and on-task accountability for students.

She moved to a new school with a new principal who provided more observations, feedback, and directions for improvement. The principal was concerned with the teacher’s lack of on-task teaching, student accountability, and academic planning. Initially, the principal utilized collaborative techniques to obtain change. The efforts did not result in sustained improvement. By January 1995, the principal had determined that a more stringent plan for correction was needed and it was decided to place the teacher on a formal plan of assistance. The plan listed goals, expectations, assistance, and measurement criteria.

Over the course of 1995 and 1996 the teacher failed to make sustained improvement in the areas identified in the plan and on June 6, 1996, the principal and a district administrator who was closely involved in the matter recommended the teacher’s dismissal. Ultimately the teacher was dismissed.

Regarding inefficiency, the panel stated that the teacher’s failure to improve despite great effort by her principal to assist her showed inefficiency. The panel further stated that, though the teacher committed extra time and effort to her students, she was ineffective in creating a balanced learning environment due to her failure to provide a structured classroom.

19. ***Bourgo v. Canby School District No. 86U***, FDA 99-6 (2000):

Administrator was dismissed for inefficiency, neglect of duty and inadequate performance. The Panel found that the Appellant Administrator, with a lengthy history of good performance, was transferred to a new position against his will. Essentially the Appellant became passively resistant to performing the duties of his current assignment. Ultimately, his non-performance, under the factual record, established the three statutory grounds. The action was appropriate under the statutory guidelines the Board must follow and the dismissal of Appellant was sustained.

## B. IMMORALITY:

1. ***Ross v. Springfield School District No. 19***, FDA 80-1 (1980), **affirmed**, 56 Or App 197 (1982), **reversed and remanded**, 294 Or 357 (1982), **order on remand** (1983), **affirmed**, 71 Or App 111 (1984), **reversed and remanded**, 300 Or 507 (1986), **order on second remand** (1987); **revised order on second remand** (1988).

The teacher was dismissed for immorality, inefficiency, and gross unfitness. The order upheld dismissal on the grounds of immorality and gross unfitness.

The teacher was the librarian at two elementary schools in the district. In January of 1979, the teacher made a number of visits, during off-duty time, to an adult bookstore in Eugene, where he engaged in sexual acts with another person in an arcade booth on the premises. He was observed by undercover police and was named as a witness when the district attorney brought suit to enjoin the bookstore operation as a nuisance. News of his involvement in the bookstore reached the Springfield community and many parents then protested the district's employment of him at the elementary schools.

The panel described his bookstore conduct as "acts of sexual deviation" and indicated that the school district parents became aware of his conduct, that they objected to his lifestyle, that the teacher has lost their respect, that the teacher's ineffectiveness as a teacher was impaired, that the teacher could not, because of his conduct, inspire confidence in his students, that he should have known that discovery of his lifestyle would damage his effectiveness as a teacher and that the sexual acts occurred in a public place. The panel stated that Ross was not charged with being a homosexual, but rather was charged with immorality, which is evidenced by his willingness to engage in deviate sexual behavior. The panel indicated that "immorality" under the Fair Dismissal Law did not have to be on-the-job conduct.

The teacher appealed to the Oregon Court of Appeals. The court affirmed. The teacher argued that "immorality" was not defined in the Fair Dismissal Law and, therefore, should have been defined in the panel's order. The court disagreed, believing that the standards of moral conduct (and fitness) were to be applied at the district level. The court also stated that the Fair Dismissal Appeals Board did not consider the illegality of the teacher's conduct significant; that the panel's findings were supported by substantial evidence; that vagueness of the terms "immorality" and "gross unfitness" did not deprive the teacher of due process; that any invasion of the teacher's privacy was the result of the teacher's indiscretion; and that dismissal was a permissible action against the teacher.

The teacher appealed to the Oregon Supreme Court. The Supreme Court reversed the dismissal on gross unfitness and remanded the case to the Fair Dismissal Appeals Board for the board's rationale as to why the facts showed "immorality." The court indicated that the Fair Dismissal Appeals Board is the primary interpreter of the statute providing for dismissal of teachers and that the board has the responsibility to interpret the term "immorality" in the Fair Dismissal Law. The court found the panel's order "inadequate" because it did not set forth the panel's reasoning showing why the facts demonstrated

“immorality.” The court remanded the case because, as it said, “there is no rationale to support the conclusion that petitioner’s conduct was immoral.” (Three justices dissented.)

On remand, the reconstituted panel again upheld dismissal on the ground of immorality, and made the following statements with respect to the term “immorality:”

1. The panel interprets the word immorality in the statute as including reprehensible sexual conduct by a teacher.
2. \*\*\*sexual conduct, to constitute immorality under the statute, must violate either the moral standards of the school community or the moral standards of the people of the State of Oregon.
3. To constitute immorality under the statute, the behavior of a teacher must negatively affect the ability of the teacher to carry out his or her required responsibilities.
4. Engaging in sexual intercourse publicly is universally condemned.
5. In this case, appellant’s engaging in sexual intercourse in a commercial establishment without a reasonable attempt to assure complete privacy is activity so reprehensible and so universally condemned that appellant was bound to know it would violate, as we conclude that it did, the standard of sexual privacy of both the people of Oregon as a whole and the school community.
6. [The teacher made an] intentional choice to engage in gratification of his sexual desires in a commercial establishment not purporting to offer privacy for sex act purposes and in a booth where he could be observed by other members of the public on the premises.

The panel further indicated that the teacher by failing to take reasonable privacy precautions, invited the notoriety of his activity; that his sexual conduct damaged his relationship with parents and sound public relations was a requirement imposed on him by school policy; that his conduct justified the district’s concluding that that it could not rely on him to promote high moral standards required by district policy; that his conduct justified the district’s concluding that it could not rely on him as a role model for students, as district directives required; and that, , the district did not have to present evidence actually demonstrating that the teacher could not be effective to sustain the charge of immorality.

The teacher appealed again to the Court of Appeals. The court affirmed the board. The court concluded that the board’s definition of immorality as including “reprehensible sexual conduct” was not erroneous and that the board correctly concluded that the teacher engaged in sexual intercourse publicly.

The teacher appealed to the Oregon Supreme Court, which reversed and remanded the matter to the Fail Dismissal Appeals Board for a proper definition of “immorality.” The

court indicated that board must itself determine what immorality is rather than determine what the community or the state considers immorality to be. The court viewed the second panel's method of defining immorality as "a search for popular opinion." "FDAB is responsible," the court said, "for deciding on the criteria that make conduct immoral without looking for community opinion on immorality." The court said that the defining responsibility of the board is hardly advanced by defining one epithet by another, for instance, that conduct is immoral if it is reprehensible."

The court further stated that the board need not provide and exhaustive list of specific disapproved conduct to establish criteria. Additionally, the court said the board must have some means of giving the statute a consistent interpretation. (The court seemed to assume that the board had no way of bringing decisions of the various panels, over the years, to the attention of panels in particular cases.)

In its Revised Findings of Fact, Conclusions of Law and Order on Remand No. 2 (1988), the panel after an evidentiary hearing on the criteria for immorality, defined the statutory ground of "immorality" as referring generally to conduct that is selfish, or in some cases malicious, and that generally shows disregard for the rights or sensitivities of other persons. The panel also stated that whether the conduct is a violation of law is immaterial in deciding whether it is immoral because criminal activity is also provided as a basis for cause under the Fair Dismissal Law.

Further, the board stated that it was confident that the legislature, by including immorality within the statute, had not meant to exclude certain sexual behavior as a cause for dismissal. Also, sexual conduct may be immoral for the same basic reason as other crimes are considered immoral, disrespect of others. Thus, the board construed "immorality," as it relates to sexual conduct, to refer to behavior such as sexual activity that violates the rights or endangers the welfare of a participant other than a consenting adult, or intimate sexual activity performed in a location not permitting a reasonable expectation of privacy.

Applying its new definition to the facts of the case, the panel found that the teacher's actions had constituted "immorality" because he had performed various sex acts in a public location, without regard for the sensitivities of others who may be present, that object to those particular acts taking place in that location. The panel stated that it was significant that the teacher knew that others could observe, or infer from other observations, what was taking place inside the booth where the teacher was taking part in sexual conduct. That he knew others may be offended and still engaged in the conduct constituted the required selfishness in the eyes of the board.

However, the panel also found that there must be a nexus between the conduct and the teacher's job duties in order to constitute grounds for dismissal. The panel found this nexus in the fact that, though the conduct took place during off-duty time, the community became aware of the conduct when it was publicized in connection with a case brought by the district attorney to close the bookstore where the actions had taken place. Because this knowledge caused negative consequences in the school community, the board held that the public knowledge of the teacher's activity furnished an adequate nexus.

Lastly, the board held that the behavior was grounds for dismissal because it damaged the teacher's ability to act as a positive role model for students, in the eyes of parents. The board stated that teachers have a greater duty to exercise discretion in their off-duty conduct because students may lose respect for their teachers upon gaining knowledge of some types of misconduct. Because the board found that the sexual conduct at issue could cause students to lose respect for the teacher, it held that the teacher's no longer had credibility as a role model.

2. ***Shipley v. Salem School District No. 24J***, FDA 81-24 (1982), **reversed and remanded**, ***Shipley v. Salem School District No. 24J***, 64 Or App 777 (1983), ***Order on Remand*** (1984):

The teacher was dismissed for immorality and gross unfitness. The panel set aside the dismissal because, as it stated, "the notice of intention to recommend petitioner's dismissal does not meet the statutory requirement that 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\* \* \*."

The district appealed to the Oregon Court of Appeals. The court reversed the order of FDAB and remanded the case to FDAB for further proceedings. The court agreed that immorality or gross unfitness charges had to show a negative impact on the ability of the teacher to discharge his duties. The court also agreed that the district's statement of facts should show the connection between the conduct charged against the teacher and the teacher's teaching responsibilities. The court indicated that the facts charged in the notice of recommendation of dismissal sufficiently charged both the conduct at issue and connection with the teacher's teaching responsibilities and, therefore, that FDAB erred in determining the notice to be insufficient.

On remand, the matter then came to hearing before an FDAB panel and the order of the panel on the merits of the case set aside dismissal.

The facts of the case showed that the 12 year-old boy brought a civil action against the teacher based on multiple allegations of primarily sexual touching; that the jury returned a verdict against the teacher that did not specify which allegations the jury found to be true; that the district suspended and then terminated the teacher on the basis of the jury's verdict; and that no judgment was entered in the case because the case was settled. The teacher was active in a Big Brother program and helped out a number of boys through the program. While the 12 year-old boy was a "Little Brother" to the teacher, in the program, the two engaged in incidents of wrestling and tickling. Several outings occurred and the boy claimed the sexual contacts occurred on these outings. On some of the outings the teacher got angry at the boy.

The panel found, from actual testimony at the hearing from the boy and the teacher, that the wrestling and tickling that occurred was not sexual in nature, though eventually so perceived by the boy, that sexual touchings did not occur, and that, consequently, the facts relied upon by the school district were not true and substantiated.



The order does not indicate what facts are necessary to show “immorality” and does not attempt to define “immorality.”

3. ***Ewart v. Parkrose School District No. 3***, FDA 82-1 (1982):

The teacher was dismissed for immorality. The dismissal was set aside.

The facts charged against the teacher, a music teacher, were that on several occasions he fondled the breasts of elementary school girls while giving them instruction on stringed instruments. The panel found that the teacher did not engage in the alleged fondling and that any touching of the girls’ breasts was accidental or inadvertent. The panel thus determined that the facts upon which the district relied for its charge of immorality were not true and substantiated. The order contains the statement that if Ewart had intentionally touched the breasts of any of the girls, it would constitute immorality.

The order, nevertheless, does not say why this is so, does not say what facts are necessary to constitute “immorality” and does not attempt to define “immorality.”

4. ***Kari v. Jefferson County School District No. 509-J***, FDA 88-6 (1989), **reversed and remanded**, ***Jefferson County School District No. 509-J v. Fair Dismissal Appeals Board***, 102 Or App 83 (1990), **affirmed** 311 Or 389 (1991), **on remand** ***Kari v. Jefferson County School District No. 509-J***, (1991) (upholding dismissal):

The teacher, who taught kindergarten in one of the district’s elementary schools, was dismissed for “immorality” and “neglect of duty.” The dismissal was set aside by a two-to-one decision of the panel.

The teacher, as part of her required duties, taught the district’s say-no-to-drugs curriculum and participated in say-no-to-drugs program activities. However, she knew that her husband, for a period in excess of two years, had been using and selling marijuana at their home, where she, her husband, and their two young children lived. The teacher disapproved of her husband’s activities but did not report him to law enforcement authorities, did not try to force him to leave their home, and did not herself leave, because she did not want to break up their family.

In concluding that the teacher’s conduct did not show “immorality,” the majority decision of the panel stated that the facts of the case did not show immorality because they do not show selfish conduct by the teacher, which the board had required in ***Ross v. Springfield School District No. 19***, FDA 80-1 (1988). The panel further stated that the facts do not show that any illegal or immoral conduct on the part of the teacher damaged her ability to teach.

The dissent found, contrary to the majority, that the teacher was not committed to the say-no-to-drugs program and that her actions, together with reasonably imputed knowledge of her husband’s activities, showed that the teacher condoned the use of their home for the possession and sale of marijuana and that the teacher accepted the financial benefit to the family of money from such sales. The dissent indicated that teacher had to have known of the risk that some of the marijuana sold by the husband would eventually

be resold to children and that her failure “to protect school children from the harm that might come to them” was not only negligent but “immoral and criminal as well.”

In discussing the charge of “immorality,” the dissent indicated that the teacher’s “frequenting a place (her home) while knowingly permitting her husband to use, keep, and sell marijuana there for over two years” was both illegal and immoral; that the reasoning of the panel in the *Ross* case was binding in this case and showed that the teacher’s conduct in this case was immoral; and that the teacher in this case “selfishly permitted a criminal enterprise to continue which put students in the community at risk.” The dissent likewise disagreed with the majority’s conclusions that the teacher’s conduct did not show neglect of duty and that regardless of cause for discipline, dismissal was unreasonable and a clearly excessive sanction.

The school district appealed to the Oregon Court of Appeals. The court reversed the order of the board and remanded the case to the Fair Dismissal Appeals Board because, in the court’s opinion, the facts showed neglect of duty. The court did not address the immorality ground.

The teacher then appealed to the Oregon Supreme Court. The court affirmed the decision of the Court of Appeals and noted that the district was not contending at this stage in the appeal, that the facts supported the ground of immorality.

On remand, the panel, with one new member replacing a former panel member, issued a revised order which, by a split decision again set aside the dismissal. The panel majority concluded that the facts did not show either immorality or neglect of duty. The dissent, however, concluded that the facts showed immorality through the teacher’s willingness to have her family’s income augmented by the proceeds of illegal drug sales; through her disregard for children and other persons in the community by her role in allowing her home to be used for the distribution of illegal drugs into the community; through violation of her role model responsibility as a teacher in allowing distribution of drugs into the community while she was expected to be an advocate for the district against drugs; and through her violation of her role model responsibility by engaging in off-duty conduct that would damage her credibility as a teacher in the community.

5. ***Thyfault v. Pendleton School District No. 16R***, FDA 90-4 (1991):

The teacher was dismissed for immorality, insubordination, neglect of duty and inadequate performance. Dismissal was upheld for immorality and neglect of duty.

The teacher was a special education teacher in one of the district’s elementary schools. The teacher altered an IEP form to falsely represent IEP Committee approval for placement of a particular student in the resource room; used a medical form to attempt to obtain confidential medical information about a junior high school student, then falsely represented that she had obtained approval to submit the form; spanked and swatted one student in her room, then falsely denied doing so; and asked an educational assistant in her room to give the district false statements regarding the spanking incident.

The panel, in its order, stated that the facts proved cause for dismissal based on immorality because the teacher's attempt to induce her assistant to lie constituted selfish conduct and intentional disregard of the assistant's rights to tell the truth.

The panel held that the teacher's altering forms and lying about spanking the student did not amount to "immorality" because they failed to show any significant disregard for the rights or sensitivities of other persons. Rather the teacher engaged in this conduct in order to protect herself from the consequences of her actions.

6. ***Webster v. Columbia Education School District***, FDA 96-1 (1998), **affirmed without opinion** 163 Or App 416 (1999):

The appellant was dismissed on the grounds of immorality and neglect of duty. She was charged with purchasing morphine tablets from a coworker (teacher) on January 10, 1996 and also receiving at least one Welbutrin tablet (prescription medication) at the same time. Appellant acknowledged receipt of the Welbutrin tablet, but denied purchasing the morphine tablets.

The facts were held to be true and substantiated. They were further held to violate district policy concerning the possession or control of controlled substances on school grounds. Additionally, they were held to violate state statutes dealing with drug abuse education in public schools. *See* ORS §§336.067(1)(d) and 336.109(a), (b), and (c). The panel found the factual allegations adequate to justify the grounds of neglect of duty and immorality, and that dismissal was not unreasonable, arbitrary or clearly excessive.

The significance of the case concerns the sufficiency of evidence analysis. The coworker (a teacher) advised both parties, through his criminal defense attorney, that he would assert the Fifth Amendment if called to testify. He was not subpoenaed by either party to the proceedings, although the district attempted to provide immunity to him. The immunity offer was not accepted. The panel heard the coworker statements through the investigating police officer's testimony. This was hearsay which was clearly admissible in this administrative proceeding under ***Reguero v. Teacher Standards and Practices***, 312 Or 402, 417-422 (1991).

7. ***Hayden v. Glendale School District No. 77***, FDA 99-4 (2000):

This was a long-term teacher with extremes of performance before the District which the Panel Opinion described as "calling to mind the analogy of a roller coaster ride". There were litigated issues concerning psychological conditions with several medical health care professional testifying before the hearings officer. There were procedural deficiencies in the processing of the personnel action noted by the Panel. Particularly the statutory criteria of giving notice to the teacher of the facts and legal basis for the proposed action were at issue. Ultimately the Panel returned those charges which were substantiated to the School Board for a decision.

One factual charge that was substantiated was appellant's giving of a cup to the principal as a Valentine gift. The cup contained "crude sexually oriented comments and a phone

number” and the appellant then placed four (4) successive phone calls to the principal on one day to discuss the “gift”. During one of the calls she described herself as phoning him from the bathtub. Appellant recognized the inappropriateness of the conduct by phoning another administrator several days later to express concern about what she had done. The Panel found this conduct to amount to immorality in that it demonstrated excessive orientation toward herself and a “significant disregard for the sensitivity of her superior.”

8. ***Bergerson v. Salem-Keizer School District***, FDA 02-2 (2002), **reversed and remanded** by 194 Or App 301 (2004):

A long-term teacher was dismissed following her off-duty behavior on the grounds of immorality and neglect of duty. During the course of a divorce she went to a residence where her husband was living and following a personal confrontation, drove her van into the back of the husband’s unoccupied pickup truck. Damage was caused to the structure because the pickup was pushed into a corner of the garage. The panel found that the conduct would meet the statutory ground of “immorality” although it did not sustain the dismissal action. The panel found that only a limited portion of the facts met the statutory standard of being “true and substantiated.” After this analysis the panel determined that the action violated two of the other three statutory provisions upon which a school district decision can be reversed. The panel then decided that the action was not “arbitrary” but was “unreasonable” and “clearly an excessive remedy.”

The district appealed to the Court of Appeals and the teacher cross-appealed. The Court of Appeals reversed and remanded the case on the district’s appeal, but affirmed on the teacher’s cross-appeal. The Court of Appeals wrote a lengthy opinion with several important rulings. It made clear that FDAB may not substitute its judgment for that of the school board unless the dismissal is arbitrary, unreasonable or clearly an excessive remedy and explained the standard for making that determination: “FDAB impermissibly substitutes its own judgment for that of the school board as to the propriety of a dismissal unless no reasonable school board would have imposed that action.” It then concluded that FDAB did not adequately explain its reasoning with respect to the conclusions that the dismissal was unreasonable or clearly excessive and that, without further explanation from FDAB, it could not agree with FDAB’s conclusion.

The Court of Appeals also overruled its earlier decision in ***Thomas v. Cascade Union High School District No. 5***, 98 Or App 679 (1989), which appeared to require FDAB to remand a case to the school board whenever some of the facts relied on by the school board are found to be untrue or unsubstantiated. The Court said that the statute does not allow FDAB to remand a case to the school board. Rather, “where FDAB finds that at least some of the facts relied on by a school board are true and substantiated and those facts support at least one of the cited statutory grounds for dismissal, the agency must affirm the board’s decision unless it finds that the decision was unreasonable, arbitrary, or clearly an excessive remedy.”

9. ***Zottola v. Three River School District***, FDA 01-05 (2002), **affirmed without opinion** 188 Or App 489 (2003), **order on motion to determine back pay** (2003), **order on remand on motion to determine back pay** (2004):

The panel's order indicates that the district dismissed the teacher on the grounds of insubordination and neglect of duty and, presumably though not mentioned in the order, immorality. The panel reversed the dismissal and ordered the teacher reinstated.

The school district had contracted with the Oregon Youth Authority to provide educational services at the OYA facility in Grants Pass. This led to a practical situation where there were two lines of authority for the Appellant – the District and OYA. The underlying conduct involved allegations about the interactions between the teacher and an incarcerated youth. The panel majority found that there was essentially a failure of proof in that they did not believe the youth's testimony and found other evidence that mitigated the Appellant's conduct (with one factor being dual lines of authority). With the facts not being "true and substantiated" the District's decision was reversed. There is a dissenting opinion which views the conduct as largely uncontested between the parties and the logical conclusions to be drawn favor the District's decision to terminate.

The district appealed. The Court of Appeals affirmed FDAB's decision without opinion on June 26, 2003.

There are three unique procedural issues addressed below from this case: (1) the question of "double jeopardy"; (2) the teacher's attempts to subpoena records from OYA during the hearing; and (3) the question of whether back pay may be offset by unemployment benefits received by the teacher.

## C. **INSUBORDINATION:**

### 1. ***Rogers v. Douglas County School District***, FDA 74-6 (1975):

The teacher was dismissed for insubordination and inefficiency. Dismissal was upheld on both grounds.

The order makes a number of findings regarding the appellant's resistance to directives from her superintendent (described variously throughout the findings as "failed to submit a reasonable response," "outright rejection" of the superintendent's request, a response that was "intentionally incomplete," "uncooperative," "willful disregard," "continuing refusal to obey," "willful disobedience of a reasonable request," etc.). The order indicates that the findings "constitute evidence of a collective, cumulative, and continuing course of insubordination." The order does not say what facts are necessary to show "insubordination"; does not say why the facts show "insubordination"; and does not define "insubordination."

(The teacher appealed to the Oregon Court of Appeals and disputed the determination that the record showed his performance to be inadequate. The Court of Appeals affirmed.)

### 2. ***Whitaker v. Coos Bay School District***, FDA 75-1 (1975), **affirmed** ***Whitaker v. Fair Dismissal Appeals Board***, 25 Or App 569 (1976):

The teacher was dismissed for insubordination and inadequate performance. Dismissal was upheld for inadequate performance.

The order indicated that the charge of insubordination was not sustained. Twenty-one separate findings were made with respect to this charge. Apparently the district charged the teacher with violating a directive against corporal punishment on seven occasions. The panel determined that only one of the seven occurred during the period of the ban on corporal punishment and that the evidence regarding that incident failed to show that the striking of the student was corporal punishment (rather than "physical restraint necessary to maintain order"). The order does not otherwise indicate why the charge of "insubordination" was not sustained; does not indicate what facts are necessary to show "insubordination"; and does not in any way define "insubordination."

The Court of Appeals upheld the inadequate performance ruling.

### 3. ***Barnes v. Scappoose School District***, FDA 75-10 (1975); **affirmed** 25 Or App 177 (1976):

The teacher was dismissed for insubordination and the dismissal was upheld.

The findings of fact show an incident of physical discipline of a student in April 1971, warning given to the teacher against such conduct, then two more instances thereafter, in 1974 and 1975, of physical discipline of a student. The findings also show an "I would

do it again” attitude of the teacher that was expressed by the teacher just after the 1974 incident and an instance of defiant conduct in April of 1974.

The order of the board states the following:

- a. The teacher “violated the policies” of the district in administering “corporal punishment” to students.
- b. The teacher demonstrated “defiance” and “refusal to adhere to written and verbal instructions” regarding corporal punishment.
- c. The incidents were not numerous.
- d. However, the incidents subjected the district to potential legal liability.
- e. The administration must be able to conduct district affairs in accordance with its own policies.
- f. The teacher’s conduct, if continued, would result in the district’s loss of control of district affairs.
- g. “The facts illustrate clear disobedience to authority over a considerable period of time and after repeated warnings \* \* \*.”

Except for the foregoing, the order does not say why the facts show “insubordination”; does not say what facts are necessary to show “insubordination”; and does not define “insubordination.”

The teacher appealed to the Oregon Court of Appeals. The court affirmed the order of the board. The court found “substantial evidence” in the record to support the board’s order. It made no statement which bears in any way on the meaning of “insubordination.”

4. ***Barcroft v. Sweet Home School District***, FDA 76-1 (1977):

The teacher was dismissed for insubordination, inadequate performance, and gross unfitness. Dismissal was upheld for insubordination and inadequate performance.

