

2008-2009 SUPPLEMENT
TO
COMPILATION OF FAIR DISMISSAL APPEALS BOARD CASES

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

TABLE OF CONTENTS

A.	INEFFICIENCY (no cases cited).....	2
B.	IMMORALITY	2
C.	INSUBORDINATION (no cases cited)	4
D.	NEGLECT OF DUTY	4
E.	PHYSICAL OR MENTAL INCAPACITY (no cases cited)	5
F.	CONVICTION OF FELONY OR CRIME INVOLVING MORAL TURPITUDE (no cases cited)	5
G.	INADEQUATE PERFORMANCE (no cases cited).....	5
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 (no cases cited)	5
I.	ANY CAUSE WHICH CONSITUTES GROUNDS FOR REVOCATION OF THE TEACHER'S TEACHING CERTIFICATE	5
J.	PROCEDURAL MATTERS	
	(a) FDAB Jurisdiction – Status of Teachers & Administrators.....	6
	(b) FDAB Jurisdiction – Timeliness of Appeal (no cases cited).....	8
	(c) FDAB Jurisdiction – Pay Reductions (no cases cited)	9
	(d) FDAB Jurisdiction – Layoffs, Resignations & Retirement	9
	(e) Evidentiary Matters.....	9
	(f) Miscellaneous Issues (no cases cited)	10
K.	REMEDIES	
	(a) Reinstatement (no cases cited).....	10
	(b) Back Pay	10

A. INEFFICIENCY (no cases)

B. IMMORALITY

1. ***Waisanen v. Clatskanie School District #6J***, FDA-05-02 (2006); affirmed 229 Or App 563 (July 15, 2009):

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's convincing testimony as to the probable truth of the former student's memories, together with the panel's own assessment of the former student's credibility during her testimony, convinced the majority panel that (i) the sexual activities took place, (ii) the former student did not suffer from false memories, and (iii) her polygraph test results were accurate.

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

This case was appealed to the Oregon Court of Appeals on October 2, 2006. On July 15, 2009, the Court of Appeals issued its decision affirming the Fair Dismissal Appeals Board order as follows: (1) FDAB properly complied with the procedures under ORS 342.906(6) as the statutes compel FDAB to consider "all the circumstances and additional facts developed at the hearing" and does not limit FDAB to the facts before the school board; (2) under the circumstances of the case, the admission of polygraph examination results was not error; and (3) the findings of fact in FDAB's final order were supported by substantial evidence.

2. ***Thomas McCaffrey v. Salem-Keizer School District***, FDA-07-09 (2009):

A teacher was dismissed on the grounds of immorality and "any cause which constitutes grounds for the revocation of such contract teacher's teaching license" after an investigation showed that he had given his step-daughter a nude massage in 2002. The incident came to the attention of the police in June 2007 and to the attention of the school district in September 2007. The school district provided the teacher with a pre-termination hearing before a hearings officer in November 2007. The hearings officer recommended that the facts in the case supported moving forward with dismissal on the grounds of

insubordination, immorality and for a cause which constitutes revocation of the teaching license. The school board voted to accept the recommendation and dismissed the teacher on the grounds of immorality, gross neglect of duty and violation of the TSPC standards for competent and ethical performance.

A hearing was held before the FDAB panel on January 20-21, 2009. The panel did not consider the ground of insubordination because the teacher had not actually been dismissed on that ground. The panel found that the true and substantiated facts were adequate to support the ground of immorality. The panel also found the true and substantiated facts were adequate to support the ground of “any cause which constitutes grounds for the revocation of such contract teacher’s teaching license,” in particular the causes of gross neglect of duty and gross unfitness. The panel also found that there was no basis on which to conclude that the dismissal was arbitrary, unreasonable or clearly an excessive remedy.

With regard to “immorality,” the panel noted that the FDAB orders in prior cases have developed a number of definitions for immorality. The definition significant to this case was “behavior such as sexual activity that violates the rights or endangers the welfare of a participant other than a consenting adult.” The teacher’s step-daughter was a minor at the time of the sexual contact. The panel noted that sexual contact with minor children is unlawful and endangers the welfare of such children as shown by the criminal statutes and child abuse reporting requirements.

3. ***Peter Porath v. Woodburn School District***, FDA-08-01 (2009):

A teacher was dismissed on the grounds of neglect of duty and immorality after an incident in May 2008 in which he charged out of the classroom and pushed a group of students back, and in which he pushed a student into a wall with sufficient force to cause a dent in the wall. At the time of this incident, he was still on probation from the TSPC for a prior incident in 2005 in which he had bitten a student. The teacher was dismissed in October 2008. After a three-day hearing before the FDAB panel in February 2009, the panel concluded that the facts were true and substantiated and adequate to support the grounds of neglect of duty and immorality. The panel also concluded that there was no basis upon which to conclude that the dismissal was arbitrary, unreasonable or clearly an excessive remedy.

