

2005-2006 SUPPLEMENT
TO
COMPILATION OF FAIR DISMISSAL APPEALS BOARD CASES

Cases Interpreting Causes for Dismissal
Under ORS 342.865
And
Selected Procedural Matters

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A. INEFFICIENCY

Ferguson v. Dayton School District #8, FDA 04-06 (2004)

1. The teacher was dismissed on the grounds of inefficiency and inadequate performance. Two of the panel members sustained the dismissal and one panel member sustained the appeal in his dissenting opinion.

The majority of the panel found that over the course of her tenure as a Special Education Teacher with the district, from 1998 to 2004, the district met with the teacher numerous times to discuss her deficiencies, review her special education files and performed many classroom visits to monitor the teacher's progress to improve, if any. Time after time the district found deficiencies serious enough to maintain a Plan of Assistance as a guideline to assist in the improvement of the teacher's method of providing instruction and maintenance of her special education files. None of these tools were successful in bringing the teacher's performance level up to a level of the district's expectation as well as within the parameters of the state and federal rules and regulations associated with her specialized area of education.

The district's decision to terminate the teacher for performance that was inefficient and inadequate was based on the fact that "[t]he teacher was unable or unwilling to meet the reasonable performance standards mandated by the District." In light of this rationale, the district was acting in a rational matter when it made its decision.

NOTE: The Court of Appeals affirmed FDAB's order without issuing an opinion on June 7, 2006. No Petition for Review was filed with the Supreme Court.

B. IMMORALITY

1. ***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.

NOTE: The Oregon Court of Appeals issued a decision on October 12, 2005, on its review of the FDAB Order regarding her claim of wrongful discharge and amount of back pay to be offset by unemployment benefits. The Court affirmed FDAB's decision. A copy of this opinion is attached. The Supreme Court granted review of this case and oral arguments were heard on September 12, 2006. The case is currently under advisement.

2. ***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.”

NOTE: The Oregon Supreme Court decided this case on September 28, 2006. The Supreme Court upheld the Court of Appeals’ decision. As soon as the Court of Appeals’ judgment is issued, the case will be back before the Board. The court’s opinion sets forth some broad principles concerning how FDAB is to adjudicate cases generally and also specifies what FDAB will need to do in its analysis on reconsideration. A copy of this case is provided in your notebook.

3. ***Waisanen v. Clatskanie School District #6J*, FDA-05-02 (2006)**

A long-term teacher was dismissed on the grounds of immorality and neglect of duty after an investigation concluded that he had engaged in sexual activity with a student in or around 1979. The former student had not come forward until she had heard rumors regarding alleged sexual harassment involving the teacher, in his capacity as a coach, and female softball players. When the allegations surfaced the former student contacted the school district, but was not willing to go public with her allegations. A few months later the school district contacted her and asked her to go public with her allegations. The former student agreed to do so. The District conducted an investigation and dismissed the teacher based on its findings.

The hearing was conducted and five day’s worth of testimony was taken. Legal arguments and discussions were held on the admissibility of polygraph evidence. The

teacher's attorney raised and their expert testified to the issue of "false memories" and their possible influence on polygraph test results. The District's expert convincingly testified that the former student's memory of the sexual occurrences, with the teacher as well as the former student's own testimony, convinced the majority panel the sexual activities took place, the former student did not suffer from false memories and her polygraph test results were accurate.

After careful consideration, a majority panel ordered, based upon a preponderance of the evidence, the allegations were substantiated and the teacher's dismissal for immorality and neglect of duty was upheld.

NOTE: This case was appealed to the Court of Appeals on October 2, 2006.

C. INSUBORDINATION

1. ***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.

NOTE: The Oregon Court of Appeals issued a decision on October 12, 2005, on its review of the FDAB Order regarding her claim of wrongful discharge and amount of back pay to be offset by unemployment benefits. The Court affirmed FDAB's decision. A copy of this opinion is attached. The Supreme Court granted review of this case and oral arguments were heard on September 12, 2006. The case is currently under advisement.

2. ***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.

NOTE: On May 31, 2006, the Court of Appeals affirmed FDAB's final order. A copy of the court's decision is included in your notebook. No Petition for Review was filed with the Supreme Court.