The teacher, a football coach, told a student player to hit a game official, during a football game between Sweet Home and Molalla High Schools. The student thereafter deliberately struck the official with his (the student’s) head. The coach then, in order to conceal facts, clipped off a portion of the game film which showed that incident and kept it at his home. The school principal investigated the incident. The coach falsely denied telling the student to hit the game official and concealed from the principal the fact that he had the portion of the game film showing the incident. The coach also called the Molalla coach and asked him to remove a similar portion of Molalla’s game film. The order of the board states that the conduct evidences insubordination.

The order does not otherwise state what facts show “insubordination”, does not state why the facts show “insubordination”; and does not in any way attempt to define “insubordination.”

5. ***Smith (John) v. North Clackamas School District***, FDA 76-8 (1977); **affirmed *North Clackamas School District No. 12 v. Fair Dismissal Appeals Board, et al.***, 30 Or App 855 (1977):

The teacher was dismissed for insubordination. Dismissal was set aside by the panel.

The district charged the teacher with several incidents of unauthorized physical discipline of students. The order of the board finds, in essence, that the incidents occurring in 1973 and 1976, after a warning given to the teacher in 1972, did not amount to physical discipline of the students involved. The panel found that several charges did not amount to deliberate or intentional violations of policy and that the teacher had demonstrated a sincere desire to cooperate with the district.

The district appealed to the Oregon Court of Appeals, but the court upheld the board. In a concurring opinion, Judge Thornton stated that he would affirm on the ground that the Board found that the district failed to establish that the teacher was insubordinate by willfully and intentionally violating district policy against the physical punishment of students. Further, the term “insubordination” is not defined within the statutes, but has been defined in other jurisdictions as including the willful refusal of a teacher to obey the rules and regulations of his employing board of education. Judge Thornton believed that that definition of “insubordination” to be read into the Fair Dismissal Law.

6. ***Hausotter v. Douglas County School District No. 4***, FDA 76-9 (1977):

The teacher was dismissed for insubordination, inefficiency, inadequate performance, and failure to comply with such reasonable requirements as the school board may prescribe to show normal improvement and evidence of professional training and growth. Dismissal was upheld on all grounds except inefficiency.

In essence, the teacher was involved in 1972 in incidents of physical discipline of students that violated district policy. In January of 1973 he was given a letter from the school board with specific written directive to refrain from using physical force on any student; to send incorrigible students to the school office; to handle disruptive student without undue emotional reaction; to maintain a professional relationship with students; and to adhere at all times to district and school board policies with respect to the discipline of students. However, the teacher engaged in some incident of September of 1976 (which is not described in the order) and engaged in grabbing a student’s hair in November of 1976 that resulted in some of the hair being pulled out. The order indicates that the September incident violated district policy. It further indicates that both 1976 incidents violated the school board’s directives of 1973 regarding use of physical force on students, referring incorrigible students to the school office, maintaining a professional relationship with students and adherence to school board policy on disciplining students.



7. ***Mayer v. Lincoln County School District***, FDA 77-11 (1978), **reversed and remanded** ***Lincoln County School District v. Mayer, et al.*** 39 Or App 99 (1979):

The teacher was dismissed for insubordination, inefficiency, neglect of duty, and inadequate performance. Dismissal was set aside by the panel.

The district based its case against the teacher on a multitude of performance criticisms, including instructional deficiencies, deficiencies in dealing with students, poor work habits, etc. The panel found the charged facts to be true and substantiated but not sufficient for dismissal.

The order makes reference to the fact that many incidents or deficiencies were “minor”; noted the lack of prior action to bring about correction of the deficiencies and the permissible inference that for a number of years the deficiencies were not considered serious; and indicates that there was an attempt to build a dismissal case by scraping together as many minor matters as possible against the teacher. In short, the panel (one member dissenting) simply believed that the facts were not serious enough for dismissal.

The district appealed to the Oregon Court of Appeals. The court reversed the board and directed entry of an order upholding dismissal. The court ruled that the board could not set aside dismissal unless it could say, as a matter of law, that no reasonable school board would have found these facts sufficient for dismissal.

8. ***Carell v. Glide School District No. 12***, FDA 77-14 (1978); **reversed and remanded** ***Glide School District No. 12 v. Carell, et al.*** 39 Or App 727 (1979):

The teacher was dismissed for insubordination, inefficiency, inadequate performance, failure to comply with reasonable requirements of the school board, and cause constituting grounds for revocation of the teacher’s teaching certificate. The panel issued an order setting aside the dismissal.

The teacher’s principal reviewed the teacher’s performance and recommended renewal of his contract (for the fourth year) in March of 1977. The superintendent and the school board disagreed, however, and notified him of non-renewal. The teacher went to court and obtained a circuit court order directing renewal of his contract. Meanwhile, the superintendent discovered the existence of a student activities bank account, opened by the teacher, which the superintendent considered to be a violation of previous directives.

The order does not indicate what facts were charged against the teacher but does indicate that all but one was known at the time of the principal’s recommendation of renewal. The panel, in essence, threw out all facts preceding the principal’s recommendation and found insufficient fault in the bank account to show cause for dismissal. The panel ruled that the facts upon which the district relied were not true and substantiated and that they did not justify any of the statutory grounds for dismissal.

The order does not indicate what facts are necessary to show “insubordination”; does not indicate (except as stated above) why the charged facts do not show “insubordination”; and does not in any way attempt to define “insubordination.”

The district appealed to the Oregon Court of Appeals. The court reversed the board and remanded the case back to the board for findings of fact on the factual allegations charged against the teacher and application of the “proper” standard of review of the dismissal. The court indicated that because the superintendent and the district school board did not agree to renew the teacher’s contract but renewed it only by court order, the district was not precluded from relying, for dismissal, upon facts supporting the superintendent’s non-renewal decision. The court also criticized the board for using its own judgment to decide that the facts were not sufficient for dismissal.

The parties thereafter settled the case.

9. ***Smith (Beulah) v. Carlton-Yamhill School District No. 11***, FDA 79-10 (1979):

The teacher was dismissed, apparently for insubordination, inefficiency, and inadequate performance (the order of the board does not identify the statutory causes on which dismissal was based). The order set aside dismissal.

The teacher was cited in December 1978 for classroom deficiencies of choppy lessons, inconsistent instruction, and lack of classroom control. Also, three incidents with students occurred in 1979. In the first, the teacher slapped a student on the back who was telling elephant jokes; in the second, the teacher pushed a boy’s head down on the desk at a time when students were to be resting; and in the third, a boy’s shirt tore when he jerked his arm out of the teacher’s grasp.

The panel found the charged facts not true and substantiated. Apparently it concluded that the evidence failed to show continuation of the classroom deficiencies during 1979 and that the fault of the teacher in the three 1979 incidents was not significant.

10. ***Keene v. Creswell School District No. 40***, FDA 80-7 (1981), **affirmed**  
***Keene v. Creswell School District No. 40***, 56 Or App 801 (1982):

The teacher was dismissed for insubordination, inefficiency, neglect of duty, and inadequate performance. Dismissal was upheld on the grounds of insubordination and neglect of duty.

The teacher obtained a leave of absence for the school year 1979-80. In March of 1980, he requested an additional year’s leave. The district denied the request. In May of 1980, the teacher filed a request with the school board for reconsideration of the denial. Also, at about that same time, the teacher was notified by mail that he needed to indicate whether he would be returning to teach at the beginning of the 1980-81 school year. The district needed to know its staffing needs for the coming school year. The teacher did not notify the district whether he would be returning. He received notice in late May of denial by the school board of his reconsideration request, and also received, in the same letter, a renewed request from the superintendent that he notify the district whether he would be returning to teach. The teacher did not respond to that notice and likewise did not respond to a telegram making the same request of him that was sent to his home a week earlier. On June 24, 1980, the superintendent indicated, by letter to the teacher, that

he would be recommending termination unless the teacher chose to resign. The teacher also did not respond to that letter.

The order of the panel stated that the teacher's failure to respond to the letters constituted insubordination because he was on notice that the superintendent was requesting a response, and his failure to give one was insubordination.

The order also states that the teacher "was given a directive" to notify the district of his intention to return to his teaching position. A "directive" is closely akin to an "order" or "command." "Insubordination" is often, and usually, defined to require a direct "order" to an employee, or subordinate, that is disobeyed. The findings do not support the characterization of the communications to the teacher as an order or directive, however, but indicate merely that the teacher was "requested" to notify the district of his intention to return. To the extent, therefore, that the facts here do not show a direct order to the teacher to respond, this case is Fair Dismissal Appeals Board precedent for the more broad definition of "insubordination," namely, a definition broad enough to include "defiance of authority," and the case, for the same reason, shows a rejection of the more limited definition of "insubordination" suggested by the concurring opinion of Judge Thornton in *North Clackamas School District No. 12 v. Fair Dismissal Appeals Board (Smith v. North Clackamas)*, 30 Or App 855 (1977).

The teacher appealed to the Oregon Court of Appeals and the court affirmed.

The teacher complained that the board erroneously relied on the teacher's lack of response to the June 24, 1980 letter because that letter was not included in the statement of charges against the teacher. The court indicated that additional facts developed at the hearing may be considered by the board, if relevant, and that the teacher's failure to respond to the June 24<sup>th</sup> letter showed, by example, the teacher's stance of refusal to respond to the superintendent's requests.

The court also disagreed with the teacher's argument that the teacher could not be guilty of insubordination in May of 1980 because he was on leave and not under the district's control. The court stated that it could not conclude that it is impermissible for a school district to insist that a teacher notify the superintendent whether he intends to return from a leave of absence.

(The dissenting judge, Warren, disagreed that the facts showed insubordination or neglect of duty. He pointed to a policy that allowed teachers on the job 14 days to decide whether to accept proffered contracts as showing treatment inconsistent with the treatment of the teacher in this case. He also indicated that the facts did not show insubordination because the teacher had no "duty" to respond to the communications on which the district relied to find insubordination. Insubordination, he indicated, can be rightfully based only on refusal to obey an order the supervisor is entitled to give and entitled to have obeyed. He quoted Judge Thornton's statements about insubordination in the *North Clackamas* case.)

11. ***Owen v. Junction City School District No. 69.***, FDA 80-10 (1981):

The teacher was dismissed for insubordination, neglect of duty, and inadequate performance. Dismissal was upheld for insubordination, inefficiency, and inadequate performance.

The facts of the case show that the teacher did not submit certain plans required by her principal, failed to carry out certain instruction programs as directed in math and reading, failed to furnish certain information requested by parents, acted defensively toward parents, did not avail herself of certain assistance offered her, did not follow schedules set up for phonics instruction, failed to meet timely with parents on one occasion, failed to respond to district concerns about her performance, had a number of parents request transfer of their children out of her classes, etc.

The order discusses the teacher's "failure to comply" with directives of the principal. Nowhere do the findings indicate an outright refusal of the teacher to comply with directives. The findings do not indicate whether the failure to comply was due to neglect, was a result of circumstances which excused compliance, or was, in fact, intentional refusal to perform. Nevertheless, the order concludes that the teacher's actions constituted insubordination.

12. ***Skeen v. Bethel School District No. 52***, FDA 81-21 (1982), **affirmed** 63 Or App 165 (1983):

The teacher was dismissed for insubordination, inefficiency, neglect of duty, and inadequate performance. Dismissal was set aside.

The district apparently criticized the teacher for four incidents of discipline or physical force used on a student and classroom performance deficiencies. The order contains lengthy discussion of evaluations of the teacher and the plan of assistance for the teacher, but makes no mention whatsoever of the deficiencies of performance upon which the district apparently relied. The relevance of the evaluations and plan of assistance is thus quite unclear.

The facts of the case show that the teacher was charged with using force on a student in February of 1976 but was not disciplined for the incident; that a roll of tape the teacher tossed, in 1976, accidentally hit a student on the cheek; that the teacher tipped a student's desk over, in 1979, because it was messy and she wanted him to clean it out; that the head of a student she was holding hit the wall, in 1980, as she was tipping his head up to look him in the eye; that the principal wanted to dismiss her in 1976 and the assistant principal recommended her for dismissal in 1980; that she was placed on a plan of assistance in 1981; that evaluation procedures were to a great extent ignored by the principal and the assistant principal in doing their evaluations of her; that a favorable evaluation of an independent evaluator was ignored; that the teacher improved her performance in a number of areas; that the superintendent designated four areas of concern for the plan of assistance but the plan actually administered had 19 deficiency areas to be corrected; that the assistant principal destroyed his evaluation notes; etc.

The order generally found the facts insufficient to show any cause for dismissal. The order contains important statements regarding the charge of "insubordination." In its

findings of fact, the panel stated that much of the evidence was in conflict as to whether the teacher failed to carry out her plan of assistance, and that the teacher had explained most of the evidence satisfactorily.

In the “Ultimate Findings and Conclusions of Law” the order indicates that the incidents with students in 1976, 1979, and 1980 were too minor and not repeated after the plan of assistance was initiated, and that the incidents, therefore, did not show cause for dismissal; that the plan of assistance was too complex and involved too many factors for correction; and that the evaluation methods of the principal and assistant principal were inappropriate and in violation of district policies. As to insubordination, however, the panel stated that the district failed to prove the charge of insubordination in that the evidence did not establish a lawful order and willful refusal to obey that order.

In this case the panel very clearly adopts the usual, but narrow, definition of insubordination, namely, willful refusal to obey a lawful order. The panel does not, however, reconcile its ruling with the *Keene* case (FDA 80-7), where no real order was given to the teacher; or with the *Owen* case (FDA 80-10), where the facts showed only “failure to comply” with certain directives of the principal.

The district appealed to the Oregon Court of Appeals but the court affirmed. The court upheld the Fair Dismissal Appeals Board’s determination that much of the district’s evidence was unpersuasive and that none of the cited statutory causes was shown by the proof.

13. ***Pecka v. Beaverton School District No. 48***, FDA 82-2 (1982):

The teacher was dismissed for insubordination and inadequate performance. Dismissal was upheld on the ground of inadequate performance.

The district based the insubordination charge on alleged repeated violations of directives, regulations, and policies regarding discipline of students. The teacher was a physical education teacher. In January of 1974, the teacher became enraged at a student, grabbed him by the hair, shook him and threw him against some bleachers. In October of 1978, when a boy refused to clean off the top of a locker, he swung the boy around and forcibly lifted him up to the locker. In September of 1980, he slapped a boy several times on the thigh on one occasion and on another swung a bag of soccer balls at a boy and struck him on the chest. In November of 1981, the teacher tipped a boy’s desk backwards in anger and caused the boy at the desk to hit his head on a cart. An evaluation in 1967 asked the teacher to work hard at not letting students upset him and work more closely with the principal when trouble arose. In January of 1974, after the first student incident described above, he was warned that such behavior in the future would result in his termination. After the 1978 incident he was told that he needed to avoid use of physical action to discipline students. After the two 1980 incidents he was given written notice that the district would tolerate no more of such behavior and that further physical handling of students would result in recommendation of dismissal. In 1981, before the November 1981 desk incident occurred, he was told on his evaluation that he needed to develop and consistently apply classroom management and discipline skills. District “Standards of Competent Performance” for teachers required teachers to (1) show respect

for students; (2) show consistency in dealing with behavioral problems; (3) exhibit positive influence on students; (4) adhere to school law and district rules and policies; and (5) adhere to the Employee Conduct and Responsibility policy. That policy required teachers to comply with job description requirements, performance goals, and supervisor directives and required teachers to act reasonably in performing their duties. A district regulation prohibited the use of physical force as punishment and permitted it only to maintain order.

The panel determined that the facts did not show insubordination because it held that the supportive facts were not true and substantiated. Because the teacher did not willfully refuse to follow district orders, he was inadequate, rather than insubordinate.

The order does not say what facts are necessary for “insubordination” and does not attempt to define “insubordination.”

14. ***Boehm v. Klamath Falls School District No. 1***, FDA 83-8 (1984):

The teacher was dismissed in the spring of 1983 for insubordination, inefficiency, neglect of duty, and inadequate performance. Dismissal was upheld for inefficiency, neglect of duty, and inadequate performance, but not for insubordination.

The facts of the case show that the teacher, an elementary teacher, had a history of reacting emotionally and at times physically toward disruptive or disrespectful students, lacked the ability to control his classroom adequately, had poor rapport with his students and at times an adversarial relationship with them, argued with students and focused on their fault in incidents where his own conduct was criticized, mislaid student papers, violated instructions regarding use of the area behind the office secretary’s desk, accused his principal of being unprofessional and playing games with him, etc. The teacher received numerous warnings about his performance deficiencies and his conduct violated many of the district’s written performance standards.

The order of the panel indicates that appellant continued to deal physically and emotionally with disruptive students even after written warnings not to do so; refused to attend part of an in-service meeting in 1979, and left the school premises early without permission; refused, in 1979, to allow a table to be put in his room to replace one taken from his room; said to his principal in October of 1982 that she was “putting a knife” into him “and turning it”; violated an oral directive, on February 4 1983, to refrain from going into the area behind the school secretary’s desk without her permission; did the same thing again that same day, when the secretary was gone, after he had been given a reminder from the principal not to do so; went behind the secretary’s desk again on March 3, 1983, without permission, while the secretary and the principal were both standing near the desk; wrote a memo to the principal on February 7, 1983, telling her, “I hope you have all kinds of fun playing your unprofessional games all day long!”; and failed to comply with district performance standards pertaining to supervision of students, consistency in dealing with students, respect for students, showing self-control, etc.

In dealing with the charge of insubordination, the order of the panel focused only on a portion of the foregoing incidents or failures of the teacher to comply with written

warnings or requirements. The order states that insubordination has been used to characterize defiant behavior or unwillingness to submit to authority. However, in applying this definition to the facts of the case, the panel held that the teacher's conduct was not insubordinate because it was mitigated by what he perceived to be discriminatorily harsh restriction placed on him. Additionally, the record showed that the teacher made some effort to comply with the district's requirements for his improvement. Thus, the record was not adequate to show insubordination.

The order does not identify "item (8)" of the charges. The import of the conclusions regarding that charge is thus, necessarily, unclear. The order, also, does not say what facts are necessary to show "insubordination"; does not really say exactly why the facts of the case do not show "insubordination"; and does not decide on a definition of "insubordination."

The panel at times seems to be saying that certain conduct is not insubordination and at other times seems to be saying that even if some insubordinate conduct occurred it was not sufficient to show the statutory cause of "insubordination."

The discussion by the panel of the charge of insubordination, however, suggests the following:

1. "Insubordination," as used in the statute, could be merely a refusal to obey a proper order or it could also include defiant behavior or unwillingness to submit to authority.
2. An act of insubordination may not be sufficient to show the statutory cause of insubordination. Factors which can reduce the fault of the insubordinate teacher to a level where that fault does not amount to the statutory cause may include:
  - a. Mitigating factors, such as the teacher's perception that restrictions placed on him are discriminatory.
  - b. Lack of any pattern of insubordinate acts.
  - c. Lack of insubordinate conduct after the act in question.
  - d. Lack of a substantial prior history of insubordinate conduct.

In other words, the panel seems to conclude that the behind-the secretary's desk conduct was insubordinate conduct, but insubordinate conduct, in and of itself, does not necessarily amount to the statutory dismissal cause, "insubordination." The panel seems to be saying that FDAB should evaluate the actual fault of the teacher in any insubordinate conduct incident and, at least where the insubordinate conduct is not flagrant or does not constitute rather serious misconduct, that "insubordination," under the statute, must be based on a pattern or series of insubordinate acts.

3. Lashing out verbally at one's supervisor does not constitute insubordination, where the lashing out is an expression of frustration and resentment and not defiance of the supervisor's authority.

4. A teacher's basic pattern of trying to comply with orders and directives tends to refute any conclusion that lashing out against the supervisor is a result of defiant attitude or defiant intent.

15. ***Covey v. Umatilla School District No. 6R***, FDA 83-9, **order on reconsideration** (1984), **affirmed without opinion, *Covey v. Umatilla School District No. 6R***, 76 Or App 402 (1985), **review denied** 300 Or 545 (1986):

The administrator was dismissed for insubordination, inadequate performance, and failure to comply with reasonable school board requirements for improvement and evidence of training and growth. In its original order and on reconsideration, the panel upheld dismissal on all three grounds.

The facts show that the administrator was employed by the district as an elementary school principal for the four school years immediately prior to his dismissal in 1983. The administrator has a problem of verbosity in his oral and written presentations which he failed to correct after warnings from his superintendent. In October of 1982, when the superintendent asked for recommendations from his administrators cutting 30 percent from their budgets, the administrator submitted only a memo dealing with the general concepts for reducing expenditures within the district. In November of 1982, the superintendent asked his principals to submit a list of reverse priority budget cuts for their schools. The administrator did not do so and objected, at the school board meeting, to the cuts which the superintendent himself proposed for the administrator's school after failing to receive any proposed cuts from the administrator. In January of 1983, knowing that the superintendent was displeased with him, the administrator requested a 10 percent salary increase (other administrators, but not he, had received increases) and, after receiving permission to speak to the school board about getting a salary increase, argued to the board for such an increase. The administrator also used that opportunity to tell the board about difficulties between him and the superintendent. The school board members disagreed with the request for salary increase and told him he needed to get along with his superintendent if he wished to continue working for the district. In March of 1983, the superintendent directed his principals to group all their teachers according to "exceptional," "average," and "needing to show improvement." The administrator did not do so and instead attempted to present a special discussion of his teachers to the school board. In March, the administrator again requested the superintendent and the school board that he be granted a salary increase. No increase was forthcoming. In May of 1983, the administrator again requested of the superintendent and the school board that he be granted a salary increase. The administrator's job description indicated that a principal was expected to prepare school budgetary requests, participate as a member of the superintendent's team, etc.

The panel stated that insubordination has been defined both as disobedience of a direct order and as including behavior showing unwillingness to submit to authority. However, the board did not decide whether to include unwillingness to submit to authority within the definition because the facts showed disobedience of a direct order.



The panel determined that the administrator disobeyed the superintendent's instructions to submit budget cuts in November of 1982, and disobeyed the superintendent's instructions to submit teacher groupings in March of 1983. The panel explained that, though the principal may have had his own reasons why he did not submit the requested list, his refusal to do so was insubordination because it constituted disobedience of a direct order. However, the panel also stated that the principal's challenge of the superintendent's proposed budget cuts was not insubordination because it was to be expected under the circumstances and the principal had not been warned about challenging the superintendent's proposals. Further, refusal to discuss his evaluation before bringing the matter to the school board was not insubordination because it does not show a lack of willingness to submit to the superintendent's authority.

The panel considered the teacher groupings disobedience especially serious because the administrator had been warned by the school board in January of 1983 that he was to stop resisting directives from the superintendent.

16. ***Fisler v. Hermiston School District No. 8R***, FDA 84-1 (1985):

The teacher was dismissed for insubordination, neglect of duty, inadequate performance, and failure to comply with reasonable school board requirements for improvement and growth. Dismissal was upheld for insubordination, neglect of duty, and inadequate performance.

The teacher taught high school chemistry, physics, and electronics classes and had taught at the high school for 13 years prior to her dismissal in January of 1984. She was regarded as a dedicated teacher who was skilled in her field. In May of 1979, the high school principal indicated on the teacher's evaluation that she needed to improve her hall duty supervision. He made a similar comment on her May 1980 evaluation. In April of 1982 he warned her of the need to take precautions for the prevention of thefts of equipment or chemicals from the lab room. In December of 1982, the principal talked to the teacher about room security because she had left a cabinet open over the weekend that contained a set of scales. From September of 1982 to December of 1982, the teacher missed bus duty seven times; missed part or all of her hall duty nine times; missed an assembly; and missed an activity duty. The principal characterized her behavior, in a letter to her, as "insubordination" and "neglect of duty." Later in January, the teacher used a photocopy machine without permission she knew was required, and did so despite attempts by the office secretary to enforce compliance with requirements for copy machine use. The principal viewed the incident as another act of insubordination and placed the teacher on a plan of assistance covering matters of room security, performance of hall and bus duty, compliance with advanced directives, etc. In June of 1983, the principal, noting "some improvement," took her off the plan of assistance, but indicated, in a letter to her that she was to continue to comply with the expectations of the plan of assistance. On the first day of school in the 1983-84 school year, the teacher went home for lunch, fell asleep, and slept through her prep period and part of her electronics class before awaking. On October 24, 1983, she overslept, took time to do her morning paper routs and got to school twenty minutes after the start of her first class. On November 3, 1983, she left her classroom, after classes were over for the day, to go to the office. On her way back she stopped at the library and conversed. Her classroom, lab room, and

chemical storage room and physics equipment room were left open the whole time, a total of about 40 minutes.

The panel, in considering the charge of insubordination, stated that most of the teacher's insubordinate conduct had occurred in the past. The incident in which the teacher fell asleep at lunch time did not show any intent to defy directives or disobey orders. Also, the October incident, in which the teacher delivered papers rather than getting to school on time, shows an error in judgment rather than an intentional defiance of her responsibilities. However, the November incident does show disobedience because it shows an intentional refusal by the appellant to lock up her room to protect scientific equipment, which had been directed by the principal. Though the November incident alone was not enough to justify the charge of insubordination, the board concluded that the district was allowed to rely on the teacher's past record of insubordinate behavior, and that continuation of a course of insubordinate conduct was enough to justify dismissal for insubordination.

The panel also indicated that insubordination requires "a defiant intent."

The order of the panel does not indicate what facts are necessary to show "insubordination"; does not indicate, except as quoted above, why the facts of the case show "insubordination"; and does not, except as indicated above, attempt to define "insubordination."