D. NEGLECT OF DUTY

1. ***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.

NOTE: The Oregon Court of Appeals issued a decision on October 12, 2005, on its review of the FDAB Order regarding her claim of wrongful discharge and amount of back pay to be offset by unemployment benefits. The Court affirmed FDAB's decision. A copy of this opinion is attached. The Supreme Court granted review of this case and oral arguments were heard on September 12, 2006. The case is currently under advisement.

2. ***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.”

NOTE: The Oregon Supreme Court decided this case on September 28, 2006. The Supreme Court upheld the Court of Appeals’ decision. As soon as the Court of Appeals’ judgment is issued, the case will be back before the Board. The court’s opinion sets forth some broad principles concerning how FDAB is to adjudicate cases generally and also specifies what FDAB will need to do in its analysis on reconsideration. A copy of this case is provided in your notebook.

3. ***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.

NOTE: On May 31, 2006, the Court of Appeals affirmed FDAB’s final order. A copy of the court’s decision is included in your notebook. No Petition for Review was filed with the Supreme Court.

4. ***Waisanen v. Clatskanie School District #6J***, FDA-05-02 (2006)

A long-term teacher was dismissed on the grounds of immorality and neglect of duty after an investigation concluded that he had engaged in sexual activity with a student in or around 1979. The former student had not come forward until she had heard rumors regarding alleged sexual harassment involving the teacher, in his capacity as a coach, and female softball players. When the allegations surfaced the former student contacted the school district, but was not willing to go public with her allegations. A few months later the school district contacted her and asked her to go public with her allegations. The former student agreed to do so. The District conducted an investigation and dismissed the teacher based on its findings.

The hearing was conducted and five day's worth of testimony was taken. Legal arguments and discussions were held on the admissibility of polygraph evidence. The teacher's attorney raised and their expert testified to the issue of "false memories" and their possible influence on polygraph test results. The District's expert convincingly testified that the former student's memory of the sexual occurrences, with the teacher as well as the former student's own testimony, convinced the majority panel the sexual activities took place, the former student did not suffer from false memories and her polygraph test results were accurate.

After careful consideration, a majority panel ordered, based upon a preponderance of the evidence, the allegations were substantiated and the teacher's dismissal for immorality and neglect of duty was upheld.

NOTE: This case was appealed to the Court of Appeals on October 2, 2006.

E. PHYSICAL OR MENTAL INCAPACITY

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

G. INADEQUATE PERFORMANCE

1. ***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.

NOTE: The Oregon Court of Appeals issued a decision on October 12, 2005, on its review of the FDAB Order regarding her claim of wrongful discharge and amount of back pay to be offset by unemployment benefits. The Court affirmed FDAB's decision. A copy of this opinion is attached. The Supreme Court granted review of this case and oral arguments were heard on September 12, 2006. The case is currently under advisement.

2. ***Ferguson v. Dayton School District #8*, FDA 04-06 (2004)**

The teacher was dismissed on the grounds of inefficiency and inadequate performance. Two of the panel members sustained the dismissal and one panel member sustained the appeal in his dissenting opinion.

The majority of the panel found that over the course of her tenure as a Special Education Teacher with the district, from 1998 to 2004, the district met with the teacher numerous times to discuss her deficiencies, review her special education files and performed many classroom visits to monitor the teacher's progress to improve, if any. Time after time the district found deficiencies serious enough to maintain a Plan of Assistance as a guideline to assist in the improvement of the teacher's methods of providing instruction and maintenance of her special education files. None of these tools were successful in bringing the teacher's performance level up to a level of the district's expectation as well as within the parameters of the state and federal rules and regulations associated with her specialized area of education.

The district's decision to terminate the teacher for performance that was inefficient and inadequate was based on the fact that "[t]he teacher was unable or unwilling to meet the reasonable performance standards mandated by the District." In light of this rationale, the district was acting in a rational matter when it made its decision.

NOTE: The Court of Appeals affirmed FDAB's order without issuing an opinion on June 7, 2006. No Petition for Review was filed with the Supreme Court.