17. ***Thyfault v. Pendleton School District No. 16R***, FDA 90-4 (1991):

The teacher was dismissed for insubordination, immorality, neglect of duty, and inadequate performance. Dismissal was upheld for immorality and neglect of duty.

The teacher, among other things, placed a student in her resource room without following required district procedures, used a school form to attempt to get confidential information to which she was not entitled, and violated a written policy against corporal punishment by spanking a child in her room. In its conclusions of law, the panel stated the district had only proved a failure to comply with district policy, rather than the required willful refusal to obey a direct order. Therefore, the district had not shown insubordination because mere violation of a policy does not rise to the level required by the board.

18. ***Enfield v. Salem-Keizer School District No. 24-J***, FDA 91-1(1992), **affirmed without opinion**, 118 Or App 162 (1993), **review denied** 316 Or 142 (1993):

The teacher was dismissed for insubordination, inefficiency, neglect of duty, and inadequate performance. The panel concluded that the facts proved were not sufficient to show any of the four statutory grounds and it set aside the dismissal.

The teacher was a high school mathematics teacher who had taught in the district for 23 years before his dismissal in March of 1991. He was effective in his instruction of students and was considered to be an excellent mathematician. On the other hand, for some six years he had had trouble with negative, sarcastic, or otherwise inappropriate comments to students and occasional confrontations with students. These problems had

generated complaints against him from both students and parents. However, except for a plan of assistance on which he was placed for several months in 1988 to help him become more courteous toward students and more supportive, the only remedial measures taken by the district to address these problems were occasional discussions with him, annual goal statements, and comments on his evaluations.

An incident in the fall of 1991 precipitated the dismissal. In his freshman algebra class, the teacher grabbed the shoulder of a student who had thrown a wad of paper. The teacher intended no pain or injury in grabbing the student but his grip was forceful and caused pain to the student. The teacher then required the student to do 15 pushups, as punishment, in the presence of other students. The student was greatly embarrassed from having to do the pushups, but doing them did not cause him any pain. Because of the incident, the student's parents filed a complaint for assault against the teacher at the local police station.

Before this incident, the teacher had never used physical force on any student. The district, however, dismissed the teacher on the basis of the incidents and the teacher's record of inappropriate remarks and confrontive behavior. With respect to insubordination, the panel concluded that the facts did not show insubordination because they showed no refusal to obey a direct order or defiant intent on the part of the teacher.

In its discussion of the charge of insubordination the panel stated that although the teacher had failed on repeated occasions to provide a supportive environment for students, he did not refuse to obey a direct order of the administration. In fact, the teacher's efforts to change his conduct while on a plan of assistance showed his willingness to try to meet the district's expectations. Therefore, the substantiated facts did not show cause for dismissal for insubordination.

19. ***Sherman v. Multnomah Educational Service District***, FDA 95-4 (1996):

The principal was dismissed on grounds of inadequate performance, insubordination, and neglect of duty. The panel upheld the dismissal on all grounds.

The employee in this case had been employed as a teacher in the respondent's alternative schools since 1979, and had been principal in the district since 1991. In June 1994, the principal was placed on leave for alcohol and drug abuse. He then entered an in-patient treatment program. Upon return to the district, the principal was transferred from Alpha High School to DELS, a high school for juvenile offenders. The principal's return to his position was conditioned upon his signing and agreeing to the conditions set forth in a last chance agreement.

The problems leading to dismissal began immediately after the principal's return to work after his in-patient treatment. Incidents included criticism of supervisors to subordinates; refusal to work; failure to report to assigned duties; unnecessary disruption of classes and agitation of students; retaliation against subordinates who reported his conduct to administration; and hostile and threatening behavior toward his supervisor.

The panel defined insubordination as “disobedience of a direct order or an unwillingness to submit to authority.” *Covey v. Umatilla School District No. 6R*, FDA 83-9, *order on reconsideration* (1984); *affirmed without opinion*, 76 Or App 402 (1985); *rev den* 300 Or 545 (1986). The board also noted that “[i]nsubordination requires a defiant intent on the part of the teacher.” *Fisler v. Hermiston School District No. 8R*, FDA 84-1 (1985).

To satisfy the *Covey* definition of “insubordination,” the panel relied on a written order from the principal’s supervisor directing him not to engage in hostile and threatening behavior toward her. The order was repeated in another written directive five weeks later. Two months later, an argument between the principal and his supervisor escalated into an altercation where the principal forced his way into a room where the supervisor was located. The principal proceeded to verbally threaten the supervisor and physically contact her. The board found this “conscious disregard of a prior clear directive” showed an unwillingness of the principal to submit to his supervisor’s authority and follow her direction. The panel indicated this incident constituted “insubordination.”

20. ***Zottola v. Three River School District***, FDA 01-05 (2002), **affirmed without opinion** 188 Or App 489 (2003), **order on motion to determine back pay** (2003); **order on remand on motion to determine back pay** (2004):

The panel’s order indicates that the district dismissed the teacher on the grounds of insubordination and neglect of duty and, presumably though not mentioned in the order, immorality. The panel reversed the dismissal and ordered the teacher reinstated.

The school district had contracted with the Oregon Youth Authority to provide educational services at the OYA facility in Grants Pass. This led to a practical situation where there were two lines of authority for the Appellant – the District and OYA. The underlying conduct involved allegations about the interactions between the teacher and an incarcerated youth. The panel majority found that there was essentially a failure of proof in that they did not believe the youth’s testimony and found other evidence that mitigated the Appellant’s conduct (with one factor being dual lines of authority). With the facts not being “true and substantiated” the District’s decision was reversed. There is a dissenting opinion which views the conduct as largely uncontested between the parties and the logical conclusions to be drawn favor the District’s decision to terminate.

The district appealed. The Court of Appeals affirmed FDAB’s decision without opinion on June 26, 2003.

There are three unique procedural issues addressed below from this case: (1) the question of “double jeopardy”; (2) the teacher’s attempts to subpoena records from OYA during the hearing; and (3) the question of whether back pay may be offset by unemployment benefits received by the teacher.

21. ***Vilches v. Multnomah Education Service District***, FDA 02-3 (2002), **affirmed without opinion**, 189 Or App 335 (2003), **review denied** 336 Or 377 (2004):

There were multiple issues in this case which arose out of the Appellant’s teaching assignment at an alternative program for developmentally disabled students. The school

district dismissed him on the grounds of insubordination, neglect of duty and inadequate performance. The panel found that Appellant disregarded clear directives from his supervisor and did so in the presence of the students, causing an escalation in an already tense, emotional situation. The panel found Appellant to lack credibility compared to the other witnesses, and so his version of events was not accepted as “true and substantiated”. The dismissal was upheld

22. ***Bellairs v. Beaverton School District***, FDA 04-01 (2004):

The teacher was dismissed on the grounds of insubordination and neglect of duty. The panel sustained the dismissal on both grounds.

The panel found that the teacher’s decision to continue negative and unprofessional communications and his failure to turn in grades on time, when considered with his past conduct, showed a continuing pattern of neglect of duty and of insubordination. The panel found that the school district’s decision was not arbitrary, unreasonable or clearly excessive simply because the final act leading to dismissal would not have been sufficient in and of itself to support termination.

#### **D. NEGLECT OF DUTY:**

1. ***Jones v. Vernonia School District No. 47J***, FDA 77-6 (1977):

The teacher was dismissed for neglect of duty, inefficiency, inadequate performance, and failure to comply with such reasonable requirements as the school board may prescribe to show normal improvement and evidence of professional training and growth. Dismissal was set aside.

The order does not indicate what factual charges were made against the teacher. Apparently the principal criticized the teacher's management of his science classroom, felt the students should be working a greater percentage of the time and felt the classroom was not as neat, clean, and orderly as it should have been. A "series of incidents" were also set forth in the charges, but the order does not indicate what those incidents were. The order essentially indicates that the incidents did not show use of undue force or violation of the district's corporal punishment policy; the incidents were minor; the incidents did not violate any teacher duty or district policy; three incidents showed "poor judgment on the part of the teacher"; and that lack of neatness and orderly disposition of classroom materials was largely corrected in 1977. The order stated that "while there is room for improvement in the teacher's performance \* \* \* there is insufficient evidence to substantiate the statutory charges of inefficiency, neglect of duty, inadequate performance, and failure to comply with such reasonable requirements as the board may prescribe to show normal improvement and evidence of professional training and growth."

The order does not indicate what facts are necessary to show "neglect of duty"; does not indicate why the facts proven failed to show "neglect of duty"; and does not in any way attempt to define "neglect of duty."

The dissenting panel member felt that the teacher was guilty of neglect of duty and failure to comply with reasonable requirements of the school board. She did not attempt to define those statutory causes or indicate what facts were necessary to show neglect of duty or failure to comply with school board requirements. She also did not indicate why she believed the two causes were proven. Her comments indicate that the teacher did not avail himself of the opportunities presented to him to improve; that he chose not to confer on the evaluations of him; that he should have spent more time helping students with their problems; and that he let other priorities and commitments take precedence over his professional duties and improvements.

2. ***Mayer v. Lincoln County School District***, FDA 77-11 (1978), **reversed and remanded**, ***Lincoln County School District v. Mayer, et al.***, 39 Or App 99 (1979):

The teacher was dismissed for neglect of duty, inefficiency, insubordination, and inadequate performance. Dismissal was set aside by the panel.

The district based its case on a multitude of performance criticisms, including instructional deficiencies, deficiencies in dealing with students, poor work habits, etc. The panel found the charged facts to be true but disagreed that dismissal was justified.

To justify its decision to set aside the dismissal, the order noted that many incidents were “minor”; it pointed out that the incidents occurred over a number of years but were apparently not considered serious for a long time; and it suggested that the district was merely attempting to build a case by collecting as many minor matter as possible against the teacher. In short, the panel (one member disagreeing) felt that the facts were not sufficiently serious to warrant dismissal.

The district appealed to the Oregon Court of Appeals. The court reversed the board and directed entry of an order upholding the teacher’s dismissal. The court indicated that the board could not set aside dismissal unless no reasonable school board would have found the facts sufficient for dismissal.

3. ***Keene v. Creswell School District No. 40***, FDA 80-7 (1981), **affirmed**  
***Keene v. Creswell School District No. 40***, 56 Or App 801 (1982):

The teacher was dismissed for neglect of duty, inefficiency, insubordination, and inadequate performance. Dismissal was upheld for neglect of duty and insubordination.

The teacher obtained a leave of absence for the 1979-80 school year. In March of 1980 he requested an additional year’s leave. The district declined. In mid-May 1980, while completing his staffing for the coming year, the superintendent notified the teacher that he was expected to indicate whether he would be returning to work at the end of his leave. The teacher filed a request for reconsideration of the denial of his additional leave but did not indicate whether he would be returning to work if the denial was not rescinded. On May 20, 1980, the teacher’s wife received a telegram requesting the teacher to respond regarding his intentions to return to work. The teacher did not respond. On May 27, 1980, the teacher received notice that his request for reconsideration was denied and he again, in that letter, requested to notify the superintendent whether he would be returning to work. The teacher did not respond. On June 24, 1980, the superintendent sent him a letter saying he would be recommended for dismissal if he did not resign. The teacher did not respond to that letter.

The panel indicated that the failure to respond to the May 20 telegram and the June 24<sup>th</sup> letter showed neglect of duty and insubordination because he was on notice that the superintendent was requesting him to indicate his intention of returning to his teaching position.

The teacher appealed to the Oregon Court of Appeals and the court affirmed.

The teacher pointed out that the June 24, 1980 letter was not cited in the charges as one to which the teacher refused to respond and, therefore, the panel was in error in relying on that refusal to show insubordination and neglect of duty. The court disagreed, indicating that the panel was authorized under the statutes to consider additional facts developed at the hearing and stated, in effect, that the June 24<sup>th</sup> incident was an example of conduct which showed the teacher’s stance of refusal to respond to the superintendent’s request.

The court also found no error in the conclusion that the facts supported the charge of neglect of duty, that the district could insist that teachers on leave advise whether they would be returning at the end of the leave, and that refusal of the teacher to do so would constitute neglect of duty.

The dissenting opinion disagreed with the conclusion that the facts showed insubordination or neglect of duty. The dissenting judge believed the teacher had no duty to respond to the district's communications.

4. ***Owen v. Junction City School District No. 69***, FDA 80-10 (1981):

The teacher was dismissed for neglect of duty, inefficiency, insubordination, and inadequate performance. Dismissal was upheld by the panel for inefficiency, insubordination, and inadequate performance.

The order mentions "neglect of duty" as one of the charged statutory grounds, at the beginning of the order, but the term is not mentioned at all thereafter and the order does not say why.

5. ***Hawkins v. Redland School District No. 116***, FDA 81-9 (1981):

The teacher was dismissed for neglect of duty and failure to comply with reasonable school board requirements. Dismissal was set aside.

The district required the teacher, as a librarian to possess and "appropriate Oregon Librarian Certificate." The teacher obtained a renewed certificate in March of 1981. The order does not specify just what facts the district was charging against the teacher to support dismissal. Apparently, for some reason, the district felt the certificate obtained was not "appropriate."

The basis for the panel's conclusions is very unclear. The panel looked at the word "appropriate," noted the TSPC rules on certificates for librarians and concluded that the teacher met prescribed district requirements for her librarian position. The district had claimed that she did not meet those requirements.

The order does not indicate what facts are necessary for "neglect of duty"; does not indicate, except as discussed above, why the facts of the case do not show "neglect of duty"; does not attempt to define "neglect of duty"; and, in fact, does not discuss "neglect of duty" at all.

6. ***Skeen v. Bethel School District No. 52***, FDA 81-21 (1982), **affirmed** 63 Or App 165 (1983):

The teacher was dismissed for neglect of duty, inefficiency, insubordination, and inadequate performance. The order of the panel set aside the dismissal.



The teacher had fifteen years experience as an elementary teacher. The order does not say what facts were charged against the teacher. Apparently the district cited four incidents with students and some failures of the teacher to perform adequately. The order contains lengthy discussions of both the plan of assistance for the teacher and evaluations done on the teacher but makes no mention whatsoever of the performance deficiencies on which the district relied. Consequently, the relevance of the plan of assistance and the evaluations is unclear.

The facts of the case show that the teacher was charged with using force on a student in February of 1976 but was never disciplined for that incident; that a roll of tape tossed by the teacher in 1976 accidentally hit a student on the cheek; that the teacher tipped over a student's desk in 1979 because it was messy and she wanted him to clean it out; that in 1980 the head of a student she was holding hit the wall as she was tipping his head back to look him in the eye; that the principal wanted to dismiss her in 1976 and the assistant principal recommended her dismissal in 1980; that she was placed on a plan of assistance in 1981; that the evaluation procedures were to a great extent ignored by the principal and assistant principal in doing their evaluations of her; that a favorable evaluation of an independent evaluator was ignored; that the teacher improved her performance in a number of areas; that the superintendent designated four areas of concern for the plan of assistance but the plan actually administered had 19 deficiency areas to be corrected; that the assistant principal destroyed his evaluation notes; etc.

The order essentially found the facts insufficient to show any cited cause for dismissal. It indicated that the incidents with the students were minor and unrelated and that they did not occur after the teacher was put on the plan of assistance. It also indicated that the plan of assistance, as carried out, was too complex and had too many factors to enable its use for professional growth, and that the evaluations by the principal and assistant principal were inappropriately carried out and violated district policies.

The order, however, does not indicate what facts are necessary to show "neglect of duty"; does not indicate why the facts of the case fail to show "neglect of duty"; and does attempt to define "neglect of duty."

The school district appealed to the Oregon Court of Appeals, but the court affirmed. The court indicated that the panel had adequate basis for concluding that the proof failed to show any of the cited statutory causes and that the panel had adequate basis for rejecting most of the district's evidence as unpersuasive.

7. ***Boehm v. Klamath Falls School District No. 1***, FDA 83-8 (1984):

The teacher was dismissed for neglect of duty, inefficiency, insubordination, and inadequate performance. Dismissal was upheld for inefficiency, neglect of duty, and inadequate performance.

The facts of the case show that the teacher, an elementary teacher, had a history of reacting emotionally and at times physically toward disruptive or disrespectful students, lacked the ability to control his classroom adequately, has poor rapport with his students and at times an adversarial relationship with them, argued with students and focused on their fault on occasions where his own conduct was criticized, mislaid student papers, violated instructions regarding the use of the area behind the secretary's desk, accused his principal of being unprofessional and playing games with him, etc. The teacher received repeated warnings about the need correct his performance deficiencies. His conduct violated many of the district's written performance standards.

The panel stated that the teacher chose to allow improper student behavior despite his duty to maintain discipline of his students. The panel also noted that the teacher continued to allow such behavior even after he was given warnings about his default in this area. Additionally, the teacher chose to allow his students to be without supervisions, despite his duty to supervise students at all times. This problem also continued, though warnings were given. Lastly, the teacher violated his duty to act as a role model of mature behavior for his students, which behavior also continued despite warnings.

The panel construed "neglect of duty," under the statute, to require that conduct constituting violation of a duty of the teacher to be within the control of the teacher to prevent. In other words, the panel seems to suggest that accidental violation of duty, unknowing violation of duty, or attempting to comply with a duty but nevertheless failing, would not constitute "neglect" of duty.

The order does not indicate what facts are necessary to show "neglect of duty"; does not really say why the facts of this case show "neglect of duty"; and does not attempt to define "neglect of duty."

8. ***Fisler v. Hermiston School District No. 8R***, FDA 84-1 (1985):

The teacher was dismissed for neglect of duty, insubordination, inadequate performance, and failure to comply with reasonable school board requirements for improvement and growth. Dismissal was upheld for neglect of duty, insubordination, and inadequate performance.

The teacher taught high school chemistry, physics, and electronics and had taught at the district's high school for 13 years prior to her dismissal in January of 1984. She was regarded as a dedicated teacher who was skilled in her field. The teacher was warned in her 1979 years-end evaluation, her 1980 goals statement and her 1980 position description that she needed to perform her assigned outside-the-classroom supervision responsibilities. She was reprimanded in 1980 for failure to perform hall duty. Security of classrooms and her need to protect against theft of science equipment and materials was discussed with science teachers in 1980, when they were told to lock their rooms if they were to be away from their room; was mentioned on the position description the teacher signed in 1980; was discussed with her in April of 1982 when she lost her keys; was discussed with her in December of 1982 when she left a cabinet open over the weekend that contained scales; and was one of the subjects covered by the plan of

assistance on which the teacher was placed in January of 1983. Teachers were told in the 1978-79 school year that weekend parties were no longer permitted but the teacher nevertheless allowed a water fight in her room near the end of the 1979-80 school year. In December of 1980, the teacher was told not to do any more experiments in her room with contact explosives but she nevertheless allowed contact explosives to be produced in her room on one occasion in 1982. In April of 1981, the teacher asked permission to attend a skills contest in which some of her students were competing. The principal denied the request, but the teacher attended the contest anyway. From September to December of 1982, she missed bus duty seven times, hall duty or part of it nine times, and other required activities two times. In January of 1983, she used a photocopy machine without required approval and in defiance of the office secretary's attempt to enforce the restrictions on use of the copy machine. She was appropriately warned about insubordination, neglect of duty, and the possibility of termination. She improved under the plan of assistance in the spring of 1983. However, in the fall of 1983 she went home at lunch time on the first day of school, August 29, 1983, and slept through both a prep period and a portion of her electronics class; on October 24, 1983, she overslept, delivered the newspapers on her newspaper route before coming to school, and did not arrive at school until twenty minutes after the beginning of her first class; and on November 2, 1983, after classes were over for the day, she left her classroom, the lab room, the chemical storage room, and the physics equipment room open and unattended while she engaged in conversation for some thirty minutes or more with other teachers in the school library.

The panel stated that the three incidents in the fall of 1983 show neglect of duty because they show the teacher's failure to perform her responsibilities behave in a way designed to bring about performance of her responsibilities. The panel noted that if the teacher had made reasonable efforts to protect her classroom she could not have been fairly charged with neglect of duty. Also, the teacher's past record of defaulting on her responsibilities shows failures to perform her duties and failure to comply with the administration's directives.

The order of the panel does not indicate, however, just what facts are necessary to show "neglect of duty" and does not attempt to define "neglect of duty."

9. ***Thomas v. Cascade Union High School District No. 5*, FDA 84-7 (1985), reversed and remanded, *Thomas v. Cascade Union High School District No. 5*, 80 Or App 736 (1986), order on remand (1987) (remanding to district), order on appeal after remand (1987), affirmed, *Thomas v. Cascade Union High School District No. 5*, 98 Or App 679 (1989), disavowed by *Bergerson v. Salem-Keizer School District*, 194 Or App 301 (2004):**

The teacher was dismissed for neglect of duty, inefficiency, inadequate performance, and cause constituting grounds for revocation of the teacher's teaching certificate. Dismissal was upheld for neglect of duty.

The teacher was a girl's physical education teacher with six years experience in another district and six years experience as Cascade Union High School prior to her dismissal in June of 1984. She had good rapport with her students, had a record of acting professionally and with self-control, and was fair in dealing with students. On April 18, 1984, however, she reacted in anger to a girl who hit her, intentionally, from behind with a volleyball during a dodge-ball game. She grabbed the girl, kicked her twice in the back of the leg, and then let her go. The girl had been violating game rules by coming over to the teacher's side of the court to retrieve the ball. In the locker room area after the game several girls, including the one who was kicked, were upset about the incident and voiced their protests of the kicking to the teacher. The teacher made statements to the girls indicating that the girl she kicked was also at fault in the matter. The kicking incident was the only instance of loss of control by the teacher in 12 years of teaching. There was no reason other than that incident to indicate that the teacher might physically abuse a student in the future. The factual charges against the teacher were that she kicked the girl during the dodge-ball game and that she engaged in a shouting match in the locker room area with some of the girls after the game. The panel found the second charge not proven and upheld the dismissal on the kicking incident alone.

The panel found that neglect of duty was the most pertinent charge. The board stated that, though the teacher knew she had a duty to refrain from striking a student in anger, she violated that duty by kicking a student. The panel also concluded that the statute required the panel to determine whether the kicking incident was sufficient to prove the dismissal cause of neglect of duty.

The panel then concluded that the kicking incident showed "neglect of duty" as that term is used in the statute. The panel held that "neglect" refers to a failure on the part of the teacher to behave in a way designed to result in proper performance of duty. Neglect of duty could occur through repeated failure to perform minor duties or through a single instance of failure to perform critical duties. Therefore, even though the teacher had only once violated her duty, the duty she violated was critical, and one instance of neglect of duty was sufficient to show "neglect of duty" under the statute.

The panel noted that the teacher objected, in defense to the dismissal, that she was never placed on a plan of assistance and that the district had defaulted on certain of its evaluation and observation responsibilities with respect to the teacher. The panel did not consider those issues relevant, finding that plans of assistance and evaluation procedures are not pertinent when the teacher engages in a serious breach of a critical duty,

As the foregoing passages show, the panel identified some of the aspects of the term "neglect of duty." The order of the panel did not, however, attempt to set forth an all-inclusive definition.

The teacher appealed to the Oregon Court of Appeals. Because some of the factual charges were not substantiated, the Court of Appeals stated that the Fair Dismissal Appeals Board should not have upheld dismissal on only the kicking incident and the court, therefore, remanded the case to the board with directions to remand the case to the district for reconsideration of the sanction imposed.

In its *Order on Remand* (1987), the panel stated that one serious incident of physical abuse by a teacher can constitute neglect of duty. Because intentionally kicking a student is a serious breach of a critical duty, one single instance can justify dismissal on the ground of neglect of duty.

In its *Order on Appeal after Remand* (1987), the panel, in reviewing the district's decision to let the dismissal stand, on the basis of the kicking incident, stated that the kicking incident alone constituted neglect of duty under the statute because it was a single instance of a serious breach of a critical duty. The panel disagreed with the teacher's contention that intent to injure needed to be shown because neglect of duty refers to failure on the part of the teacher to behave in a way designed to result in proper performance of duty, and does not require any intent to violate a policy or order.

The teacher appealed again. In affirming the order of the panel on appeal after remand, the Oregon Court of Appeals indicated that the teacher was not entitled to reinstatement and back pay up to the time of the district's decision, on remand, to let the dismissal stand, because the facts proved in the first hearing before the panel were sufficient as a matter of law to justify dismissal. The court also indicated that the district's decision on remand to let the dismissal stand did not require a new recommendation of the superintendent for dismissal because the remand proceeding before the district school board was a continuation of the dismissal proceeding begun by the superintendent's original recommendation for dismissal.

10. ***Kari v. Jefferson County School District No. 509-J***, FDA 88-6 (1989), **reversed and remanded** *Jefferson County School District No. 509-J v. Fair Dismissal Appeals Board*, 102 Or App 83 (1990), **affirmed** 311 Or 389 (1991), **on remand** *Kari v. Jefferson County School District No. 509-J*, (1991) (upholding dismissal):

The teacher, who taught kindergarten in one of the district's elementary schools, was dismissed for "neglect of duty" and "immorality." The dismissal was set aside by a two-to-one decision of the panel.

The teacher, as part of her required duties, taught the district's say-no-to-drugs curriculum and participated in say-no-to-drugs program activities. However, she knew that her husband, for a period in excess of two years, had been using and selling marijuana at their home, where she, her husband, and their two young children lived. The teacher disapproved of her husband's activities but did not report him to law enforcement authorities, did not try to force him to leave their home and did not herself leave, because she didn't want to break up their family.

The majority of the panel concluded that neglect of duty was not shown by the facts because there was no proof of notice to appellant of just what her duty was in situations of this kind and there was no proof that whatever duty she had to do more than she did, under the circumstances, was so clear that actual notice of the duty was not required.

In explaining its conclusion, the majority stated several things: First, it noted that there was no warning, as in the *Ross* case, that teachers were expected to avoid off-the-job conduct that would be detrimental to their effectiveness as teachers. The district had told

teachers they were responsible to “convey moral and ethical standards” and to apply “positive influence” on students. Also in the say-no-to-drugs training, teachers had been told that they were “role models” with regard to that program and that they should “model” what they expected of their students. None of these statements, however, indicated to the teachers just what off-duty behavior would be inconsistent with their responsibilities as teachers.

Second, the majority noted that respondent, at the hearing, never did specify just what, in its opinion, appellant should have done, in complying with her duty to the district, and the panel majority believed that this ambiguity as to her responsibility tended to excuse the teacher’s inaction.

Third, the majority noted that the teacher was personally opposed to use of drugs and did not condone her husband’s involvement with marijuana. “In looking at her own behavior, therefore,” said the majority, “she would see no basis for concluding that she herself was not performing her role model responsibility fully. Knowing that she was, herself, acting totally consistently with the say-no-to-drugs policy of the district, she could well have expected that the district, if it became concerned about her husband’s activities, would recognize her own personal stance against drugs and protect her, accordingly, from criticism for the misdeeds of her husband. It was not unreasonable for her to expect, in other words, that the district would base decisions about her employment on her own conduct and not on another person’s conduct or on guilt some persons would presume from her association with her drug-selling husband.”

Fourth, the majority noted that, to the teacher, the value of preserving her family unit ranked high. The board stated that, though she may have realized that leaving her husband might be required for preservation of her status as a teacher, it is understandable that she might have been unable to bring herself to the point of taking that action. More importantly, she could reasonably have expected the district to give recognition to her desire to avoid the break up of her family if she were ever called to account for her inaction in the face of her husband’s activities.

The panel also stated that it had no reason to believe that the teacher should have known that her appearing to condone her husband’s drug activities was more important than preserving the family unity. The board held that it is important that cause for dismissal for neglect of duty be based on a very clear duty to the district which the teacher could not reasonably have disregarded and about which she could not have reasonably have been confused. Lastly, the panel stated that a deficient use of good judgment, in the absence of a clear indication of the teacher’s duty, does not amount to neglect of duty. The majority also concluded that even if it could be said that the teacher’s inaction amounted to the dismissal cause of neglect of duty, nevertheless, dismissal was unreasonable and a clearly excessive sanction under the circumstances.

The dissent found that the teacher was not committed to the say-no-to-drugs program; that her inaction over this long period of time proved, in short, that she condoned her husband’s use of their home for drug sales; that she should have known that sales of marijuana by her husband over a two year period presented a risk that some of that marijuana would be used by school children; that she should have known that her role

model responsibility in the say-no-to-drugs program, a very important program to the district, required her to avoid living with a person engaging in the sale of marijuana; and that she “permitted a criminal enterprise to continue which put students in the community at risk.” The dissent, in finding a clear duty that the teacher could not reasonably ignore, stated: “\* \* \* to hold that teachers have to be told not to commit murder or armed robbery in their off-duty hours before being subject to dismissal therefore would be ridiculous. To hold here that teachers have to be told not to frequent places where illegal drugs are used, kept, and sold before they can be fired, is to insult all of the other teachers in the district, and indeed, all members of the teaching profession. In my judgment, the members of the district board had the right to assume that teachers, especially those with master’s degrees, had no need for further instruction in citizenship.”

The school district appealed to the Oregon Court of Appeals. The court concluded that the facts of the case showed neglect of duty and that the panel’s analysis of the teacher’s duty was incorrect. It reversed the order of the Fair Dismissal Appeals Board and remanded the case to the board.

In explaining its decision, the court referred to portions of the board’s order indicating that the district had given the teacher no notice of her obligation to do anything in the particular situation, where her husband was selling marijuana from their home; that the district necessarily relied upon the premise that the teacher should have known, despite the lack of notice, that she could not simply do nothing about her situation; but that the teacher could not be required to know that she should place so much importance on her appearance of condoning the sale of marijuana, by continuing to love with her husband while he sold it, to the exclusion of her own personal, anti-drug conduct and to the exclusion of her need to keep her family together.

The court stated that it disagreed with FDAB for two reasons. First, that FDAB’s conclusion that Kari was not on notice that she had a duty did not follow from the findings. The court believed that the workshop training gave clear notice that off-duty drug involvement was contrary to the teacher’s role as an anti-drug advocate. Second, the court stated that the duty that the teacher neglected was to preserve the integrity of her role as an anti-drug advocate and not one to eject her husband from the home. The court believed that FDAB had focused on the reasonableness of the teacher’s actions, when it should have focused on the propriety of her conduct in the light of her responsibilities to the district and to her students.

The teacher then appealed to the Oregon Supreme Court and that court affirmed the decision of the Oregon Court of Appeals. The Oregon Supreme Court disagreed with the teacher’s contention on review that the Court of Appeals had exceeded its authority by substituting its judgment for that of the board, rather than simply determining whether FDAB had “erroneously interpreted a provision of law.” The Supreme Court found that the Court of Appeals decision clearly only decided that FDAB had incorrectly applied the Fair Dismissal Law by focusing on the teacher’s personal circumstances, rather than on the objective standard contemplated by the statute.

The Supreme Court also declined to reject the Court of Appeals' interpretation of the term "duty." The Supreme Court accepted the broad definition of duty, concluding that it could be read in reference to off-the-job conduct as well as on-the-job conduct.

The court discussed the issue of the reasonableness of the sanction of dismissal and then concluded that the Court of Appeals had acted within its statutory scope of review under the Oregon Administrative Procedures Act; that it had correctly interpreted "neglect of duty" as it is used in the Fair Dismissal Law; and that it had correctly remanded the case for reconsideration of FDAB's conclusion that dismissal was an unreasonable and clearly excessive sanction.

On remand, the panel, with one new member replacing a former panel member, issued an order which again set aside the dismissal. The panel majority concluded that the facts did not show either neglect of duty or insubordination. The panel majority held again that the facts did not justify the statutory ground of "neglect of duty." The board again based its holding on its reasoning that the legislature did not intend the term "neglect of duty" to be applied to off-duty conduct in complete disregard of a teacher's right to order her life according to her own dictates. The board found that the teacher's conduct was not "neglect" of her duty to preserve the integrity of her anti-drug role because she herself engaged in no activity that was inconsistent with her anti-drug advocacy. In the discussion of its reasons for this conclusion, the panel majority cited *Fisler v. Hermiston School District No. 8R*, FDA 84-1 (1985), *Thomas v. Cascade Union High School No. 5*, FDA 84-7 (1987) and the Oregon Supreme Court's decision in *Ross v. Springfield School District No. 19*, 294 Or 357 (1982).

The panel stated that it understood that the teacher had a duty to maintain the integrity of her role as an anti-drug teacher, and that that role depended on her maintaining her credibility as a role model for students. The panel then addressed the question of whether the teacher neglected her duty to preserve the integrity of her role. The panel stated that while drug use, sale, manufacture, or possession by the teacher would be neglect of duty, the term "neglect of duty" was not intended to be applied to off-duty conduct without limit. Because of these limitations, the majority believe that applying the statutory term "neglect of duty" to a teacher's off-duty conduct, it is obligated to give protection to a teacher's right to live her personal life according to her own dictates.

The panel concluded that the *Fisler and Thomas* rule should not be applied to the facts of this case because the teacher did not engage in activity inconsistent with her teaching duty and because the teacher did not condone her husband's activities. Additionally, because the teacher had no rights in her house superior to those of her husband, she could not control his use of the property. Lastly, the panel found that any damage to the teacher's reputation would be due to an incorrect inference that the teacher condoned her husband's drug activities.

The dissenting panel member had no difficulty, however, finding neglect of duty under the facts of the case. She stated that the teacher's choice to live with a person who used and sold drugs can only be accepted as her condoning of her husband's illegal activities. Additionally, the panel member believed that the teacher had a duty to her own child, who was a student in the district that she had neglected by allowing him to be exposed to



her husband's drug use. The dissenting member also disagreed with the majority's statement that "neglect of duty," when applied to off-duty behavior must give way to the teacher choice to do as she pleases. The panel member believed that the district had a right to regulate a teacher's behavior which could lead to a loss of that teacher's credibility.

11. ***Thyfault v. Pendleton School District No. 16R***, FDA 90-4 (1991):

The teacher was dismissed for neglect of duty, immorality, insubordination, and inadequate performance. Dismissal was upheld for neglect of duty and immorality.

The teacher, a special education teacher, operated a "resource room" in one of the district's elementary schools. She had taught 14 years for the district at the time of her dismissal; had been a consultant to various agencies; and had completed work toward her doctor's degree. Her resource room was used as a model by the district for programs that addressed needs of handicapped children.

However, during her last school year with the district, she engaged in the following conduct: She placed a student in her room without the required consent of the multi-disciplinary team and IEP committee, then altered a file document to represent, falsely, that the consent had been given; she used a school form to attempt to get confidential medical information to which she was not entitled, then falsely represented that she had obtained approval to submit the form; she forcefully spanked a student for biting another student; she swatted the student some days later for slamming the classroom door; she falsely denied both the spanking and the swatting conduct; and she requested one of the educational assistants under her supervisions to give a false report about the spanking incident.

Regarding neglect of duty, the panel stated that the facts showed that the teacher had neglected a number of her duties and that the violation of duties resulted from intentional conduct on her part, which she knew or should have known would result in a violation of her duties.

The panel also found that the teacher's alteration of files was a serious violation of her duty because the alteration was done for the purpose of protecting her from the consequences of her own actions. Additionally, the spanking of a student was a serious violation of the teacher's critical duty to protect her students from physical mistreatment, as was the attempt to induce her assistant to lie about her observations of the teacher's behavior.

The panel held that the teacher's conduct constituted cause for dismissal for neglect of duty through the combination of several instances of failure to perform her minor duties and through two serious instances of serious violations of critical duties. Therefore, the cause for dismissal was proven because the district could not rely on the teacher's compliance with duty.

12. ***Enfield v. Salem-Keizer School District No. 24-J***, FDA 91-1(1992), **affirmed without opinion**, 118 Or App 162 (1993), **review denied** 316 Or 142 (1993):

The teacher was dismissed for neglect of duty, inefficiency, insubordination, and inadequate performance. The panel concluded that the facts proved were not sufficient to show any of the four statutory grounds and it set aside the dismissal.

The teacher was a high school mathematics teacher who had taught for the district for 23 years before his dismissal in March of 1991. He was effective in his instruction of students and was considered to be an excellent mathematician. On the other hand, for about six years, he had had trouble with negative, sarcastic, or otherwise inappropriate remarks to students and occasional confrontations with students. These problems had generated complaints against him from both students and parents. However, except for being placed on a plan of assistance in 1988 to help him become more courteous to students and more supportive, the only remedial measures taken by the district to address these problems were occasional discussions with him, annual goal statements and comments on his evaluations.

An incident in the fall of 1991 precipitated the dismissal. In his freshman algebra class, the teacher grabbed the shoulder of a student who had thrown a wad of paper. The teacher intended no pain or injury in grabbing the student but his grip was forceful and caused pain to the student. The teacher then required the student to do 15 pushups, as punishment, in the presence of the other students. The student was greatly embarrassed from having to do the pushups but encountered no pain in doing them. Because of the incident the student's parents filed a complaint for assault against the teacher at the local police station. Before this incident occurred the teacher had never used physical force on any student. The district, however, dismissed the teacher on the basis of the incident and the teacher's record of inappropriate remarks and confrontive behavior.

The panel, in concluding that the facts did not show neglect of duty, stated that the teacher had violated his duty to assure the safety of his students in these two instances. However, the facts are not adequate to show "neglect of duty" because neither of the instances showed that the teacher acted with a wrongful intent. The panel held that the teacher's judgment errors failed to show sufficient fault for dismissal. Additionally, the teacher's previous failure to provide a supportive environment for students could not be added to bolster the district's case for dismissal because those violations were of no special concern to the district in regard to the teacher's continued employment.

In its discussion of the charge of neglect of duty, the panel stated that one instance of a violation of a duty does not amount to "neglect" within the meaning of the statute, unless the duty is critical and the violation is serious.

13. ***Clawson v. Gresham-Barlow School District No. 10***, FDA 94-3 (1995), **affirmed without opinion** 139 Or App 325 (1996):

The teacher was dismissed for neglect of duty. The dismissal was upheld by the panel and by the Court of Appeals.

The employee had nearly sixteen years of experience as a school principal. Factual charges against the principal numbered nineteen, and included use of district funds,

personnel, and property for personal benefit; failure to follow and/or violation of several accounting, purchasing, and recordkeeping school district policies/procedures; and excessive absenteeism which was non-school related.

Regarding the use of district property and funds for his personal gain, the panel found that the principal used his position with the district for his personal financial benefit in violation of ORS 244.040(1)(a). The panel inferred from the improper use of the district long distance service “intentional concealment, show[ing] serious dishonesty and lack of integrity, especially for a person in the leadership position of principal of an elementary school.”

The panel found that “the bulk of the charges against the principal were proved.” In its analysis of the charges regarding misuse of district funds, the panel relied in part on ***Secretary of State v. Hanover Insurance Co.***, 242 Or 541 (1966). The ***Hanover*** court held a strict standard of case applies to custodians of public money. The court stated:

For the purposes of the directed verdict the state proved it *prima facie* case when it proved that the bonded officers had control of the funds, that they authorized the disbursement of the funds in the form of cash, and that the vouchers did not show to whom or for what purpose the cash was paid out by the subordinate who obtained the purported rations. ***Hanover***, at 547 to 549.

The panel applied the ***Hanover*** standard, finding that the principal’s mishandling of a school “coffee fund” was “unconscionable disregard for his responsibility \* \* \* for the financial operations of his school and for the trust relationship he held in his control of money that did not belong to him. His conduct constituted a serious repudiation of his duty to account for his use of the money.”

In its order, the panel found that the principal’s failure to engage in conduct designed to fulfill his professional duties constituted “neglect of duty,” citing ***Thomas***, FDA 84-7 and ***Thyfault***, FDA 90-4. The panel found that the substantiated factual allegations were adequate to justify the ground of neglect of duty and the facts of the case did not show the dismissal was unreasonable, arbitrary, or clearly an excessive sanction.

14. ***Huddleston v. Salem-Keizer School District No. 24-J***, FDA 95-2 (1995):

The teacher was suspended with pay and subsequently dismissed for immorality, neglect of duty, and gross unfitness. The order of the panel set aside the dismissal.

The district based its case against the teacher on reports that the teacher hit, kicked, and threw a minor child in his supervision while on a weekend trip. The minor was the child of a woman with whom the teacher was having a relationship.

The district also based its case against the teacher on reports that the teacher had intentionally lied to Clatsop County Sheriff’s officers by telling them he had been hitting his dog, not the child. The teacher also refused to assist officers in identifying and locating the child’s guardian.

The order does not indicate what facts are necessary to show “inefficiency” or “neglect of duty.” The panel found the charged facts were not substantiated. It emphasized the lack of credibility and reliability of the district’s witness, who had viewed and overheard the alleged incident of abuse from a distance of at least 70 yards. The panel also noted that some charged facts were unsubstantiated because the minor’s physician found no evidence of injury consistent with abuse of the type reported.

The panel found that the teacher told the investigating officer part of what had happened on the day in question, but did not initially tell the entire version of the events. The panel concluded that “[b]y telling [the officer] part of the events and not all of them, [the teacher] did not intentionally lie to [the officer]; he simply was not fully forthcoming when first approached by the [officer]. Telling an inquirer a portion of an even rather than the entire event is not an “intentional lie.”

15. ***Moore v. Medford School District 549C***, FDA 95-6 (1996):

The teacher was dismissed for neglect of duty. Dismissal was upheld for neglect of duty.

The teacher taught art at North Medford High School and participated in the “Natural Helpers” program, a quasi-counseling program. In 1994, the teacher began interacting with a female student after being asked to talk with her by a second student. The teacher and the student took walks together, watched movies, and so on. The parties also signed a “suicide contract” which indicated that the student would notify the teacher if she intended to commit suicide. These interactions occurred with only the two individual parties present.

The most significant interaction in 1994 occurred on Christmas Day, when the teacher shared with the student details of sexual abuse by a family member which led to her obtaining an abortion. This matter had never been shared with any of the teacher’s family members. Another interaction occurred when the student had an adverse reaction to a combination of prescription drugs, alcohol, and marijuana while visiting a friend. The teacher was called but did not consult a physician or the student’s parents. Instead, she took the student to her own home where the student slept in the teacher’s bed until morning. Shortly after this incident, the teacher communicated to a school counselor that she was in “over her head” with respect to the student. However, the interactions between the teacher and the student continued. In 1995, while the student was visiting the teacher’s home, the two discussed the student’s feelings toward the teacher. The teacher held the student’s hand, hugged her, and kissed her.

The factual charges against the teacher were essentially (1) that she had inappropriate contact with a minor student when she hugged and kissed her, and (2) that she did not maintain a professional distance from a student when she shared her own personal accounts of sexual abuse and when she had the student sleep in her (the teacher’s) bed after the drug and alcohol incident. The panel found that the conduct demonstrated statutory grounds of “neglect of duty.”

The order of the panel included the following statements:

Appellant, as a teacher for the district, had the duty:

- A. To work in a cooperative manner with parents and the administration.
- B. To maintain a professional relationship with students inside and outside the classroom.
- C. To follow district policies, including procedures for dealing with alcohol or other mind-altering drugs.
- D. To know and abide by district requirements concerning relationships with students and ethical requirements and rules of the Teacher Standards and Practices Commission.

Appellant failed to engage in conduct designed to result in fulfillment of these duties. \* \* \* The appellant's conduct in each of the incidents identified above was intentional in that her acts and/or omissions were volitional and her intended conduct. As such, this conduct constituted "neglect" of her duties within the meaning of the term "neglect of duty" in ORS 342.865(1)(d). (Citations omitted.)

16. ***Sherman v. Multnomah Educational Service District***, FDA 95-4 (1996):

The principal was dismissed for insubordination, neglect of duty, and inadequate performance. The panel upheld the dismissal on all grounds.

The employee had worked as a teacher for Multnomah ESD since 1979, serving as a principal since 1991. In 1994, the principal was placed on leave at which time he entered a drug and alcohol treatment in-patient program. The incidents leading up to this dismissal began after the principal returned to work after treatment. His return to work was conditioned upon a signed last-chance agreement. The panel considered all of the principal's conduct in its deliberations. However, this summary deals only with the "neglect of duty" component.

The panel defined "neglect of duty" as "the failure to engage in conduct designed to result in proper performance of duty." ***Thomas v. Cascade Union High School No. 5***, FDA 84-7.

The panel's discussion of "neglect of duty" focused solely on incidents occurring on May 17, 1995. On that day, the principal and supervisor were embroiled in an argument which escalated over the course of a short period of time. The principal forced his way into a classroom in which the supervisor was located, and subsequently physically contacted her and verbally threatened her with assault. The panel found that the principal's conduct on this day "alone constituted cause for his dismissal for neglect of duty." The panel noted that cause for dismissal is found where the "principal's conduct in a single incident \* \* \* constitutes violation of a critical duty. The duty to refrain from threats and hostile behavior in the workplace is a critical duty because compliance with such a duty is fundamental to respondent's need to provide a safe workplace for all persons, staff, and students. Appellant's conduct toward [his supervisor] on May 17 violated that duty."

17. ***Webster v. Columbia Education School District***, FDA 96-1 (1998), **affirmed without opinion** 163 Or App 416 (1999):

The appellant was dismissed on the grounds of immorality and neglect of duty. She was charged with purchasing morphine tablets from a coworker (teacher) on January 10, 1996 and also receiving at least one Welbutrin tablet (prescription medication) at the same time. Appellant acknowledged receipt of the Welbutrin tablet, but denied purchasing the morphine tablets.

The facts were held to be true and substantiated. They were further held to violate district policy concerning the possession or control of controlled substances on school grounds. Additionally, they were held to violate state statutes dealing with drug abuse education in public schools. *See* ORS §§336.067(1)(d) and 336.109(a), (b), and (c). The panel found the factual allegations adequate to justify the grounds of neglect of duty and immorality, and that dismissal was not unreasonable, arbitrary or clearly excessive.

The significance of the case concerns the sufficiency of evidence analysis. The coworker (a teacher) advised both parties, through his criminal defense attorney, that he would assert the Fifth Amendment if called to testify. He was not subpoenaed by either party to the proceedings, although the district attempted to provide immunity to him. The immunity offer was not accepted. The panel heard the coworker statements through the investigating police officer's testimony. This was hearsay which was clearly admissible in this administrative proceeding under ***Reguero v. Teacher Standards and Practices***, 312 Or 402, 417-422 (1991).

18. ***Poole v. Lebanon Community School District***, FDA 98-2 (1998):

**NOTE:** This case was heard by a hearings officer who then made proposed findings of fact for review and ultimate adoption by the panel.

The appellant was involved in a physical interaction with his son at a local fairground during a county fair held in the summer. The full panel accepted the hearing officer's factual findings on what occurred. It included what a lay person would describe as a "fight" between father and son. A majority of the panel held that the conduct violated the statutory neglect of duty provision. The majority opinion emphasized that the concept of "duty" of professional teachers goes beyond "any litmus test of geography (school grounds) or the clock (on duty). A more detailed assessment of the interrelationship if all relevant criteria is necessary." Included is the conduct, and its impact on the district's mission, public exposure, either direct or through publicity, as examples. In a specially concurring opinion, one panel member believed that the incident was not a proper basis for finding a duty existed which could have potentially been neglected in these circumstances.

However, the full panel found that the district's action was "clearly an excessive remedy" under ORS 342.905(8). The full panel reinstated, with the majority holding the reinstatement would be without back pay.

19. ***Bourgo v. Canby School District No. 86U***, FDA 99-6 (2000):

Administrator was dismissed for inefficiency, neglect of duty and inadequate performance. The Panel found that the Appellant Administrator, with a lengthy history of good performance, was transferred to a new position against his will. Essentially the Appellant became passively resistant to performing the duties of his current assignment. Ultimately, his non-performance, under the factual record, established the three statutory grounds. The action was appropriate under the statutory guidelines the Board must follow and the dismissal of Appellant was sustained.

20. ***Hayden v. Glendale School District No. 77***, FDA 99-4 (2000):

There was a substantiated finding of neglect of duty based upon three separate areas of conduct. The first involved the missing of school following an evening of heavy drinking where the school was not contacted until the next morning. The appellant did have a preplanned school related trip starting in the afternoon with a commitment to have a lesson plan for the substitute. The class missed a day of teaching with her morning absence and with no lesson plan available as had been promised by the appellant. The second finding of neglect of duty involved the “Valentine’s Day gift” followed by telephone calls from the Appellant to the principal to discuss the gift.

Finally, Appellant’s actions toward a local merchant and a parent were jointly the basis of a finding of neglect of duty. Appellant became upset and returned the merchant’s donation although he had made it to the school, not to her individually. Another part of the conduct was the manner in which she solicited monetary donations for a school sponsored student field trip. The factual charge was that she did so while under the influence of alcohol. Both areas of conduct were substantiated.

21. ***Nuffer v. Mollala River School District***, FDA 01-02 (2002), **affirmed** 187 Or App 259 (2003):

The administrator was found to have neglected several “critical duties” involving the placement of students and the receipt of state funds for students, in the District’s alternative school which had been designated a charter school. The result of this finding is that dismissal for will be upheld without the need to show progressive personnel actions preceding the dismissal because the administrator failed to meet what are, in effect, minimum performance standards..

22. ***Beeson v. Warrenton-Hammond School District***, FDA 01-04 (2002), **vacated and remanded** 189 Or App 576 (2003), **on reconsideration** (2004) (adhering to prior decision as modified):

The district filed a motion to dismiss on the grounds that the teacher was still a probationary teacher. The panel denied the motion and ordered a hearing to be scheduled. After the hearing, in its final order, the panel found that the facts were not “true and substantiated” so that the question of whether the conduct would amount to the

statutory grounds of neglect of duty or inadequate performance was a moot issue. Appellant was ordered reinstated.

The district appealed on the main contention that the teacher was still in “probationary” status at the time of the district’s decision and therefore the panel should have granted the motion to dismiss. On October 1, 2003, the Court of Appeals vacated and remanded FDAB's decision for reconsideration its decision with regard to Appellant’s alternative argument in opposition to the motion to dismiss in light of *Smith v. Salem-Keizer School District*.

On December 29, 2003, on reconsideration, the Panel adhered to its final order and modified its order on the district’s motion to dismiss to vacate the unnecessary discussion of Appellant’s alternative argument.

23. ***Zottola v. Three River School District***, FDA 01-05 (2002), **affirmed without opinion** 188 Or App 489 (2003), **order on motion to determine back pay** (2003), **order on remand on motion to determine back pay** (2004):

The panel’s order indicates that the district dismissed the teacher on the grounds of insubordination and neglect of duty and, presumably though not mentioned in the order, immorality. The panel reversed the dismissal and ordered the teacher reinstated.