- H. FAILURE TO COMPLY WITH SUCH REASONABLE REQUIREMENTS AS THE SCHOOL BOARD MAY PRESCRIBE TO SHOW NORMAL IMPROVEMENT AND EVIDENCE OF PROFESSION TRAINING AND GROWTH**
- I. ANY CAUSE WHICH CONSTITUTES GROUNDS FOR REVOCATION OF THE TEACHER'S TEACHING CERTIFICATE**

J. PROCEDURAL MATTERS

(a) Status of Teachers and Administrators

(b) Timeliness of Appeal

1. ***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.

NOTE: On May 10, 2006, the Court of Appeals upheld FDAB's final order. A copy of the court's decision is included in your notebook. No Petition for Review was filed with the Supreme Court.

(c) Pay Reductions

1. ***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.

NOTE: On May 10, 2006, the Court of Appeals upheld FDAB's final order. A copy of the court's decision is included in your notebook. No Petition for Review was filed with the Supreme Court.

(d) Layoffs and Resignations

1. ***Zellner v. Forest Grove Middle School District***, FDA-05-01 (2006)

The sole issue of this hearing was to determine whether or not the administrator (Assistant Principal) resigned his position.

It was the school district's position that the administrator voluntarily resigned by telling the Assistant Superintendent twice of his intention not to return to his position as Assistant Principal. Shortly after his statement, the District stated to the administrator's attorney that the administrator's intention was not to return to his employment with the school district.

The district sent out a letter of non-renewal to the administrator. The letter cited performance concerns and did not contain any statement of his resignation. The next day the District posted a job announcement for the administrator's vacant position.

The administrator's attorney sent the District a letter informing them that the administrator would be returning to his position in May 2005. The District responded that they would not reinstate him based on his intention of not returning to the position.

The Board found that it does not have jurisdiction over this appeal and found that the administrator did resign his position with the school district. The administrator's attorney argued that since his resignation was not in writing (per ORS 342.553), the school district could not rely upon his verbal statement. The Board disagreed with the administrator's attorney's interpretation of the statute stating that the statute does not, in fact, require the resignation to be in writing.

(e) Evidentiary Matters

1. ***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.

NOTE: On May 31, 2006, the Court of Appeals affirmed FDAB's final order. A copy of the court's decision is included in your notebook. No Petition for Review was filed with the Supreme Court.

2. ***Waisanen v. Clatskanie School District***, FDA 05-02 (2006)

A long-term teacher was dismissed on the grounds of immorality and neglect of duty after an investigation concluded that he had engaged in sexual activity with a student on or around 1979. Because the student came forward with these allegations approximately twenty-seven (27) years later, the District hired a polygraph examiner to perform a polygraph exam on the former student. The teacher filed a Motion requesting the Panel exclude evidence and testimony pertaining to the former student's polygraph exam. The Panel admitted the polygraph evidence on the grounds that the Oregon Supreme Court has held that polygraphs are admissible in administrative proceedings.

The teacher also filed a Motion requesting the panel to limit the testimony that was presented to the School Board. The Panel denied the Motion on the basis that there is no statutory requirement to limit the FDAB hearing to the evidence presented before the School Board. ORS 342.905(6) authorizes the Panel, if it finds the facts true and substantiated, to consider additional facts developed at the hearing to determine if the dismissal supports the statutory grounds cited in the teacher's dismissal letter.

The panel sustained the dismissal on both grounds, finding that the teacher's conduct was a neglect of duty and constituted immorality and was not an arbitrary, unreasonable or clearly excessive remedy.

NOTE: This case was appealed to the Court of Appeals on October 2, 2006

(f) Miscellaneous Issues

1. ***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.”

NOTE: The Oregon Supreme Court decided this case on September 28, 2006. The Supreme Court upheld the Court of Appeals’ decision. As soon as the Court of Appeals’ judgment is issued, the case will be back before the Board. The court’s opinion sets forth some broad principles concerning how FDAB is to adjudicate cases generally and also specifies what FDAB will need to do in its analysis on reconsideration. A copy of this case is provided in your notebook.

2. ***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.

NOTE: The Oregon Court of Appeals issued a decision on October 12, 2005, on its review of the FDAB Order regarding her claim of wrongful discharge and amount of back pay to be offset by unemployment benefits. The Court affirmed FDAB's decision. A copy of this opinion is attached. The Supreme Court granted review of this case and oral arguments were heard on September 12, 2006. The case is currently under advisement.