The school district had contracted with the Oregon Youth Authority to provide educational services at the OYA facility in Grants Pass. This led to a practical situation where there were two lines of authority for the Appellant – the District and OYA. The underlying conduct involved allegations about the interactions between the teacher and an incarcerated youth. The panel majority found that there was essentially a failure of proof in that they did not believe the youth’s testimony and found other evidence that mitigated the Appellant’s conduct (with one factor being dual lines of authority). With the facts not being “true and substantiated” the District’s decision was reversed. There is a dissenting opinion which views the conduct as largely uncontested between the parties and the logical conclusions to be drawn favor the District’s decision to terminate.

The district appealed. The Court of Appeals affirmed FDAB's decision without opinion on June 26, 2003.

There are three unique procedural issues addressed below from this case: (1) the question of “double jeopardy”; (2) the teacher’s attempts to subpoena records from OYA during the hearing; and (3) the question of whether back pay may be offset by unemployment benefits received by the teacher.

24. ***Bergerson v. Salem Keizer School District***, FDA 02-2 (2002), **reversed and remanded by** 194 Or App 301 (2004):

A long-term teacher was dismissed following her off-duty behavior on the grounds of immorality and neglect of duty. During the course of a divorce she went to a residence where her husband was living and following a personal confrontation, drove her van into the back of the husband’s unoccupied pickup truck. Damage was caused to the structure



because the pickup was pushed into a corner of the garage. The panel found that the proven conduct of Appellant driving her vehicle into the back of the unoccupied truck of her soon to be ex-husband would support a claim of neglect of duty under the statute. The panel also found that the conduct would meet the statutory ground of “immorality”. However, it did not sustain the dismissal action because the panel decided that the action was not “arbitrary” but was “unreasonable” and “clearly an excessive remedy.”

The district appealed to the Court of Appeals and the teacher cross-appealed. The Court of Appeals reversed and remanded the case on the district’s appeal, but affirmed on the teacher’s cross-appeal. The Court of Appeals wrote a lengthy opinion with several important rulings. It made clear that FDAB may not substitute its judgment for that of the school board unless the dismissal is arbitrary, unreasonable or clearly an excessive remedy and explained the standard for making that determination: “FDAB impermissibly substitutes its own judgment for that of the school board as to the propriety of a dismissal unless no reasonable school board would have imposed that action.” It then concluded that FDAB did not adequately explain its reasoning with respect to the conclusions that the dismissal was unreasonable or clearly excessive and that, without further explanation from FDAB, it could not agree with FDAB’s conclusion.

The Court of Appeals also overruled its earlier decision in *Thomas v. Cascade Union High School District No. 5*, 98 Or App 679 (1989), which appeared to require FDAB to remand a case to the school board whenever some of the facts relied on by the school board are found to be untrue or unsubstantiated. The Court said that the statute does not allow FDAB to remand a case to the school board. Rather, “where FDAB finds that at least some of the facts relied on by a school board are true and substantiated and those facts support at least one of the cited statutory grounds for dismissal, the agency must affirm the board’s decision unless it finds that the decision was unreasonable, arbitrary, or clearly an excessive remedy.”

25. *Vilches v. Multnomah Education Service District*, FDA 02-3 (2002), **affirmed without opinion**, 189 Or App 335 (2003), **review denied** 336 Or 377 (2004):

There were multiple issues in this case which arose out of the Appellant’s teaching assignment at an alternative program for developmentally disabled students. The school district dismissed him on the grounds of insubordination, neglect of duty and inadequate performance. The panel found that Appellant disregarded clear directives from his supervisor and did so in the presence of the students, causing an escalation in an already tense, emotional situation. In addition, his contact with parents and supplying false or misleading information adversely impacted the district’s relationship with the parents. The panel found Appellant to lack credibility compared to the other witnesses, and so his version of events was not accepted as “true and substantiated”. The dismissal was upheld on the insubordination and neglect of duties grounds.

26. *Bellairs v. Beaverton School District*, FDA 04-01 (2004):

The teacher was dismissed on the grounds of insubordination and neglect of duty. The panel sustained the dismissal on both grounds.

The panel found that the teacher's decision to continue negative and unprofessional communications and his failure to turn in grades on time, when considered with his past conduct, showed a continuing pattern of neglect of duty and of insubordination. The panel found that the school district's decision was not arbitrary, unreasonable or clearly excessive simply because the final act leading to dismissal would not have been sufficient in and of itself to support termination.

**E. PHYSICAL OR MENTAL INCAPACITY:**

There are no cases citing this statutory cause that have gone to an FDAB hearing on the merits.

**F. CONVICTION OF FELONY OR CRIME INVOLVING MORAL TURPITUDE**

**1. *Hayden v. Glendale School District No. 77*, FDA 99-4 (2000):**

A panel rejected this statutory ground for dismissal on a record involving a conviction before a justice court, which would not meet the statutory standards for a fair dismissal ground. In part this was based on ORS 153.108 which limited the legal effect of the justice court convictions. The Panel opinion, in a footnote, also pointed out that the decision to dismiss was made *before* the actual conviction and that any other related circuit court proceedings such as a “stalking” matter would also not comply with the statutory requirement.

**G. INADEQUATE PERFORMANCE:**

1. ***Paul v. Washington County School District No. 48***, FDA 72-1 (1972), **affirmed *School District No. 48 v. FDAB***, 14 Or App 635 (1973):

The teacher was dismissed for inadequate performance, based on five factual charges stated in general terms.

The panel found charges one and two not true. The third charge stated: “You have involved some students in disputes between yourself and the administration regarding the quality of your teaching performance.” The panel found the charge not true. It indicated in its findings that there was “no evidence of involvement of the students in disputes with the administration that sufficiently reflects upon the teacher’s adequacy of performance.” The panel ruled, also, that “the evidence relied upon does not reflect upon the teacher’s adequacy of performance.”

The panel found that the fourth charge, namely that the teacher had “not brought about an acceptable standard of student involvement in class activities,” was not true and that it did not “support the statutory charge of inadequate performance.”

Charge number five stated, essentially, that the teacher did not show improvement in his performance as a result of the many suggestions made to him. The panel, in its ultimate findings, stated that the charge “is not an adequate charge of ‘inadequate performance.’” The panel indicated in its findings of fact that the charge “may have charged insubordination.”

The panel concluded that the teacher’s performance was “not \* \* \* shown to be inadequate.” The order of the panel, however, does not indicate what facts are necessary to constitute “inadequate performance”; does not indicate why the facts of the case fail to show “inadequate performance”; and does not attempt to define “inadequate performance.”

The panel directed reinstatement of the teacher. The school district appealed to the Court of Appeals. The court in essence affirmed the panel’s conclusions about the five charges.

2. ***Juenemann v. Multnomah County School District No. 1***, FDA 72-2 (1972):

The teacher was dismissed for the lone charge of “inadequate performance.” Dismissal was affirmed.

The panel found that the facts supported “inadequate performance.” It gave no definition of “inadequate performance”; did not indicate what facts are necessary to show “inadequate performance”; and set forth no rationale for its conclusion that the facts (found to be true) showed “inadequate performance.” Factual areas covered included numerous deficiencies in lesson planning; lack of order in the classroom and lack of control of the students in the classroom; deficiencies in presentation of subject matter material to the students; and failure of the teacher to accept criticism or assistance.

3. ***Nance v. Portland School District No. 1***, FDA 73-1 (1973):

The teacher was dismissed for “inadequate performance” and “gross unfitness to perform.” The hearing was held by a hearings officer but the order was signed by a three member FDAB panel. The panel upheld dismissal on both grounds.

The teacher apparently taught English and geology classes. During several of those classes he discussed oral sex with the students, used street language, and asked a girl personal sexual questions. On another day, the teacher made an obscene physical gesture to a student. He also used suggestive vulgarisms at times on evaluations and documents going to parents; refused at time to do certain reports; and had been deficient in preparing teaching goals and objectives.

The panel’s conclusions of law appear to rely on the following characterizations of the teacher’s conduct to show inadequate performance:

1. The teacher failed to establish knowledge attainment goals for his English and geology classes.
2. The teacher showed a willingness to deviate into any topic that suited his or the students’ fancy.
3. The teacher displayed a gross lack of sensitivity and uncalled-for conduct in asking a 15-year-old girl private, personal sexual questions.
4. The teacher failed to work constructively with and give leadership to his students as shown by his using vulgarisms on evaluation reports and using street language to communicate with students.
5. The teacher displayed unwillingness or inability to assume expected responsibility in the areas of preparation, execution of his duties, and display of mature judgment.

The foregoing are the panel’s characterizations of the fault of the teacher in various factual areas involved in the case but the panel does not indicate what facts are required to show “inadequate performance”; does not attempt to define “inadequate performance”; and does not explain why these faults constitute “inadequate performance.” The conclusions indicate that appellant “displayed inadequate performance” through conduct and deficiencies covered in the teacher’s evaluation and through “displaying in sensational detail the results of his unwillingness or inability to assume the duties expected of a teacher in preparation, execution of duties, and in the display of mature judgment.” The order indicated that respondent “established facts establishing appellant’s inadequate performance.”

4. ***Taylor v. Lincoln County School District***, FDA 74-5 (1974):

The teacher was dismissed for inadequate performance only. The panel found that the district's evaluation procedures were not followed and that the last evaluation was made for the purpose of supporting dismissal. It set aside the dismissal.

The facts charged against the teacher came from the evaluations. (The order does not describe those facts.) The order does not define "inadequate performance"; does not indicate what facts are necessary to show "inadequate performance"; and does not say why the facts fail to show "inadequate performance." (The order says that "procedures required by law were not observed" and that the last two "personnel evaluations" were not made in compliance with school district policy or the law.)

5. ***Whitaker v. Coos Bay School District***, FDA 75-1(1975), **affirmed *Whitaker v. Fair Dismissal Appeals Board, et al.*** 25 Or App 569 (1976):

The teacher was dismissed for inadequate performance and insubordination. Dismissal was upheld on the ground of inadequate performance.

The findings are separated into findings with respect to inadequate performance and findings with respect to insubordination. With respect to the former, most of the 53 separate findings describe procedural matters concerning evaluations, responses to evaluations, etc. There are no findings of actual deficiencies of the teacher. The closest things to such findings are statements that numerous evaluations rated the teacher below satisfactory, that the teacher discussed his dislike for students and that the teacher had indicated he did not like teaching fifth grade students. The order indicated that the facts showed the teacher to be inadequate.

However, the order does not say which facts show "inadequate performance"; does not say why the findings show "inadequate performance"; and does not in any way attempt to define "inadequate performance."

The teacher appealed to the Oregon Court of Appeals. The Court of Appeals affirmed the order of the board. Nothing in the court's opinion bears in any way on the meaning of "inadequate performance." The court merely states, at the end of its opinion: "We conclude that the Board's finding that petitioner is an inadequate teacher is supported by substantial evidence."

6. ***Wilcoxson v. Jewel School District***, FDA 75-9 (1975):

The teacher was dismissed for inadequate performance. The order set aside dismissal because the evaluations of the teacher were made for the purpose of dismissal. The panel found that the procedures required by law with respect to teacher evaluations were not followed, and therefore the facts contained in the notice of intention to dismiss based upon those evaluations were not true and substantiated.

7. ***Barcroft v. Sweet Home School District***, FDA 76-1 (1977):

The teacher was dismissed for inadequate performance, insubordination, and gross unfitness. Dismissal was upheld for insubordination and inadequate performance.

The teacher was a high school football coach. In a game between Sweet Home and Molalla, he told one of his players to hit a game official. The student did not toward the end of the game and did so deliberately. The coach then cut off a portion of the game film which showed the incident, took it home, and kept it there. The school principal conducted an investigation of the matter. The coach falsely denied telling the student to hit the official and the coach concealed from the principal the fact that he had the portion of the game film showing the incident. The coach also called the Molalla coach and asked him to remove a similar portion of Molalla's game film.

The board stated that the conduct evidences insubordination and inadequate performance, as charged and as stated in the grounds for dismissal.

The order does not otherwise state what facts show "inadequate performance"; does not state why the facts show "inadequate performance"; and does not in any way attempt to define "inadequate performance."

8. ***Martin v. Reynolds School District***, FDA 76-5 (1976), **remanded *Reynolds School District v. Martin***, 30 Or App 39 (1977):

A principal was transferred to a non-administrative position on the charge of inadequate performance. The order of the panel listed certain "allegations pertaining to inadequacy," such as failure to provide leadership, conflict in relations with staff, etc., which it said were not proven, and it directed the principal's reinstatement. The order did not identify the statutory causes involved; did not indicate what facts constitute "inadequate performance"; did not indicate why the facts failed to show "inadequate performance"; and did not in any ways attempt to define "inadequate performance."

The district appealed the board's order to the Oregon Court of Appeals. The court remanded the case back to the board because of the absence of findings, etc., in the decision. The court stated that it could not tell from the conclusion whether any or all of the district's evidence was believed or whether the evidence was sufficient as a matter of law to prove the statutory standard of "inadequate performance." The parties thereafter settled the case without further hearing.

9. ***Hausotter v. Douglas County School District No. 4***, FDA 76-9 (1977):

The teacher was dismissed for inadequate performance, inefficiency, insubordination, and failure to comply with reasonable requirements of the school board for normal improvement and evidence of professional training and growth. Dismissal was upheld.

In essence, the teacher was involved in two incidents in 1972 of unauthorized physical discipline of students. In January of 1973, therefore, he was given a letter from the school board which directed him to refrain from use of physical force on any student; to send incorrigible students to the school office; to handle disruptive students without undue emotional reaction; to maintain a professional relationship with students; and to adhere at all times to district and school board policy with respect to the discipline of students. The teacher, however, engaged in an (unidentified) incident in September of 1976 and grabbed the hair of a student in November of 1976 with such force that some



hair was pulled out. The order indicates that the 1976 incidents violated the January 1973 directives to the teacher to refrain from the use of physical force on students, refer incorrigible students to the school office, maintain a professional relationship with students and adhere to school board policies with respect to discipline of students.

10. ***Chubb v. Grants Pass School District***, FDA 77-1 (1977):

The teacher was dismissed for inadequate performance. Dismissal was set aside.

The teacher had taught science in the district for 16 years. He was an excellent teacher, except for classroom discipline (control), and was well-liked by students, parents, and teachers. From 1970 to 1973, he received evaluations and counselings indicating his need to improve classroom discipline. In 1974, he was warned that the problem could result in his not being rehired for the 1974-75 school year. Retirement was discussed with him in 1976 and the administration believed he had agreed to retire after the 1976-77 school year. At the beginning of the 1976-77 school year, the teacher indicated that he was not going to retire at the end of that year. Dismissal proceedings were commenced thereafter.

Classroom observations disclosed that classroom discipline in the teacher's classroom was poor during the period of 1973 to 1977. The teacher was never put on a plan of assistance or program to correct his classroom discipline problem. He received a salary advancement in 1973. Factors adding to the difficulty of maintaining classroom control included: (1) disproportionate number of "trouble-maker" students and students of low-level reading ability who were assigned to the teacher's classes; and (2) the fact that his classes were larger than they should have been. The teacher made improvement in classroom discipline during his last year and no evidence indicated that students did not master the material being taught.

The order emphasizes the fact that other factors than the teacher's weakness in the area of classroom control could have accounted for much of the classroom control problem. The order makes the following statements:

- a. Mr. Chubb is charged with inadequate performance; yet it is conceded by the District and the evidence has established conclusively that he is an excellent teacher and is well thought of by his fellow teachers, parents, and student.
- b. He has been retained as a teacher in this District for a period of some 16 years.
- c. His evaluation reports \* \* \* do not offer a concrete plan for improvement. The assistance offered seemed to consist largely of counseling and advice to do better.
- d. Some evaluations appear to have been made while the administration was either threatening his dismissal or demanding his early retirement.

The order, in the Conclusions of Law, stated that the facts relied upon "are true and substantiated but are not adequate to justify the statutory grounds cited for the dismissal."

In definition or explanation of the ground of “inadequate performance” and its application to the **Chubb** case, the order gives the following guidance:

- a. The charge of inadequate performance relates in a large degree to a teacher’s ability to convey knowledge or teach the subject in an adequate manner.
- b. Mere inefficiency, such as poor classroom discipline, might ultimately affect the adequacy of a teacher’s performance \* \* \*.
- c. [B]ut we do not believe that under all of the circumstances here related that the teacher’s inadequacy has been shown to such a degree as to warrant dismissal.
- d. The panel is of the opinion that there would need to be demonstrated that the poor classroom discipline had been detrimental to the educational process to such an extent or degree as to warrant a teacher’s immediate removal.
- e. With the conceded good qualities here demonstrated, the drastic step of dismissal in view of the teacher’s long association with the district is not supported by the evidence.

11. ***Jones v. Vernonia School District No. 47J***, FDA 77-6 (1977):

The teacher was dismissed for inadequate performance, inefficiency, neglect of duty, and failure to comply with reasonable requirements of the school board for normal improvement and evidence of professional training and growth. Dismissal was set aside.

The order does not set forth the factual charges made against the teacher in support of dismissal. Apparently the teacher’s principal objected to the teacher’s management of his science classroom, felt the students should be working a greater percentage of the time, and felt that the classroom was not as clean, neat, and orderly as it should have been. A “series of incidents” of some sort were set forth in the charges but the order does not indicate what the incidents were. The order essentially indicated that the incidents did not show use of undue force, violation of district policy, or violation of the teacher’s duties; that the incidents were minor; that three incidents showed “poor judgment on the part of the teacher,” and that the lack of neatness and orderly disposition of the classroom materials was largely corrected in 1977. The panel stated that while the teacher could improve, the evidence is insufficient to substantiate the statutory charges of inefficiency, neglect of duty, inadequate performance, and failure to comply with such reasonable requirements as the board may prescribe to show normal improvement and evidence of professional training and growth.

12. ***Mayer v. Lincoln County School District***, FDA 77-11 (1978), **reversed and remanded**, ***Lincoln County School District v. Mayer, et al.***, 39 Or App 99 (1979):

The teacher was dismissed for inadequate performance, inefficiency, insubordination, and neglect of duty. Dismissal was set aside by the panel.

The district based its case against the teacher on a multitude of performance criticisms, including instructional deficiencies, deficiencies in dealing with students, poor work habits, etc. The panel found the charged facts to be true, but felt they “did not justify” the statutory grounds. With one panel member dissenting, the panel indicated several concerns about the facts, namely, that many incidents were “minor”; that the incidents occurred over a number of years; that they could not have been considered serious during that time or else corrective action would have been taken; and that the district seemed to have tried to build a case for dismissal by collecting as many minor incidents as possible against the teacher.

The district appealed to the Oregon Court of Appeals. The court reversed the board and directed entry of an order upholding dismissal. The court indicated that the board could not set aside dismissal unless no reasonable school board would have found the facts sufficient for dismissal.

13. ***Carell v. Glide School District No. 12***, FDA 77-14 (1978); **reversed and remanded** ***Glide School District No. 12 v. Carell, et al.*** 39 Or App 727 (1979):

The teacher was dismissed for inadequate performance, inefficiency, insubordination, failure to comply with reasonable school board requirements, and cause constituting grounds for revocation of the teacher’s teaching certificate. The panel issued an order setting aside the dismissal.

In the first part of 1976, the teacher’s principal reviewed the teacher’s performance in his third probationary year and recommended renewal of the teacher’s contract. The superintendent disagreed with renewal, however, and the district notified the teacher of non-renewal. The teacher went to court over the matter and the county circuit court directed the district to renew the teacher’s contract. Meanwhile, the superintendent discovered the existence of a student activities bank account opened by the teacher which the superintendent felt violated previous directives. The district dismissed the teacher on the basis of facts known at the time of the principal’s review as well as the bank account matter.

The order does not indicate what facts were charged against the teacher. However, the panel noted that all facts except one were known at the time of the principal’s review of the teacher’s performance. The panel, in essence, threw out all facts known at the time of the principal’s recommendation of renewal, as facts upon which the district was not entitled to rely, and in addition, concluded that the fault with respect to the bank account was not sufficient to show cause for dismissal. The panel ruled that the facts upon which the district relied were not true and substantiated and that they did not justify the statutory grounds cited for dismissal.

The district appealed to the Oregon Court of Appeals. The court reversed and remanded the case to the board for findings of fact and application of the “proper” standard of review. The court indicated that because the superintendent and the school board did not agree to renew the teacher’s contract, but did so only by court order, the district was not precluded from relying, for dismissal, on facts supporting the superintendent’s non-

renewal decision. The court also criticized the Fair Dismissal Appeals Board for using its own judgment to decide that the facts were not sufficient for dismissal.

The parties thereafter settled the case.

14. ***Vorm v. David Douglas School District No. 40***, FDA 78-12 (1979), **affirmed**, ***Vorm v. David Douglas School District No. 40***, 45 Or App 225 (1980):

The teacher was dismissed for inadequate performance. The panel found the facts charged to be true and upheld dismissal. (One panel member dissented.)

The facts showed that the teacher had a number of deficiencies hindering his effectiveness, that the district has made every reasonable effort to help him and that the teacher was unable to attain sustained improvement. Problems of the teacher included inability to maintain classroom discipline, students out of their seats and not working, students ignoring the teacher, students exhibiting lack of respect for the teacher, confusing instruction methods, lack of complete lesson plans, monotone voice of the teacher, parent complaints about lack of direction and control of students, failure to achieve performance targets, lack of preparation of students for library visits, etc.

The teacher appealed to the Oregon Court of Appeals. The court affirmed the order of the board.

The teacher contended, on appeal, that the order upholding dismissal was erroneous because the term “inadequate performance” required interpretation or definition through standards adopted by FDAB or school districts and the panel’s findings and conclusion, in this case, were not based on any articulated standards. The court noted the provisions of subsection (2) of ORS 342.865 pertaining to adequacy of performance of teachers and standards of performance adopted by a district school board and indicated that the panel’s failure to articulate performance standards in the order was not error. The court also indicated that conclusory allegations in the district’s statement of facts supporting dismissal did not invalidate the dismissal, that letters of parents were not inadmissible in the hearing before the panel and that a panel member’s statements (outside the hearing) concerning board decisions and dismissals of teachers showed no cause for excluding him from the panel.

15. ***Smith (Beulah) v. Carlton-Yamhill School District No. 11***, FDA 79-10 (1979):

The teacher was apparently dismissed for inadequate performance, inefficiency, and insubordination (the order does not indicate the charges made against her). The dismissal was set aside.

Facts against the teacher included charges that her lessons were choppy, that discipline of students was inconsistent or deficient, and that instruction was inconsistent. Three incidents with students occurred in 1979. One involved the teacher’s striking a student in the back who was telling elephant jokes; another involved pushing a boy’s head down to his desk when the students were to be resting; and the third involved a boy’s shirt tearing as he jerked his arm away from the grasp of the teacher. The panel indicated concern

about lack of proof that classroom deficiencies, cited against the teacher in December of 1978, continued into 1979. The teacher was dismissed in June of 1979. The panel also apparently felt that the actual fault of the teacher in the three incidents did not show cause for dismissal. It ruled that the facts charged were not true and substantiated.

16. ***Keene v. Creswell School District No. 40***, FDA 80-7 (1981), **affirmed**  
***Keene v. Creswell School District No. 40***, 56 Or App 801 (1982):

The teacher was dismissed for inadequate performance, inefficiency, insubordination, and neglect of duty. Dismissal was upheld on the grounds of insubordination and neglect of duty.

The teacher obtained a leave of absence for the 1979-80 school year. In March of 1980, he requested an additional year's leave. The district declined. The district sent him a number of communications, thereafter, indicating the need to know, for staffing purposes, whether he intended to return to work for the 1980-81 school year. The teacher did not respond and was eventually dismissed.

The panel indicated that the teacher's failure to respond to at least two of the communications showed insubordination and neglect of duty because the teacher knew the superintendent was requesting him to indicate his intention to return. The panel indicated, however, that the facts did not show inadequate performance because the facts related to events occurring while the teacher was on leave of absence and did not relate to his classroom performance as a teacher.

The teacher appealed to the Court of Appeals, but the court upheld the board's determination that the facts showed insubordination and neglect of duty.

17. ***Owen v. Junction City School District No. 69***, FDA 80-10 (1981):

The teacher was dismissed for inadequate performance, inefficiency, insubordination, and neglect of duty. Dismissal was upheld by the panel for inadequate performance, inefficiency, and insubordination.

The facts of the case show that the teacher did not submit certain plans required by her principal, failed to carry out certain instructional programs as directed in math and reading, failed to furnish certain information requested by parents, acted defensively toward parents, did not avail herself of certain assistance offered to her, did not follow schedules for phonics instruction, failed to meet timely with parents on one occasion, failed to respond to district concerns about her performance, had a number of parents request transfer of their children out of her classes, etc.

The order concluded that the facts showed in adequate performance. The panel determined that any problems of the teacher with stress or depression did not make dismissal an excessive penalty.

18. ***Brown v. Astoria School District No. 1C***, FDA 81-20 (1982):

The teacher was dismissed for inadequate performance, inefficiency, and failure to comply with reasonable requirements of the school board. The dismissal was upheld on all three grounds.

The facts showed that the teacher, a physical education teacher, had problems of organization of her students and presentation of subject matter, displayed ineffective communication at times, allowed students to decide the class activity to be pursued, lacked adequate control of her students, on several occasions failed to require warm-up exercises, failed to utilize her class assistants adequately, was often late getting instruction or class activity started, sometimes failed to have equipment ready, argued extensively with students on one occasion, failed to provide certain lesson plans, and failed to improve adequately during a plan of assistance.

The order does not indicate what facts are necessary to show “inadequate performance”; does not indicate why the facts in this case showed “inadequate performance”; and does not attempt to define “inadequate performance.”

19. ***Skeen v. Bethel School District No. 52***, FDA 81-21 (1982), **affirmed** 63 Or App 165 (1983):

The teacher was dismissed for inadequate performance, inefficiency, insubordination, and neglect of duty. The order of the panel set aside dismissal.

The teacher was an experienced elementary teacher. The order does not say what facts were charged against the teacher. Apparently the district cited four incidents with students and some failures of the teacher to perform adequately. The order contains lengthy discussions of both the plan of assistance for the teacher and evaluations done on the teacher, but makes no mention whatsoever of the performance deficiencies on which the district relied. Consequently, the relevance of the plan of assistance and the evaluations is unclear.

The facts of the case show that the teacher was charged with using force on a student in February of 1976, but was never disciplined for that incident; that a roll of tape tossed by the teacher in 1976 hit a student on the cheek; that the teacher tipped over a student's desk in 1979 because it was messy and she wanted him to clean it out; that in 1980 the head of a student she was holding hit the wall as she was tipping his head back to look him in the eye; that the principal wanted to dismiss her in 1976 and the assistant principal recommended her dismissal in 1980; that she was placed on a plan of assistance in 1981; that the evaluation procedures were, to a great extent, ignored by the principal and assistant principal in doing their evaluations of her; that a favorable evaluation of an independent evaluator was ignored; that the teacher improved her performance in a number of areas; that the superintendent designated four areas of concern for the plan of assistance but the plan actually administered had 19 deficiency areas to be corrected; that the assistant principal destroyed his evaluation notes; etc.

The order essentially found the facts insufficient to show any cited cause for dismissal. It indicated that the incidents with the students were minor and unrelated and that they did not occur after the teacher was put on the plan of assistance. It also indicated that the

plan of assistance, as carried out, was too complex and had too many factors to be of assistance for professional growth, and that the evaluations by the principal and assistant principal were inappropriately carried out and violated district policies,

The order, however, does not indicate what facts are necessary to show “inadequate performance”; does not indicate why the facts of the case fail to show “inadequate performance”; and does not attempt to define “inadequate performance.”

The school district appealed to the Oregon Court of Appeals, but the court affirmed the order of the panel. The court indicated that the panel had an adequate basis for concluding that the proof failed to show any of the cited statutory causes and that the panel had adequate basis for rejecting most of the district’s evidence as unpersuasive.

20. ***Pecka v. Beaverton School District No. 48***, FDA 82-2 (1982):

The teacher was dismissed for inadequate performance and insubordination. Dismissal was upheld for inadequate performance.

The district based its charges on five instances of improper physical handling of students. The teacher was a physical education teacher and school policy prohibited use of physical force on students except to maintain order. In January of 1974, the teacher became enraged at a boy, grabbed him by the hair, shook him and threw him against some bleachers. He was warned that such behavior in the future would result in his termination. In October of 1978, when a boy refused to clean off the top of a locker, he swung the boy around and forcibly lifted him up to the lockers. He was warned that he needed to avoid the use of physical action to discipline students. In September of 1980, he slapped a boy several times on the thigh on one occasion and hit a boy in the chest by swinging a bad of soccer balls on another occasion. He was then given written notice that further physical handling of students would result in recommendation of dismissal. His May 1981 evaluation warned him of the need to develop and consistently apply classroom management and discipline skills. In November of 1981, however, he tipped a desk backwards in anger and caused the boy sitting at the desk to hit his head on a cart.

The panel, in its order, pointed out that the teacher performed inadequately in managing students and did not follow the district’s regulations regarding physical punishment. It pointed out that the district’s “concern for the safety of its students is reasonable and its tolerance of Mr. Pecka’s inability to refrain from physical assaults, direct or indirect, has understandably been exhausted.” The panel disagreed that the facts showed a case, however, of failure to communicate with students.

The order does not say what facts are necessary to show “inadequate performance”; does not say just why the proven facts in this case show “inadequate performance”; and does not attempt to define “inadequate performance.”

21. ***Holcomb v. Jefferson County School District No. 509-J***, FDA 82-6 (1982):

The teacher was dismissed for inadequate performance, inefficiency, and failure to comply with reasonable school board requirements for improvement and growth. Dismissal was upheld on all three grounds.

The findings of fact discuss the teacher's Title I program duties and who testified to what at the hearing, but give little in the way of specifics as to the teacher's defaults. The Ultimate Findings, however, indicate the following:

- (1) Holcomb failed to comply with Title I program requirements in preparing and filing necessary records.
- (2) Holcomb failed to organize PACs.
- (3) Holcomb failed to send individual progress reports home to parents.
- (4) Holcomb failed to maintain a classroom environment inductive (sic) to learning.
- (5) Holcomb failed to use appropriate teaching techniques.
- (6) Holcomb failed to observe techniques used by other teachers in remedial situations.
- (7) Holcomb failed to obtain her evaluation assistance on lesson planning in time to modify the program and study before implementation.
- (8) Holcomb failed to complete required updating of IEP (Individual Educational Plan) for nine students until March, although the principal gave her repeated warnings.

The panel, in its "Discussion" section of the order, stated that Holcomb should have been more aggressive in pursuing the objectives of her duties. Additionally, though Holcomb attempted to excuse her performance, the emergent pattern was unacceptable to the district because of a possible loss of revenue due to Holcomb's shoddy record keeping. Further, though each of the incidents standing alone would not be sufficient for dismissal, taken together, they constituted inadequate performance.

The order does not indicate what facts are necessary to show "inadequate performance"; does not indicate just why the facts of the case show "inadequate performance"; and does not, except as quoted above, attempt to define "inadequate performance."

22. ***Boehm v. Klamath Falls School District No. 1***, FDA 83-8 (1984):

The teacher was dismissed for inadequate performance, inefficiency, insubordination, and neglect of duty. Dismissal was upheld by the panel for inefficiency, neglect of duty, and inadequate performance.



The facts of the case show that the teacher, an elementary teacher, had a history of reacting emotionally and at times physically toward disruptive or disrespectful students, lacked the ability to control his classroom adequately, had poor rapport with his students and at times an adversarial relationship with them, argued with students and focused on their faults in incidents where his own conduct was criticized, mislaid student papers, violated instructions regarding the use of the area behind the office secretary's desk, accused his principal of being unprofessional and playing games with him, etc. The teacher received repeated warnings about the need to correct his performance deficiencies. His conduct violated many of the district's written performance standards.

The panel stated that the teacher's failures to meet district standards in several areas were repeated and extensive. Because the failures were so extensive, the panel held that they constituted inadequate performance, and, hence, cause for dismissal.

The panel showed its view that "inadequate performance" under the statute can be based on:

1. A pattern or failure to comply with district standards for performance or teacher conduct;
2. A pattern of failure to comply with warnings of a supervisor regarding performance or conduct; or
3. A pattern of failure of the teacher to avoid conduct or teaching practices he knows or should know are not conducive to effective learning or harmonious working relationships.

The order does not indicate what facts are necessary to show "inadequate performance"; does not indicate just why the facts of this case show "inadequate performance"; and does not attempt to define "inadequate performance."

23. ***Covey v. Umatilla School District No. 6R***, FDA 83-9, ***order on reconsideration*** (1984); ***affirmed without opinion***, 76 Or App 402 (1985); ***review denied*** 300 Or 545 (1986):

The administrator was dismissed for inadequate performance, insubordination, and failure to comply with reasonable school board requirements for improvement and evidence of training and growth. Dismissal was upheld on all three grounds.

The facts show that the administrator was employed as an elementary school principal for the four school years immediately prior to his dismissal (which occurred in June of 1983.) The administrator reported directly to the superintendent, was a part of the superintendent's administrative "team" and was required to furnish such budgetary and other information or reports to the superintendent as the superintendent might require. The administrator received evaluations in October and December of 1982, which indicated displeasure of the superintendent about certain habits or conduct of the administrator. One problem about which the superintendent warned the administrator and attempted to guide him toward improvement in the October evaluation was verbosity. Despite the warnings to him, the administrator submitted a 10-page salary request

document and a 34-page evaluation rebuttal to the superintendent and the school board in January of 1983. In December of 1982, the administrator refused to submit prioritized budget cuts to the superintendent which the superintendent had requested in November. In January, the administrator asked the superintendent's permission to make a plea to the school board for a salary increase. When he went before the board, however, he presented not only his request for a salary increase, but also his 34-page evaluation rebuttal. The school board, at that meeting, warned the administrator that he would be "down the road" if he did not work cooperatively with the superintendent. Nevertheless, in March of 1983, the administrator refused to furnish a three-category grouping of teachers that the superintendent directed him to furnish. The administrator was not granted a salary increase after his January request to the school board. In early March, the administrator again petitioned both the board and the superintendent for a salary increase.

With regard to the charge of inadequate performance, the panel stated that the principal's repeated failures in his working relationship with the superintendent show a pattern of resistance to the superintendent's authority. The board found that the record did not show that a plan of assistance was required under the circumstances because the principal had been given repeated warning about his failures both by the superintendent and by the school board. Additionally, the Fair Dismissal Law does not require a plan of assistance as one of the procedural steps preceding dismissal.

The order does not indicate what facts are necessary to show "inadequate performance"; does not indicate why the facts properly charged and proven in this case showed "inadequate performance"; and does not attempt to define "inadequate performance."

24. ***Fisler v. Hermiston School District No. 8R***, FDA 84-1 (1985):

The teacher was dismissed for inadequate performance, insubordination, neglect of duty, and failure to comply with reasonable school board requirements for improvement and growth. Dismissal was upheld for inadequate performance, insubordination, and neglect of duty.

The teacher taught high school chemistry, physics, and electronics and had taught at the district's high school for 13 years prior to her dismissal in January of 1984. She was regarded as a dedicated teacher who was skilled in her field. The teacher was warned in her 1979 evaluation, her 1980 evaluation, a 1980 goals statement and her 1980 position description that she needed to perform her assigned outside-the-classroom supervision responsibilities. She was, however, reprimanded in 1980 for failure to perform hall duty. Security of classrooms and her need to protect against theft of science equipment and materials was discussed with science teachers in 1980, when they were told to lock their rooms if they were to be away from their room; was mentioned on the position description the teacher signed in 1980, was discussed with her in April of 1982 when she lost her keys; was discussed with her in December of 1982 when she left a cabinet open over the weekend that contained scales; and was one of the subjects covered by the plan of assistance on which she was placed in January of 1983. Teachers were told in the 1978-79 school year that weekend parties were no longer permitted, but the teacher nevertheless allowed a water fight in her room near the end of the 1979-80 school year.

In December of 1980, the teacher was told not to do any more experiments in her room with contact explosives, but she nevertheless allowed contact explosives to be produced in her room on one occasion in 1982. In April of 1981, the teacher asked permission to attend a skills contest in which some of her students were competing. The principal denied the request, but the teacher attended the contest anyway. From September of 1982 to December of 1982, the teacher missed bus duty seven times, hall duty or part of it nine times, and other required activities two times. In January of 1983, she used a photocopy machine without required approval and in defiance of the office secretary's attempt to enforce the restrictions on use of the copy machine. She was appropriately warned about insubordination, neglect of duty, and the possibility of termination. She improved under the plan of assistance in the spring of 1983. However, in the fall of 1983, she went home at lunch time on the first day of school, August 29, 1983, and slept through both a prep period and a portion of her electronics class; on October 24, 1983, she overslept, delivered the newspapers on her newspaper route before coming to school and did not arrive at school until 20 minutes after the beginning of her first class; and on November 2, 1983, after classes were over for the day, she left her classroom, the lab room, the chemical storage room, and the physics equipment room open and unattended while she engaged in conversation for some thirty minutes or more with other teachers in the school library.

The order of the panel states that all three incidents in the fall of 1983 show serious failures of performance by the teacher and that her prior record shows failures to comply with other duties as well. In addition, the board stated that inadequate performance does not require defiant intent, but that to justify dismissal the inadequacy of the teacher's performance must be prolonged or reasonably severe.

25. ***Thomas v. Cascade Union High School District No. 5*, FDA 84-7 (1985), reversed and remanded, *Thomas v. Cascade Union High School District No. 5*, 80 Or App 736 (1986), order on remand (1987) (remanding to district), order on appeal after remand (1987), affirmed, *Thomas v. Cascade Union High School District No. 5*, 98 Or App 679 (1989), disavowed by *Bergerson v. Salem-Keizer School District*, 194 Or App 301 (2004):**

The teacher was dismissed for inadequate performance, inefficiency, neglect of duty, and cause constituting grounds for revocation of the teacher's teaching certificate. Dismissal was upheld for neglect of duty.

The teacher was a girls' physical education teacher with 12 years of experience (six in another district) prior to her dismissal in June of 1984. She had good rapport with her students, had a record of acting professionally and with self-control, and was fair in dealing with students. On April 18, 1984, however, during a dodge-ball game, she reacted in anger to a girl who hit her intentionally from behind with a volleyball. She grabbed the girl and kicked her twice in the back of the leg. In the locker room after the game, when several girls voiced their protests of the kicking to the teacher, the teacher made statements indicating that the girl was also at fault in the incident. The kicking incident was the only instance of loss of control by the teacher in her 12 years of teaching. There was no other reason than that incident to suggest that the teacher might physically abuse a student in the future.

The factual charges against the teacher were essentially two, namely (1) that she kicked the girl during the dodge-ball game and (2) that she engaged in a shouting match in the locker room with some of the girls after the game. The panel found the second charge not proven and upheld dismissal (for “neglect of duty”) on the kicking incident alone.

The panel, in considering the cited cause of “inadequate performance,” stated that the record showed the teacher had performed adequately in her teaching until the April 18<sup>th</sup> kicking incident. In this instance, the board held that, though the one kicking incident was a serious enough default of performance, it was not proof of any underlying inability or unwillingness to perform properly, and so did not justify the statutory ground of inadequate performance.

Except for the foregoing, the order of the panel does not indicate just what facts are necessary to show “inadequate performance” and does not attempt to set forth a definition of “inadequate performance.”

The Court of Appeals remanded the case to the Fair Dismissal Appeals Board for remand to the district because a number of the factual charges were not substantiated.

In its *Order on Remand* (1987), the panel reiterated its statements from the original order regarding inadequate performance and in its *Order on Appeal after Remand* (1987), the panel did not discuss the ground of inadequate performance.

In affirming the order of the panel on appeal after remand, the Oregon Court of Appeals indicated that the teacher was not entitled to reinstatement and back pay up to the time of the district’s decision, on remand, to let the dismissal stand and that the district’s decision to let the dismissal stand, on the basis of the proven facts (the kicking incident), did not require a new dismissal recommendation of the superintendent.

26. ***Hoover v. Hermiston School District No. 8***, FDA 87-1 (1988):

After serving 18 years as the high school choral director, the teacher requested reassignment to teaching mathematics in the high school. Problems in his classroom control and instructional technique resulted in his dismissal, after three years of teaching mathematics classes, for inadequate performance and inefficiency. He was unable to stop student misbehavior in his classes; students used profanity and were disrespectful to him; he was not able to achieve a classroom environment conducive to learning; he allowed the problem of students not on task to continue; and he showed insufficient monitoring of student understanding of the subject matter.

In upholding dismissal on the ground of inadequate performance, the panel stated that the panel views “inadequate performance” to mean failure to perform job duties in conformance with district standards or requirements, where the teacher has been given notice of deficiencies and an opportunity to correct them. In addition, the deficiencies must result in a significant detriment to the teacher’s performance. The panel also stated that in determining whether a teacher’s performance is adequate, it must also consider any written standards of performance adopted by the school board.

The panel found that the teacher had been repeatedly informed of his deficiencies in his yearly evaluations, as well as a plan of assistance and an extension of that plan by letter. The panel also found that the teacher had been given ample opportunity to correct those deficiencies. Additionally, the panel found that the teacher's failures were repeated in the sense that the deficiencies continued throughout his tenure as a mathematics teacher. In sum, the panel found that the teacher's deficiencies resulted in a substantial failure to perform his duties which caused detriment to the district through complaints by parents and students.

Further, the teacher failed to provide an atmosphere in which students remained on task, a deficiency which also continued throughout his tenure as a mathematics teacher. The panel also found that this was a substantial failure to perform a significant teaching duty, which hindered the educational mission of the district.

Because the teacher failed to improve despite repeated warnings from his supervisor and the several opportunities for improvement he was given, the board held that cause for dismissal for inadequate performance existed.

27. ***Ballman v. Warrenton-Hammond School District No. 30***, FDA 89-4 (1990):

The teacher was dismissed for inadequate performance, inefficiency, and failure to comply with school board requirements for improvement, training, and growth. Dismissal was upheld by the panel for inadequate performance and inefficiency.

The teacher was a high school science teacher who ran a loose-disciplined classroom. He preferred a free-structured classroom, where students had freedom to do their own thinking. Over a fifteen year period of time prior to his dismissal in June of 1989, the teacher was repeatedly warned that he needed to improve his control of student behavior in the classroom, increase the amount of productive class time and reduce off-task student behavior. In April of 1988 his principal put him on a plan of assistance to help him improve in the area of keeping students on task.

A new principal took over, however, for the 1988-1989 school year. He believed in strict control of student behavior in the classroom and expected teachers to follow their discipline plans strictly. He warned the teacher about failure to follow the teacher's discipline plan, lack of supervision of the student, wasted class time, ineffective attempts of the teacher to gain proper classroom behavior, allowing students to argue with the teacher about assignments or admonishments about behavior, lack of attention by students while the teacher was talking, etc. By October 25, 1988, he had placed the teacher on another plan of assistance.. For lack of significant improvement the teacher was placed on a revised plan of assistance in March of 1989. By May the principal determined that the teacher was not meeting the district's standards for control of student classroom behavior, maximization of on-task time, productive use of class time and supervision of students and he accordingly recommended dismissal.

The panel concluded that the evidence proved cause for dismissal for inadequate performance because the teacher failed to conduct his classes in a way that maximized

on-task time by the students and demonstrated his inability to control his students in his classes. The panel found that the principal had been given ample notice of his deficiencies by the principal, and amply opportunity to correct his shortcomings. Further, the panel found that the teacher's deficiencies in classroom control showed a substantial inability to perform his duties. Therefore, the panel held that cause for dismissal for inadequate performance existed.

The panel discussed the case of *Chubb v. Grants Pass School District*, FDA 77-1 (1977), where a science teacher close to retirement was dismissed. In setting aside dismissal the panel in *Chubb* stated: "The panel is of the opinion that there would need to be demonstrated that the poor classroom discipline had been detrimental to the educational process to such an extent or degree as to warrant a teacher's immediate removal." The panel in the *Ballman* case determined that *Chubb* did not require dismissal in the *Ballman* case to be set aside. It reasoned that the *Chubb* panel, in saying dismissal was too severe a sanction, failed to defer to the school district's judgment regarding the appropriate penalty for the teacher's classroom discipline deficiencies and that the *Chubb* panel's apparent requirement of detriment to the educational process so serious as to warrant the teacher's immediate removal conflicted with ORS 342.865, which allows dismissal for reasons not causing such detriment to the educational process; and that the *Chubb* statement about such detriment contradicted prior decisions of the board upholding dismissal in cases not showing evidence of such detriment.

The *Ballman* panel also distinguished the case of *Jones v. Vernonia School District No. 47J*, FD 77-6 (1977), another case of a long time science teacher whose dismissal for classroom management problems was set aside. In the *Jones* case observations of the teacher were brief, the principal had decided far in advance that the teacher should be dismissed, there was little evidence of assistance given to the teacher to help him improve and both the charges and facts were so inadequately stated in the *Jones* order that it could not be given much validity as a precedent.

28. *Thyfault v. Pendleton School District No. 16R*, FDA 90-4 (1991):

The teacher was dismissed for inadequate performance, immorality, insubordination and neglect of duty. Dismissal was upheld for immorality and neglect of duty.

The teacher was dismissed because she placed a child in her resource room without required approval, then altered a special education file form to cause the form to represent, falsely, that approval had been given; used a school form to attempt to get confidential medical information to which she was not entitled and was untruthful when questioned about the form; spanked a child in her room; falsely denied the spanking; and asked an educational assistant to give a false statement regarding the spanking. The panel determined that the facts did not show inadequate performance because that statutory cause was intended to cover performance deficiencies that continue to occur after notice and opportunity to correct the deficiencies.

29. *Enfield v. Salem-Keizer School District No. 24-J*, FDA 91-1(1992), **affirmed without opinion**, 118 Or App 162 (1993), **review denied** 316 Or 142 (1993):

The teacher was dismissed for inadequate performance, inefficiency, insubordination and neglect of duty. The panel concluded that the facts proved were not sufficient to show any of the four statutory grounds and it set aside dismissal.

The teacher was a high school mathematics teacher who had taught for the district for 23 years before his dismissal in March of 1991. He was effective in his instruction of students and was considered to be an excellent mathematician. On the other hand, for about six years he had had trouble with negative, sarcastic or otherwise inappropriate remarks to students and occasional confrontations with students. These problems had generated complaints from both students and parents. Except for being placed on a plan of assistance in 1988 to help him become more courteous to students and more supportive, however, the only remedial measures taken by the district to address these problems were occasional discussions, annual goal statements and comments on his evaluation.

An incident in the fall of 1991 precipitated the dismissal. In his freshman algebra class the teacher grabbed the shoulder of a student who had thrown a wad of paper. The teacher intended no injury or pain in grabbing the student but his grip was forceful and caused pain to the student. The teacher then required the student to do 15 pushups, as punishment, in the presence of the other students. The student was greatly embarrassed from having to do the pushups but doing them did not cause him pain. Because of the incident the student's parents filed a complaint for assault against the teacher at the local police station.

Before the incident had occurred the teacher had never used physical force on any student. The district, however, dismissed the teacher on the basis of the incident and the teacher's record of inappropriate remarks and confrontive behavior.

The panel stated that the facts do not show cause for dismissal for inadequate performance because the teacher's acts constituting failure to provide a supportive environment were a continuation of a problem that had not been a major concern to the district. The panel found that two instances of use of physical force were not sufficient to show an inability to meet district requirements of providing a supportive environment or assuring safety of students.

In its discussion of the charge of inadequate performance the panel found that the teacher had been given notice of the need to correct his problem with making unsupportive remarks to students, however, the district also represented to the teacher that his conduct did not merit discipline or put his employment at risk.

30. ***Sherman v. Multnomah Education Service District***, FDA No. 95-4 (1996):

The principal was dismissed for inadequate performance, insubordination, and neglect of duty. The dismissal was upheld on all three statutory grounds.

The district based its charges on the principal's criticism of the administration to support staff, his refusal to teach, his verbal threats to and physical contact with a supervisor, and other conduct which demonstrated poor judgment and/or insubordination. The employee

was working under a conditional return-to-work agreement, which was implemented after the employee returned to work in 1994 after being placed on leave and participating in an in-patient drug and alcohol treatment program.

The board relied on its definition of “inadequate performance” in *Hoover v. Hermiston School District No. 8*, FDA 87-1 (1988).

The panel relied in part on the principal’s agreement before returning to work that he understood he was to “demonstrate appropriate judgment and decision-making skills.” The panel found that the principal’s interruption of classrooms where he disrupted and agitated students constituted a lack of good judgment and decision-making. The panel also found grounds for poor judgment when the principal entered and remained in a classroom while a teacher was tutoring a student the principal had been warned to stay away from, based upon the student’s allegation of inappropriate touching against the principal.

The panel clearly equated these and other instances of poor judgment with inadequate performance.

The panel also found grounds for inadequate performance when the principal retaliated against his subordinates for their reports regarding him to the administration, and when the principal disregarded a memorandum advising him not to engage in hostile or threatening behavior toward his supervisor.

The panel’s decision seemed to focus much of its decision on the events of May 17, 1995. On that day, the principal argued with his supervisor regarding a possible gas line leak near the school. The argument escalated, resulting in the principal forcing open a door to a classroom, positioning himself so his supervisor could not leave, poking his supervisor, and threatening her with physical violence. In response to the incidents of this particular day, the panel found that “[t]he allegations relating to events on May 17 alone warrant dismissal when viewed in the context of appellant’s prior conduct and the repeated notice to him about another instance of similar conduct.” The panel also noted that the “events of May 17 were a very serious neglect of appellant’s duty toward his fellow workers, showing inadequate performance[.]”

The panel also found that the facts proved cause for dismissal for “neglect of duty” and “insubordination,” each of which are summarized in their respective categories within this index.

31. ***Packard v. Corvallis School District No. 509-J***, FDA 97-4 (1998):

The teacher was dismissed for inefficiency and inadequate performance. The panel found the facts sufficient on both grounds and upheld the dismissal.

The teacher taught for approximately 28 years for the same district before her dismissal in March of 1997. She was identified as a teacher with great concern for the social, emotional and academic welfare of children. The appellant spent many hours outside of class engaged in supportive activities for her students and in some instances, their



families. She individually helped many students who had learning, emotional or motivational difficulty in school. She strove to find a learning “hook” for each student in order for them to become life-long learners. She focused on each student’s strengths and progress in an open-ended teaching process. She was generally observed to be a nurturing, empathetic, kind, approachable and dedicated person. These characteristics were her strengths but also exacted a toll on her teaching methods in the areas of academic planning and on-task accountability for students.

She moved to a new school with a new principal who provided more observations, feedback and directions for improvement. The principal was concerned with the teacher’s lack of on-task teaching, student accountability and academic planning. Initially, the principal utilized collaborative techniques to obtain change. The efforts did not result in sustained improvement. By January 1995 the principal had determined that a more stringent plan for correction was needed and it was decided to place the teacher on a formal plan of assistance. The plan listed goals, expectations, assistance and measurement criteria. Over the course of 1995 and 1996 the teacher failed to make sustained improvement in the areas identified in the plan and on June 6, 1996, the principal and a district administrator who was closely involved in the matter recommended the teacher dismissal. Ultimately, the teacher was dismissed on the statutory grounds of inefficiency and inadequate performance.

On the inadequate performance charge, the panel concluded that inadequate performance means failure to perform job duties in conformance with district standards or requirements, where the teacher has been given notice of deficiencies and opportunity to correct the deficiencies, and where the failure is a repeated or otherwise substantial failure to perform a teaching, counseling, supervisory, administrative or other significant duty or the failure to perform results in some substantial detriment to the district.

*Hoover, supra; Ballman, supra.*

32. ***Bourgo v. Canby School District No. 86U***, FDA 99-6 (2000):

Administrator was dismissed for inefficiency, neglect of duty and inadequate performance. The Panel found that the Appellant Administrator, with a lengthy history of good performance, was transferred to a new position against his will. Essentially the Appellant became passively resistant to performing the duties of his current assignment. Ultimately, his non-performance, under the factual record, established the three statutory grounds. The action was appropriate under the statutory guidelines the Board must follow and the dismissal of Appellant was sustained.

33. ***Hayden v. Glendale School District No. 77***, FDA 99-4 (2000):

This was a long-term teacher with extremes of performance before the District which the Panel Opinion described as “calling to mind the analogy of a roller coaster ride”. There were litigated issues concerning psychological conditions with several medical health care professional testifying before the hearings officer. There were procedural deficiencies in the processing of the personnel action noted by the Panel. Particularly the statutory criteria of giving notice to the teacher of the facts and legal basis for the

proposed action were at issue. Ultimately the Panel returned those charges which were substantiated to the School Board for a decision.

One factual charge that was substantiated was appellant's giving of a cup to the principal as a Valentine gift. The cup contained "crude sexually oriented comments and a phone number" and the appellant then placed four (4) successive phone calls to the principal on one day to discuss the "gift". During one of the calls she described herself as phoning him from the bathtub. Appellant recognized the inappropriateness of the conduct by phoning another administrator several days later to express concern about what she had done.

Appellant's conduct in missing the school morning to recover from alcohol consumption was also found to meet this statutory ground.

34. ***Zottola v. Three River School District***, FDA 01-05 (2002), **affirmed without opinion** 188 Or App 489 (2003), **order on motion to determine back pay** (2003), **order on remand on motion to determine back pay** (2004):

The school district had contracted with the Oregon Youth Authority to provide educational services at the OYA facility in Grants Pass. This led to a practical situation where there were two lines of authority for the Appellant – the District and OYA. The underlying conduct involved allegations about the interactions between the teacher and an incarcerated youth. In the alternative, the Panel majority found that there was essentially a failure of proof in that they did not believe the youth's testimony and found other evidence that mitigated the Appellant's conduct (with one factor being dual lines of authority). With the facts not being "true and substantiated" the District's decision was reversed. There is a dissenting opinion which views the conduct as largely uncontested between the parties and the logical conclusions to be drawn favor the District's decision to terminate. There are two unique procedural issues addressed below from this opinion: one is the question of "double jeopardy" and the other is the teacher's attempts to subpoena records from OYA during the hearing.

This ground was not met under the panel majority's analysis of the facts. The dissenting panel member may have his point of view addressed by the appellate court since the case has been appealed.

35. ***Beeson v. Warrenton-Hammond School District***, FDA 01-04 (20 ), **vacated and remanded** 189 Or App 576 (2003), **on reconsideration** (2004) (adhering to prior decision as modified):

The district filed a motion to dismiss on the grounds that the teacher was still a probationary teacher. The panel denied the motion and ordered a hearing to be scheduled. After the hearing, in its final order, the panel found that the facts were not "true and substantiated" so that the question of whether the conduct would amount to the statutory grounds of neglect of duty or inadequate performance was a moot issue. Appellant was ordered reinstated.

The district appealed on the main contention that the teacher was still in “probationary” status at the time of the district’s decision and therefore the panel should have granted the motion to dismiss. On October 1, 2003, the Court of Appeals vacated and remanded FDAB's decision for reconsideration its decision with regard to Appellant’s alternative argument in opposition to the motion to dismiss in light of *Smith v. Salem-Keizer School District*.

On December 29, 2003, on reconsideration, the Panel adhered to its final order and modified its order on the district’s motion to dismiss to vacate the unnecessary discussion of Appellant’s alternative argument.

36. *Vilches v. Multnomah Education Service District*, FDA 02-3 (2002), **affirmed without opinion** 189 Or App 335 (2003), **review denied** 336 Or 377 (2004):

There were multiple issues in this case which arose out of the Appellant’s teaching assignment at an alternative program for developmentally disabled students. The school district dismissed him on the grounds of insubordination, neglect of duty and inadequate performance. The panel found that Appellant disregarded clear directives from his supervisor and did so in the presence to the students, causing an escalation in an already tense, emotional situation. The panel found Appellant to lack credibility compared to the other witnesses, and so his version of events was not accepted as “true and substantiated.”

The panel majority found the conduct of Appellant did not violate the statutory ground of inadequate performance because the conduct did not relate directly to teaching duties. The actions of Appellant were more in the nature of workplace “behaviors” as opposed to workplace “performance”. However, the panel found the other grounds for dismissal were supported and that dismissal was not arbitrary, unreasonable or a clearly excessive remedy.

**H. FAILURE TO COMPLY WITH SUCH REASONABLE REQUIREMENTS AS THE SCHOOL BOARD MAY PRESCRIBE TO SHOW NORMAL IMPROVEMENT AND EVIDENCE OF PROFESSIONAL TRAINING AND GROWTH:**

**1. *Hausotter v. Douglas County School District No. 4*, FDA 76-9 (1977):**

The teacher was dismissed for inefficiency, insubordination, inadequate performance and failure to comply with such reasonable requirements as the school board may prescribe to show normal improvement and evidence of professional training and growth. Dismissal was upheld on all grounds except inefficiency.

After a couple incidents in 1972 of improper disciplining students by the teacher, the school board, in January of 1973 gave him a letter directing him to refrain from use of physical force on any student; to send incorrigible students to the office; to handle disruptive students without undue emotional reaction; to maintain a professional relationship with students; and to adhere at all times to school board and district policies regarding discipline of students. Nevertheless, the teacher was involved in two more incidents in 1976. In September he engaged in some conduct (not described in any way in the order) which the order said was “violative of school district policy with respect to student discipline.” In November of 1976 he grabbed a student’s hair with such force that some of the hair was pulled out. The order indicates that the 1976 incidents violated the January 1973 directives to refrain from use of physical force on students, send incorrigible students to the school office, maintain a professional relationship with students and adhere to school board policy regarding discipline of students.

**2. *Jones v. Vernonia School District No. 47J*, FDA 77-6 (1977):**

The teacher was dismissed for inefficiency, neglect of duty, inadequate performance and failure to comply with such reasonable requirements as the school board may prescribe to show normal improvement and evidence of professional training and growth. Dismissal was set aside.

The order does not disclose the factual charges made against the teacher. Apparently, the principal felt the teacher should have managed his science classroom better, that students should have been working a greater percentage of the time and that the classroom was not as clean, neat and orderly as it should have been. A “series of incidents” of some sort were set forth in the charges but the order does not indicate what those incidents were. The order essentially indicated that the incidents did not show use of undue force; that the incidents were minor and did not violate any district policy or any duty of the teacher; that three incidents showed “poor judgment on the part of the teacher;” and that lack of neatness and orderly disposition of classroom materials was largely corrected in 1977.

The panel stated that while the teacher showed some room for improvement, the evidence was insufficient to substantiate the statutory charge of failure to comply with such reasonable requirements as the school board may prescribe to show normal improvement and evidence of professional training and growth.

The order does not indicate what facts show failure to comply with reasonable school board requirements; does not indicate why the facts proven failed to show such failure to comply; and does not in any way attempt to define this statutory cause.

The dissenting panel member, however, felt that the teacher was guilty of neglect of duty and failure to comply with reasonable requirements. Her comments indicated that the teacher was fully and clearly notified of the dissatisfactions with his performance; that the teacher did not avail himself of the opportunities presented to him to improve; that the teacher chose not to confer on the criticisms of his performance; that he should have spent more time helping students; and that he let other priorities and commitments take precedence over his professional duties and improvement. She did not indicate, however, what requirements were prescribed for the teacher; did not indicate why she felt the proven facts showed failure to comply with the requirements; did not indicate what facts are necessary to make out this statutory cause; and did not in any way attempt to define this statutory cause.

3. ***Carell v. Glide School District No. 12***, FDA 77-14 (1978); **reversed and remanded** ***Glide School District No. 12 v. Carell, et al.*** 39 Or App 727 (1979):

The teacher was dismissed for failure to comply with such reasonable requirements as the school board may prescribe to show normal improvement and evidence of professional training and growth, inefficiency, insubordination, inadequate performance and cause constituting grounds for revocation of the teacher's teaching certificate. The order of the panel set aside dismissal.

The teacher's principal reviewed the teacher's third probationary year of performance in the first part of 1976 and recommended renewal of the teacher's contract. The superintendent disagreed and recommended non-renewal and the district notified the teacher of non-renewal. The teacher went to court on the matter and the (county circuit) court issued an order directing that the teacher's contract be renewed. Meanwhile, the superintendent discovered a student activities bank account opened by the teacher which the superintendent believed violated previous directives. The district then dismissed the teacher.

The order does not disclose what facts were charged against the teacher. The order points out, however, that all the facts but one were known at the time of the principal's recommendation of the teacher for renewal. The panel, in essence, threw out all the facts known at the time of the principal's review and found insufficient fault in the bank account matter to show cause for dismissal. The panel indicated that the facts upon which the district relied for dismissal were "not true and substantiated" and that they did not justify the statutory grounds cited for dismissal.

The district appealed to the Oregon Court of Appeals. The court reversed and remanded the case to the board for findings on the factual allegations charged against the teacher and application of the "proper" standard of review of the dismissal. The court indicated that because the superintendent and school board had disagreed with renewal of the

teacher's contract and had renewed the contract only because so ordered by the circuit court the district was not precluded from relying for dismissal on facts supporting the superintendent's recommendation for non-renewal. The court also criticized the Fair Dismissal Appeals Board for using its own judgment to decide that the facts were not sufficient for dismissal.

The parties settled the case thereafter.

4. ***Hawkins v. Redland School District No. 116***, FDA 81-9 (1981):

The teacher was dismissed for neglect of duty and failure to comply with reasonable requirements of the school board to show normal improvement and evidence of professional training and growth. Dismissal was set aside.

The order is confusing because it does not indicate just what facts the district charged against the teacher. The district required a person in a librarian position, such as the teacher's, to have an "appropriate Oregon Librarian certificate." For some reason, not stated in the order, the district felt the certificate the teacher obtained in March of 1981 did not meet this requirement. The panel examined the meaning of the word "appropriate," noted TSPC rules on certificates and determined the teacher's certificate to be appropriate for her position.

The order does not indicate what facts are necessary to show this statutory cause; does not, except in finding the certificate "appropriate," indicate why the facts of the case do not support this statutory cause; does not attempt to define the statutory cause; and does not, in fact, mention the statutory cause at all after noting that it was one of the causes cited by the district for the dismissal.

5. ***Brown v. Astoria School District No. 1C***, FDA 81-20 (1982):

The teacher was dismissed for inefficiency, inadequate performance and failure to comply with reasonable requirements of the school board to show normal improvement and evidence of professional training and growth. Dismissal was upheld on all three grounds.

The facts of the case showed that the teacher, a physical education teacher, lacked adequate organization and control of her students, lacked adequate organization for presentation of subject matter, displayed ineffective communication with students on some occasions, allowed students to make class activity decisions, on several occasions failed to require the necessary warm-up exercises, failed to utilize her class assistants adequately, was often late getting instruction or class activity started, sometimes failed to have equipment ready, argued extensively with students on one occasion, failed to provide some lesson plans and failed to improve adequately during a plan of assistance.

The order does not indicate what facts are necessary to show failure to comply with reasonable school board requirements for normal improvement and evidence of professional training and growth; does not indicate why the facts of the case show this statutory ground; and does not attempt to define the statutory grounds.

6. ***Holcomb v. Jefferson County School District No. 509-J***, FDA 82-6 (1982):

The teacher was dismissed for failure to comply with reasonable requirements of the school board to show normal improvement and evidence of professional training and growth, inefficiency and inadequate performance. Dismissal was upheld on all three grounds.

The teacher had Title I program and learning-disabled children responsibilities. Her performance showed on-going deficiencies in record-keeping, getting reports to parents, updating required plans, etc. She was put on two different plans of assistance but did not meet the goals of those plans of assistance.

The order does not indicate what requirements, if any, were prescribed by the school board or what specific requirements of the school board or the teacher's supervisors she failed to meet. There is, in fact, not any discussion at all in the order of this statutory ground for dismissal and no hint is given as to why the facts of the case were found sufficient to prove this statutory ground.

7. ***Covey v. Umatilla School District No. 6R***, FDA 83-9, **order on reconsideration** (1984), **affirmed without opinion** 76 Or App 402 (1985), **review denied** 300 Or 545 (1986):

The administrator was dismissed for failure to comply with reasonable requirements of the school board to show normal improvement and evidence of professional training and growth, insubordination and inadequate performance. Dismissal was upheld on all three grounds.

The administrator was an elementary school principal and was employed by the district for the four school years immediately prior to his dismissal in June of 1983.

The panel concluded that the charge of failure to comply with reasonable school board requirements was supported only by the evidence that the administrator failed to correct his problem of verbosity. The panel found that the superintendent had notified the principal of the problem and given the principal ample time to correct it, but that the principal had made no effort at all to correct his problem of verbosity.

The panel did not say that dismissal was sustainable on this charge alone but indicated that failure to correct the verbosity problem constituted cause for dismissal that was "additional" to the cause shown under the insubordination and inadequate performance charges.

The order does not indicate what facts are necessary to show this statutory cause and does not attempt to define the cause.

8. ***Fisler v. Hermiston School District No. 8R***, FDA 84-1 (1985):

The teacher was dismissed for failure to comply with reasonable requirements of the school board to show normal improvement and evidence of professional training and

growth, insubordination, neglect of duty and inadequate performance. Dismissal was upheld only on the last three grounds.

The teacher had taught high school chemistry, physics and electronics classes for the district for 13 years before her dismissal in January 1984. She had a pattern of neglecting hall duty and in the fall of 1982 failed to perform hall duty and bus duty on numerous occasions. She also refused to comply with her principal's directives on a number of occasions. In 1980 she signed a goals statement emphasizing her need to improve in the area of outside-the-classroom supervision of students and a position description that required her to abide by district policies, assume responsibility for assigned teaching and non-teaching duties and take all reasonable precautions to protect equipment, materials and facilities. In January of 1983 she was put on a plan of assistance which focused on her need to perform hall duty and bus duty and which also warned her that she was to maintain the security of chemicals, supplies and other equipment within her classroom. She performed satisfactorily for the rest of 1982-1983 school year but in the fall of 1983, in addition to missing parts of her classes on two occasions because of oversleeping or delivering papers, she left her classroom, lab room, chemical storage room and physics equipment room unattended one afternoon, after classes were over, while she conversed for thirty minutes in the school library.

The panel stated that the expectations listed in the plan of assistance, the goal-planning form, or the position description were the type of requirements envisioned by this statutory ground. However, the panel declined to decide whether this statutory ground was proven because it found that cause for dismissal was proven under the other grounds charged against the teacher.

The order does not say just what facts are necessary to show proof of this ground and does not attempt to define this statutory ground.

9. ***Wagenblast v. Crook County School District***, FDA 84-03 (1984), **affirmed** 75 Or App 568 (1985):

The Teacher Standards and Practices Commission declared the teacher's basic teaching certificate invalid for nonpayment of the renewal fee. The school district then terminated her. The teacher appealed her termination contending that the statutory procedures for dismissal were not followed. The school district contended that, at the time of her termination, she was not a "permanent teacher" as defined under the statutes effective at that time. A "permanent teacher" under ORS 342.815 was "any person who holds a teacher's certificate as provided in ORS 342.125 or who is otherwise authorized to teach in the public schools of this state." The panel agreed, concluded it had no jurisdiction and dismissed the appeal.

The teacher appealed to the Court of Appeals, and the court affirmed the panel's decision. It also disagreed with the teacher's assertion that she had the protection of the Fair Dismissal Law because she was dismissed for "any cause which constitutes grounds for the revocation of such permanent teacher's teaching certificate." The court held that failure to pay the required fee for renewal of the teaching certificate was not a "grounds for the revocation" of her certificate and that TSPC did not revoke her certificate. It



simply never renewed it. The Fair Dismissal Law does not apply to a termination because the teacher does not hold a valid teaching certificate.

10. ***Ballman v. Warrenton-Hammond School District No. 30***, FDA 89-4 (1990):

The teacher was dismissed for inefficiency, inadequate performance and failure to comply with such reasonable requirements as the school board may prescribe to show normal improvement and evidence of professional training and growth. Dismissal was upheld for inefficiency and inadequate performance based, essentially, on failure to meet district standards for control of student behavior, on-task time and supervision of students.

In addressing the ground of failure to comply with school board requirements, the panel said that the evidence did not show failure by the teacher to comply with any requirement of the school board for improvement, training, or growth because the statutory ground was limited to requirements of the school board itself, rather than those established by principals or superintendents.

**I. ANY CAUSE WHICH CONSTITUTES GROUNDS FOR REVOCATION OF THE TEACHER'S TEACHING CERTIFICATE:**

**1. *Nance v. Portland School District No. 1*, FDA 73-1 (1973):**

The teacher was dismissed for inadequate performance and “gross unfitness to perform.” The panel upheld dismissal on both grounds.

There is no indication in the order what statutory cause is referenced by the term “gross unfitness to perform,” but the district probably meant to charge a cause constituting grounds for revocation of the teacher’s teaching certificate, specifically, “any gross unfitness” (ORS 342.175).

The facts involved the teacher’s use of street language, asking of personal sexual questions, deficient work performance and the like. The board’s opinion, however, does not define “gross unfitness”; does not indicate what is necessary to show “gross unfitness”; and does not indicate why the facts show “gross unfitness.”

The panel, after discussing some of appellant’s sexual remarks to students and insensitivity to students by such remarks, stated that an invasion of the personal rights of a student “of tender years” is an act displaying gross unfitness to teach. The order indicated that respondent had “established facts establishing appellant’s \* \* \* gross unfitness to be a teacher.”

**2. *Barcroft v. Sweet Home School District*, FDA 76-1 (1977):**

The teacher was dismissed for insubordination, inadequate performance and gross unfitness. Dismissal was upheld for insubordination and inadequate performance. The order says nothing about the charge of gross unfitness.

**3. *Carell v. Glide School District No. 12*, FDA 77-14 (1978), **reversed and remanded** *Glide School District v. Carell, et al.*, 39 Or App 727 (1979):**

The teacher was dismissed for “any cause which constitutes grounds for the revocation of such permanent teacher’s teaching certificate,” inefficiency, insubordination, inadequate performance and failure to comply with reasonable requirements of the school board. The order of the panel set aside the dismissal.

The order does not indicate what facts were charged against the teacher and does not say what “cause for revocation,” if any, was cited by the district. The panel concluded that the charged facts were not true and substantiated and the statutory grounds not proven, on the reasoning that a recommendation by the teacher’s principal for contract renewal in March of 1976 precluded reliance by the district on deficiencies of the teacher known at the time and subsequently discovered facts did not show fault sufficient for dismissal. (The district had not agreed with renewal but was forced, by circuit court order, to renew the teacher’s contract. Dismissal occurred thereafter.)

The order does not attempt to define this statutory cause and does not discuss it in any way. The essence of the order is that a recommendation of renewal precludes later reliance for dismissal, on facts known at the time of the recommendation.

The district appealed to the Oregon Court of Appeals. The court reversed and remanded the case to the Fair Dismissal Appeals Board for findings of fact on the allegations against the teacher and for application of the “proper” standard of review of the dismissal. The court indicated that the district *could* rely on facts against the teacher known at the time of the principal’s recommendation for renewal because the district had disagreed with that recommendation. The court also criticized the board for using its own judgment to decide that the facts were not sufficient for dismissal.

4. ***Ross v. Springfield School District No. 19***, FDA 80-1 (1980), **affirmed**, 56 Or App 197 (1982), **reversed and remanded**, 294 Or 357 (1982), **order on remand** (1983), **affirmed**, 71 Or App 111 (1984), **reversed and remanded**, 300 Or 507 (1986), **order on second remand** (1987); **revised order on second remand** (1988).

The teacher was dismissed for “gross unfitness,” inefficiency and immorality. The order of the panel upheld dismissal on the grounds of immorality and gross unfitness.

The teacher was a librarian in two of the district’s elementary schools in the Springfield area. During off-time in January of 1979 the teacher visited an adult bookstore in the neighboring city of Eugene and engaged in sexual activity with another person on the premises. His activities were observed by undercover police officers; a suit was filed by the district attorney to close down the bookstore; and the teacher’s involvement in the bookstore eventually became known to the school district community. Parents protested his continuation as the librarian in the schools attended by their children. In March of 1979 the superintendent filed a complaint with the Teacher Standards and Practices Commission seeking revocation of his certificate for “gross unfitness,” based on the adult bookstore activity. The commission conducted an investigation and then, without any hearing on the matter, dismissed the complaint, in May of 1979, for “lack of probable cause.” The district served dismissal charges on the teacher later that year.

The panel stated that it had given very little weight to the Teacher Standards and Practices Commission dismissing the complaint for lack of probable cause because it determined whether Ross was qualified to teach anywhere in the State of Oregon, not just within this particular school district. The panel indicated that either the ground of immorality or the ground of gross unfitness would support dismissal.

The teacher appealed to the Oregon Court of Appeals and the court affirmed. The court believed that it was not up to the Fair Dismissal Appeals Board to determine what constitutes gross unfitness but that, instead, the standards for fitness must be established by each school district. The court concluded that the panel’s decision was supported by substantial evidence, that dismissal did not violate constitutional requirements and that dismissal by the district was a permissible action.

The teacher then appealed to the Oregon Supreme Court. The Supreme Court reversed the dismissal on the gross unfitness ground and remanded the case to the board for rationale on the panel's conclusions that the teacher was guilty of immorality.

The court (several justices dissenting) indicated that the rejection of the gross unfitness complaint by the Teacher Standards and Practices Commission precluded the board's determining that the teacher's conduct constituted gross unfitness. It stated that "the Commission is the agency with power to interpret the statutory grounds for revocation." The court stated that if the Commission concluded that the facts did not give probable cause to proceed to a revocation hearing, that conclusion must represent the Commission's interpretation of the statute for which it has responsibility. Therefore, the FDAB misconceived its own responsibility to apply the statutory term to the facts and engaged in a restrictive interpretation of that term than that rendered by the Commission. Therefore, there the Commission has determined a particular set of facts as not constituting grounds for revocation, neither the school board nor FDAB may reach a different interpretation.

On remand, a reconstituted panel issued revised ultimate findings of fact and conclusions of law upholding dismissal on the ground of immorality. The panel noted that the Supreme Court had "indicated that because the Teacher Standards and Practices Commission determined that the facts \* \* \* [failed to] show grounds for revocation of teaching certificate for gross unfitness, the Fair Dismissal Appeals Board could not conclude otherwise \* \* \*."

The teacher appealed again to the Court of Appeals and the court again affirmed.

The teacher appealed again to the Supreme Court. The Supreme Court reversed and sent the case back again to the Fair Dismissal Appeals Board because of the panel's improper means of defining "immorality."

On the second remand, the panel repeated the ruling on "gross unfitness" that was stated by the prior panel in the Order on Remand.

5. ***Shipley v. Salem School District No. 24J***, FDA 81-24 (1982), **reversed and remanded**, ***Shipley v. Salem School District No. 24J***, 64 Or App 777 (1983), ***Order on Remand*** (1984):

The teacher was dismissed for gross unfitness and immorality. The panel set aside the dismissal because it deemed the statement of facts insufficient to give the teacher notice of what was charged against him and insufficient to show a connection between the conduct charged and the teacher's responsibilities as a teacher.

The district appealed to the Oregon Court of Appeals. The court reversed the order of FDAB and remanded the case to FDAB for further proceedings. The district's statement of charges against the teacher relied on a jury determination, in a civil suit, that the teacher had assaulted and battered a 12-year-old boy by touching or rubbing the boy's clothing and body, including the genital area. The court agreed that gross unfitness or immorality charges had to show a negative impact on the ability of the teacher to

discharge his duties. The court also agreed that the district's statement of facts should show the connection between the conduct charged against the teacher and the teacher's teaching responsibilities. The court indicated that the facts charged in the notice of recommendation of dismissal sufficiently charged both the conduct at issue and connection with the teacher's teaching responsibilities and, therefore, that FDAB erred in determining the notice to be sufficient.

In the hearing, after remand, on the merits, FDAB again set aside dismissal. The facts of the case showed that the 12-year-old boy brought a civil action against the teacher based on multiple allegations of primarily sexual touching; that the jury found to be true; that the district suspended and then terminated the teacher on the basis of the jury's verdict; and that no judgment was entered in the case because the case was settled. The teacher was active in a Big Brother program and took the boy on a number of outings. The two engaged in wrestling and tickling on a number of occasions. The boy claimed that sexual touching occurred on several occasions.

The panel listened to the testimony of both the boy and the teacher and based its findings on that testimony. It found that the tickling and wrestling that occurred was not sexual in nature that no sexual touching occurred and, therefore, that the facts upon which the district relied were not true and substantiated.

The order does not discuss or attempt to define the statutory cause (cause which constitutes grounds for revocation of the teacher's certificate) or the term "gross unfitness."

6. ***Thomas v. Cascade Union High School District No. 5*, FDA 84-7 (1985), reversed and remanded, *Thomas v. Cascade Union High School District No. 5*, 80 Or App 736 (1986), order on remand (1987) (remanding to district), order on appeal after remand (198 ), affirmed, *Thomas v. Cascade Union High School District No. 5*, 98 Or App 679 (1989), disavowed by *Bergerson v. Salem-Keizer School District*, 194 Or App 301 (2004):**

The teacher was dismissed for cause constituting grounds for revocation of the teacher's teaching certificate, inefficiency, neglect of duty and inadequate performance. Dismissal was upheld for neglect of duty.

The teacher was a girl's physical education teacher, with six years experience for the district and six years experience before that in another district, prior to her dismissal in June of 1984. She had good rapport with her students, had a record of acting professionally and with self-control and was fair in dealing with students. However, during a dodge-ball game on April 18, 1984, when one of the girls intentionally hit her in the back with the ball, she reacted in anger by grabbing the girl and kicking her twice in the back of the leg. After the incident, in the locker room, some of the girls voiced protests of the kicking to the teacher, and the teacher answered with statements indicating that the girl was also at fault in the matter. This kicking incident was the only incident of loss of control by the teacher in her 12 years of teaching.

The district based the dismissal on essentially two factual charges, namely, (1) that she kicked the girl during the dodge-ball game and (2) that she engaged in a shouting match in the locker room with some of the girls after the game. The panel found the second charge not proven and upheld dismissal on the kicking incident alone.

The panel stated that it interpreted the term “gross” and the more severe penalty allowed as requiring a more aggravated case of neglect than is necessary to show cause for dismissal for neglect of duty.

The Oregon Court of Appeals remanded the case to the Fair Dismissal Appeals Board for remand to the district because a number of factual charges were not substantiated. In its *Order on Appeal after Remand* (1987) the panel upheld dismissal for neglect of duty.

The Oregon Court of Appeals affirmed the panel’s order upholding dismissal for neglect of duty.

## J. PROCEDURAL MATTERS

### (a) FDAB Jurisdiction – Status of teachers and administrators

1. ***Wesockes v. Powers School District No. 31***, FDA 81-17 (1981), **affirmed** 57 Or App 652 (1982).

The teacher appealed his dismissal and the district moved to dismiss the appeal on the grounds that the teacher had not attained “permanent teacher” status and therefore FDAB lacked jurisdiction to hear the appeal. The panel granted the motion to dismiss.

The teacher appealed to the Court of Appeals. The court held that the teacher was still a “probationary teacher” at the time of his dismissal, albeit near the end of that period and after his contract for the fourth year had been renewed, and therefore FDAB did not have jurisdiction.

NOTE: this case discusses terms under the pre-1997 statutes. See, ***Smith v. Salem-Keizer School District***, 188 Or App 237 (2003), for more discussion of this issue.

2. ***Arnold v. Cascade School District No. 5***, FDAB 99-3 (2000):

Appellant was a probationary teacher who resigned mid-year, but continued to teach until the conclusion of the school year. Thus, as a factual matter her teaching for that school year was uninterrupted. The school district treated her as a temporary teacher under the statute. However, the statute, while containing a definition of temporary teacher in ORS 342.815(10), did not make that an exclusive category. In this case the Appellant met the statutory definition of probationary teacher found in ORS 342.815(6) based upon the actual uninterrupted teaching for the full year. Thus, under the statute, a teacher can be a temporary but still be accruing time so as to meet the definition of a probationary teacher.

However, the Panel dismissed the appeal because probationary teachers have a remedy in circuit court under ORS 342.835(3). Accordingly, there was no jurisdiction for the Panel on the underlying merits.

3. ***Smith (Robert) v. Salem-Keizer School District***, FDA 01-03 (2002), **reversed and remanded**, 188 Or App 237 (2003), **rev denied** 366 Or 60 (2003), **order on remand** (2004):

This opinion addressed an issue of first impression for the Board because it had to “interpret” the language of the statute to determine the legislature’s intent for when a teacher passes from probationary to contract status. The latter is subject to FDAB jurisdiction. Factually the school district renewed the teacher in March of his third year and then dismissed him as a “probationary” teacher near the end of the same school year. The panel majority found that the teacher remained in probationary status during the entire third year. A dissenting opinion found that under ORS 342.840 the teacher, after 135 days of the third year, passed from probationary to contract status by operation of law. The dissent relied on an Opinion from the Federal District Court of Oregon discussing this issue under an earlier version of the FDAB statute.

Smith appealed and on June 12, 2003, the Court of Appeals reversed Smith's dismissal and remanded to FDAB for further proceedings. The Court held that Smith was a contract teacher under FDAB's jurisdiction and entitled to a contested case hearing. The District appealed the reversal to the Supreme Court on July 17, 2003. The Supreme Court denied review on October 6, 2003.

At the hearing on remand, the parties put on evidence that the District had given Appellant a second notice of intent to recommend his dismissal as a contract teacher but had not concluded the process. The panel found that the first notice of intent to dismiss as a probationary teacher did not meet the statutory requirements for dismissal of a contract teacher, and that the second notice complied with the statutory requirements, but the school district had not made a decision to dismiss Appellant. For this reason, there was no dismissal decision to review and the matter was remanded to the District for further proceedings.

The parties thereafter settled the case.

4. ***Beeson v. Warrenton-Hammond School District***, FDA 01-04 (2002), **vacated and remanded** 189 Or App 576 (2003), **on reconsideration** (2004) (adhering to prior decision as modified):

The district filed a motion to dismiss on the grounds that the teacher was still a probationary teacher. This case required the Panel to also interpret the statute as a question of first impression. The district did not consider the time that the teacher was on approved leave status to meet the statutory requirement that a teacher be "employed" for three successive years before passing from probationary to contract status. The panel concluded that "employed" was intended to include the time when a staff member was on leave status. The reasoning was that this term did not mean the same thing as "actual teaching", but essentially meant the relationship of employment between the teacher and the District, which continued throughout the period of leave.

The panel denied the motion and ordered a hearing to be scheduled. After the hearing, in its final order, the panel found that the facts were not "true and substantiated" so that the question of whether the conduct would amount to the statutory grounds of neglect of duty or inadequate performance was a moot issue. Appellant was ordered reinstated.

The district appealed FDAB's denial of its motion to stay reinstatement of Ms. Beeson. On January 8, 2003, the Court of Appeals affirmed FDAB's denial of the motion to stay.

The district appealed on the main contention that the teacher was still in "probationary" status at the time of the district's decision and therefore the panel should have granted the motion to dismiss. On October 1, 2003, the Court of Appeals vacated and remanded FDAB's decision for reconsideration its decision with regard to Appellant's alternative argument in opposition to the motion to dismiss in light of ***Smith v. Salem-Keizer School District***.



On December 29, 2003, on reconsideration, the Panel adhered to its final order and modified its order on the district's motion to dismiss to vacate the unnecessary discussion of Appellant's alternative argument.

5. ***Nuffer v. Mollala River School District*** FDA 01-02, **affirmed** 187 Or App 259 (2003):

Appellant was the administrator for the District's Charter School and she challenged the jurisdiction of FDAB to hear the case on this basis. The contention was rejected by the Panel decision. The Oregon Court of Appeals affirmed FDAB's decision.

#### **(b) FDAB Jurisdiction – Timeliness of appeal**

1. ***McIntyre v. Umatilla Educational Service District***, FDA 82-12 (1982):

The appellant's employment as a diagnostic and prescriptive program specialist was terminated on or about June 6, 1981. She claimed the district did not comply with the statutory procedures for dismissal. However, on June 4, 1982, she filed an action in federal court contending she had been unlawfully dismissed by the district. On December 1, 1982, she appealed her dismissal to FDAB. The district moved to dismiss the appeal on the ground that the appeal was untimely. FDAB granted the motion to dismiss because the filing of the federal lawsuit showed the appellant had notice of her dismissal and, once she had such notice, she had ten days to appeal to FDAB.

2. ***Washington v. Portland School District No. 1***, FDA 85-04 (1985):

The appellant received notice by phone that he was being reassigned and that the reassignment would be a demotion. He received written notice of the demotion a reasonable time after the telephone call. FDAB held that a permanent teacher who is given all the notice and procedural protections required by the statutes is entitled to wait for the written notice of the school board's decision before the appeal time begins to run.

3. ***Post v. Salem-Keizer School District***, FDA 96-3 (1997); **affirmed** 162 Or App 15 (1999); **reversed and remanded** 334 Or 61 (2002).

A permanent part-time teacher who is given a temporary full-time contract and who is subsequently involuntarily reduced to part-time status must appeal within 10 days of that action to FDAB in order for FDAB to determine whether it has jurisdiction to consider the matter as a dismissal. The appellant has the burden of proving an appeal is timely filed when the matter is disputed.

FDAB has not determined whether reducing a temporary full-time teacher to a permanent part-time assignment is a dismissal for purposes of FDAB review. FDAB has not determined whether it has authority to review district actions arising under ORS 342.845.

The Court of Appeals affirmed FDAB's order, holding that a permanent part-time teacher who accepted a temporary full-time teaching assignment that was not renewed had a right

to appeal and that the 10 day appeal period ran from receipt of written notice of dismissal, notwithstanding the school districts failure to follow statutory notice procedures.

The Supreme Court reversed and remanded the case to FDAB for further proceedings, concluding that the 10 day limit for appeals is triggered only by formal notice of the school board's decision. The school board's authority to dismiss a permanent teacher was subject to compliance with the statutory dismissal procedures, including the requirements for notification of dismissal set out in ORS 342.895(2) and (3) (1995). When a teacher is not provided with proper statutory notice, the school board could not act to dismiss the teacher and therefore the 10 day limitation period for appeals would not begin to run.

4. ***Wassom v. Harrisburg School District***, FDA 00-02 (2001):

The teacher received a contract during the summer for the upcoming school year and objected to the fact she was listed as less than full-time. The District moved to dismiss on the basis that the appeal was not within 10 days of receipt of the contract document. The panel decision "deferred" ruling on this issue and scheduled the matter for an evidentiary hearing to fully address the facts and law on whether receipt of a contract document triggers the 10 day appeal period. Appellant withdrew her appeal when a separate arbitration decision effectively reinstated her after the interim Order.

5. ***Folkers v. Lincoln County School District***, FDA 01-09 **interim order** (2002), **final order** (2003):

This school district changed the salary of Appellant administrator for the school year by sending him a contract in December of the school year with the new salary. Appellant filed with FDAB and the District challenged the appeal as untimely. The Panel denied the motion to dismiss with leave to renew later in the proceeding. In part the Panel Order found that the FDAB case of ***Post v. Salem-Keizer***, 334 Or 61 (2002), provided potential controlling authority on the process of determining what school district actions are subject to review by FDAB. Significantly the ***Post*** decision states that a District must comply with the *specific* statutory procedures to notify a teacher or administrator of an action in order to rely on the timelines in the FDAB statute as a ground to dismiss an appeal.

The district renewed its motion to dismiss and the parties submitted supplemental stipulated facts for the panel's consideration. The panel concluded that the appeal was timely filed because the administrator had filed his appeal within 15 days of notice of the alleged pay reduction. However, the panel concluded that a change in working conditions, in this case an increase in the number of work days each year, is not a reduction in pay. Therefore, the panel concluded that FDAB lacked jurisdiction over the appeal and granted the motion to dismiss.

The administrator filed an appeal with the Court of Appeals in January 2004.

(c) **FDAB Jurisdiction – Pay reductions**

1. ***Neuschwander et al v. Beaverton School District No. 48***, FDA 76-03 (1976):

The appellants in this case were given notice that the length of their work year was to be changed from a 12-month year to one of 192 days plus a 15-day extension, or a 9 ½ month year. At the time, ORS 342.845(1) required consent of the teacher to dismiss or employ on a part-time basis. The panel held that reducing from a 12 month schedule to one of 192 days plus a 15-day extension was not employment on a part-time basis and therefore FDAB lacked jurisdiction to hear the matter.

2. ***Folkers v. Lincoln County School District***, FDA 01-09 **interim order** (2002), **final order** (2003):

This school district changed the salary of Appellant administrator for the school year by sending him a contract in December of the school year with the new salary. Appellant filed with FDAB and the District challenged the appeal as untimely. The Panel denied the motion to dismiss with leave to renew later in the proceeding. In part the Panel Order found that the FDAB case of ***Post v. Salem-Keizer***, 334 Or 61 (2002), provided potential controlling authority on the process of determining what school district actions are subject to review by FDAB. Significantly the ***Post*** decision states that a District must comply with the *specific* statutory procedures to notify a teacher or administrator of an action in order to rely on the timelines in the FDAB statute as a ground to dismiss an appeal.

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The administrator filed an appeal with the Court of Appeals in January 2004.

3. ***McNair v. Springfield School District***, FDA 01-6 (2003):

The school district eliminated the Appellant's position as a Director of Curriculum and Institutional Support Services, and reassigned her to a position as Principal of Gateways Learning Center. The district "red circled" her current salary. Directors holding her prior position were given a 1.5% increase. Appellant, in her current position, did not receive the salary increase. She appealed the district's transfer and the loss of pay increase. The district did not contend that the position elimination, subsequent reassignment and salary issue were disciplinary or treated as a reduction in force. The board has jurisdiction in deciding whether appellant's reassignment was a pay reduction per ORS 342.845(5)(a). The board found that the district did not reduce appellant's pay and, therefore, does not

have the jurisdiction under ORS 342.845(5)(a). The panel granted the district's motion to dismiss.

In reaching its decision, the panel considered and distinguished *Anderson v. Greater Albany Public School District*, FDA 93-3 (1994) as being decided under an earlier version of the statute that had been significantly amended in 1993. That earlier version required consent for transfers to "lower paying positions." The current statute does not require consent for such a transfer and now refers to "reduction in pay".

**(d) FDAB Jurisdiction – Layoffs and resignations**

1. ***Pierce v. Douglas School District No. 4*, FDA 80-08 (1981), reversed and remanded, 60 Or App 285 (1982), reversed Court of Appeals decision and reinstated FDAB decision, 297 Or 363 (1984).**

The teacher claims she was improperly dismissed from her employment with the district. She had submitted a resignation letter, the district found a replacement for her, and then she attempted to retract her resignation. FDAB found that she had resigned and therefore had not been dismissed. The Court of Appeals reversed and remanded, holding that the written resignation letter was ineffective, so that the district's actions constituted a "de facto dismissal" giving FDAB jurisdiction to hear the appeal. The Supreme Court reversed the Court of Appeals' decision, concluding that the teacher had not been dismissed and therefore FDAB did not have jurisdiction.

2. ***Babitzke v. Silverton Union High School No. 7J*, 83-01 (1983), affirmed on order on motion to dismiss and final order, 72 Or App 153 (1985):**

Appellant was a teacher employed by the district to teach classes and to coach girls' softball and gymnastics. She resigned as the girls' gymnastics coach and the school board accepted the resignation as a resignation from her employment. Appellant viewed this action as a dismissal and appealed to FDAB. The district filed a motion to dismiss the appeal, contending that FDAB lacked jurisdiction to review a resignation.

The panel interpreted the statutory term "dismisses" as follows:

"Obviously, the Fair Dismissal Appeals Board has no jurisdiction if there has been no dismissal. The record shows, however that [the district] notified appellant of termination of her employment and that appellant never consented to such termination. [The district] says this termination action was not a dismissal but was merely an acceptance of appellant's resignation from her employment. The panel concludes that the burden is on [the district], if it chooses to rely on resignation, to prove that appellant in fact resigned from her employment. The evidence shows to the contrary.

"The critical ingredient of a resignation is the intent of the employee to terminate the employment relationship. Appellant's intent, however, was to continue her employment but not to coach gymnastics."

The panel further explained that “voluntary relinquishment of employment is best analyzed as occurring in essentially three ways, namely by mutual rescission of the contract, by resignation, or by abandonment. In all three situations intent of the employee to relinquish employment is essential, although in abandonment, the intent is often presumed.”

The panel denied the motion to dismiss and a hearing on the merits was held before the FDAB panel. On the merits, the panel set aside the dismissal because it was without the appellant’s consent and was taken without compliance with the statutorily required procedures for dismissal. The panel said that any “consent” to dismissal, in order to excuse compliance with the statutory procedures, must be shown by clear evidence in the record. In this case the record did not show clear evidence of consent to dismissal.

The district appealed to the Court of Appeals. The court of appeals affirmed FDAB’s orders on the motion to dismiss and on the merits. The court decided that FDAB’s interpretation of the term “dismissed” was correct because it “coincides with the legislative policy which inheres in the meaning of the statute.”

3. ***Pedee v. Multnomah Education Service District***, FDA 84-06 (1984):

Appellant was an administrator placed on lay-off status after loss of federal funding for his position. The panel held that a reduction in force is not a dismissal and that it did not have jurisdiction to hear the appeal.

4. ***Mulvaney v. Union School District No. 5***, FDA 95-5 (1997):

The district moved to dismiss the appeal asserting that FDAB lacks jurisdiction over appeals of layoffs. A terminated teacher or administrator may appeal an asserted reduction in force (RIF) to FDAB only if the action was a pretext for a dismissal under ORS 342.905. A RIF alleged to be pretextual will be found to be a dismissal subject to FDAB review only when the district action was taken solely for the purpose of terminating the applicant rather than the position and the district had no basis to RIF the appellant.

In order to resolve the question of whether a termination labeled as an RIF is pretextual, the panel will need to determine whether the decision can be made on the basis of prehearing motions with supporting documents and affidavits. If the appellant has made a prima facie showing of pretext and if significant differences in assertions between the appellant and respondent remain even after the submission of materials in support of and in opposition to the motions, FDAB must undertake an evidentiary hearing.

FDAB concluded that appellant had not proved the district acted in bad faith in making the layoff decision and dismissed the appeal.

5. ***Deines v. Salem-Keizer School District***, FDA 03-03 (2004):

The teacher was arrested, pled no contest to the crime of harassment, and entered into an order of probation that required him to resign his teaching position and to have no contact with minors. The school district directed him to report for duty and he did not report to work. The district deemed this an abandonment of employment. The teacher appealed and the district moved to dismiss the appeal on the ground that appellant had not been dismissed, but had abandoned his job when he could not return to work without violating his probation order. The panel found that district had not established that appellant abandoned his employment because the panel could not conclude that appellant's decision not to return to work was voluntary and, therefore, denied the motion, with leave to renew later in the proceeding.

**(e) Evidentiary Issues**

1. ***Webster v. Columbia Education School District***, FDA 96-1 (1998), **affirmed without opinion** 163 Or App 416 (1999) **and** ***Poole v. Lebanon Community School District***, FDA 98-2 (1998):

In both *Webster* and *Poole*, the underlying conduct resulted in criminal charges and each individual was found not guilty after a trial. Because the burden of proof in a criminal case is higher (beyond a reasonable doubt) the outcome of the criminal case does not control the administrative proceeding (preponderance of the evidence standard). Counsel for both sides accepted the distinction and have not asked the board through its panels to rule otherwise.

2. ***Bellairs v. Beaverton School District***, FDA 04-01 (2004):

The teacher was dismissed on the grounds of insubordination and neglect of duty. At the beginning of the hearing, he moved the panel to strike all allegations in the school district's notice of dismissal relating to prior misconduct. The panel ruled that the allegations of prior misconduct were evidence showing a pattern of behavior by the appellant and not the basis for new discipline. As such, the district was permitted to consider the appellant's past record in determining whether his recent conduct justified dismissal.

The panel sustained the dismissal on both grounds, finding that the teacher's decision to continue negative and unprofessional communications and his failure to turn in grades on time, when considered with his past conduct, showed a continuing pattern of neglect of duty and of insubordination. The panel found that the school district's decision was not arbitrary, unreasonable or clearly excessive simply because the final act leading to dismissal would not have been sufficient in and of itself to support termination.

**(f) Miscellaneous Issues**

1. ***School District No. 48, Washington County, et al. v. Fair Dismissal Appeals Board, et al.***, 14 Or App 35 (1973):

The district filed a writ of review petition in Marion County Circuit Court seeking review of FDAB's order. FDAB moved to quash, contending that the exclusive means of judicial review was by direct appeal to the Oregon Court of Appeals under the Administrative Procedures Act. The motion was granted and the writ was quashed. The district appealed to the Court of Appeals. The Court of Appeals affirmed the decision of the circuit court.

2. ***Juenemann v. Richards, et al.***, 14 Or App 231 (1973):

The teacher filed a writ of review in the circuit court. The circuit court granted a motion to quash the writ and, as in ***School District No. 48***, 14 Or App 35, the Court of Appeals affirmed the circuit court's decision.

3. ***Campbell v. Newberg School District***, FDA 83-03 (1983):

The teacher appealed his dismissal and filed a motion to have the dismissal set aside or to have the dismissal recommendation letter made more definite and certain. The panel found that the teacher actually received the notice of dismissal that was placed in his school mailbox and therefore this defect in delivery did not invalidate the notice. The panel also found that a reference to facts stated in another document was sufficient to constitute a "plain and concise statement of the facts relied on" as required by ORS 342.895(2).

4. ***Ridle v. Woodburn School District***, FDA 01-10 (2002), **affirmed without opinion** 190 Or App 397 (2003), **review denied** 336 Or 534 (2004):

Appellant had an attorney assigned by OEA to work with her during the District's decision making process. Subsequently Appellant fired the attorney and later appealed to FDAB as "pro se". Her appeal was rejected as untimely after an evidentiary hearing. During the hearing the Panel addressed and approved Appellant's request to call the Executive Secretary and administrative assistant for FDAB as witnesses because she had interacted with them during the course of representing herself after the dismissal decision had been made by the District. There was no evidence that Appellant was misled by any party as she personally processed her case.

5. ***Zottola v. Three River School District***, FDA 01-05 (2002), **affirmed without opinion** 188 Or App 489 (2003), **order on motion to determine back pay** (2003), **order on remand on motion to determine back pay** (2004):

This case presented three procedural issues of note related to double jeopardy, subpoenas and back pay.

In this case the Appellant had initially been disciplined by the school board by being placed on unpaid status for the remainder of the school year. Subsequently the school board was presented with additional information and dismissed the teacher during the summer. The dismissal decision cited to the same grounds used for the earlier discipline

along with the new facts. The panel majority ruled that because the earlier action had never been rescinded the District could not rely on the same facts for a second discipline without violating the concept of “double jeopardy”.

The Panel issued subpoenas for Appellant seeking records of the incarcerated youth from OYA. The teacher wanted to challenge the youth’s credibility by use of the records. OYA filed a Motion to Quash the subpoena and the Circuit Court in Josephine County granted the Motion. The teacher did not appeal the trial court Order. FDAB may be faced with this issue in the future because of the manner in which OYA contracts for educational services with school districts geographically close to youth facilities. This case is on appeal but the question relating to the records will *not* be raised because the proceeding involving the subpoena was a circuit court proceeding subject to separate appeal procedures.

The Oregon Court of Appeals affirmed the panel’s decision without opinion on June 26, 2003. The District had already reinstated the teacher. It asked FDAB to make a determination regarding the amount of back pay it should give the teacher and FDAB ordered the back pay offset by the unemployment benefits received by the teacher. The teacher appealed this decision to the Court of Appeals, and the parties then realized the evidence they had presented to FDAB was incomplete and erroneous. They moved the Court to remand the matter to FDAB for further proceedings and the Court granted the motion. On remand, the panel adhered to its original decision as explained in the order on remand.

6. ***Osborn v. Lane County School District 4J***, FDA 99-09:

This case is an example of the parties using the statutory right to “opt out” from FDAB consideration and using an arbitrator to decide the case.

7. ***Bergerson v. Salem-Keizer School District***, FDA 02-2 (2002), **reversed and remanded** by 194 Or App 301 (2004):

The Court of Appeals overruled its earlier decision in ***Thomas v. Cascade Union High School District No. 5***, 98 Or App 679 (1989), which appeared to require FDAB to remand a case to the school board whenever some of the facts relied on by the school board are found to be untrue or unsubstantiated. The Court said that the statute does not allow FDAB to remand a case to the school board. Rather, “where FDAB finds that at least some of the facts relied on by a school board are true and substantiated and those facts support at least one of the cited statutory grounds for dismissal, the agency must affirm the board’s decision unless it finds that the decision was unreasonable, arbitrary, or clearly an excessive remedy.”

8. **NOTE:** Separate panels denied motions for stay in ***Zottola, supra, Beeson, supra*** and ***Bergerson, supra***. Generally the panels found that the statutory basis for granting a stay



was difficult for a school district to meet once the decision to dismiss had been reversed by an FDAB panel. Each of these decisions was made in separate Orders that followed the panel decision on the merits.

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