With regard to the ground of immorality, the panel stated that “the statutory ground of immorality refers generally to conduct that is selfish, or in some cases malicious, and that generally shows disregard for the rights or sensitivities of others. Conduct that has been determined to meet the statutory ground of immorality is ‘other directed’ in that it harms the legitimate interest of third party entities or individuals.” In this case, the panel found that the teacher engaged in conduct that ignored obvious risks to students. His conduct focused on his own needs and desires and showed a disregard for the rights and sensitivities of the individuals to whom he caused harm.

This case was appealed to the Court of Appeals on May 22, 2009.

C. INSUBORDINATION (no cases)

D. NEGLECT OF DUTY

1. ***Waisanen v. Clatskanie School District #6J***, FDA-05-02 (2006); affirmed 229 Or App 563 (July 15, 2009):

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's convincing testimony as to the probable truth of the former student's memories, together with the panel's own assessment of the former student's credibility during her testimony, convinced the majority panel that (i) the sexual activities took place, (ii) the former student did not suffer from false memories, and (iii) her polygraph test results were accurate.

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

This case was appealed to the Oregon Court of Appeals on October 2, 2006. On July 15, 2009, the Court of Appeals issued its decision affirming the Fair Dismissal Appeals Board order as follows: (1) FDAB properly complied with the procedures under ORS 342.906(6) as the statutes compel FDAB to consider "all the circumstances and additional facts developed at the hearing" and does not limit FDAB to the facts before the school board; (2) under the circumstances of the case, the admission of polygraph examination results was not error; and (3) the findings of fact in FDAB's final order were supported by substantial evidence.

2. ***Peter Porath v. Woodburn School District***, FDA-08-01 (2009):

A teacher was dismissed on the grounds of neglect of duty and immorality after an incident in May 2008 in which he charged out of the classroom and pushed a group of students back, and in which he pushed a student into a wall with sufficient force to cause a dent in

the wall. At the time of this incident, he was still on probation from the TSPC for a prior incident in 2005 in which he had bitten a student. The teacher was dismissed in October 2008. After a three-day hearing before the FDAB panel in February 2009, the panel concluded that the facts were true and substantiated and adequate to support the grounds of neglect of duty and immorality. The panel also concluded that there was no basis upon which to conclude that the dismissal was arbitrary, unreasonable or clearly an excessive remedy.

With regard to the ground of neglect of duty, the panel concluded that there is no question that a teacher has a duty to refrain from physical abuse of students, and a duty to keep students safe and to refrain from negligent or intentional actions that would result in injury to students. In this case, the teacher's actions were sufficient to demonstrate a neglect of these duties.

This case was appealed to the Court of Appeals on May 22, 2009.

- E. PHYSICAL OR MENTAL INCAPACITY (no cases)**
- F. CONVICTION OF FELONY OR CRIME INVOLVING MORAL TURPITUDE (no cases)**
- G. INADEQUATE PERFORMANCE (no cases)**
- 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 (no cases)**
- I. ANY CAUSE WHICH CONSTITUTES GROUNDS FOR REVOCATION OF THE TEACHER'S TEACHING CERTIFICATE**
 - 1. *Thomas McCaffrey v. Salem-Keizer School District*, FDA-07-09 (2009):

A teacher was dismissed on the grounds of immorality and "any cause which constitutes grounds for the revocation of such contract teacher's teaching license" after an investigation showed that he had given his step-daughter a nude massage in 2002. The incident came to the attention of the police in June 2007 and to the attention of the school district in September 2007. The school district provided the teacher with a pre-termination hearing before a hearings officer in November 2007. The hearings officer recommended that the facts in the case supported moving forward with dismissal on the grounds of insubordination, immorality and for a cause which constitutes revocation of the teaching license. The school board voted to accept the recommendation and dismissed the teacher on the grounds of immorality, gross neglect of duty and violation of the TSPC standards for competent and ethical performance.

A hearing was held before the FDAB panel on January 20-21, 2009. The panel did not consider the ground of insubordination because the teacher had not actually been dismissed on that ground. The panel found that the true and substantiated facts were

adequate to support the ground of immorality. The panel also found the true and substantiated facts were adequate to support the ground of “any cause which constitutes grounds for the revocation of such contract teacher’s teaching license,” in particular the causes of gross neglect of duty and gross unfitness. The panel also found that there was no basis on which to conclude that the dismissal was arbitrary, unreasonable or clearly an excessive remedy.

With regard to the ground of “any cause which constitutes grounds for the revocation of such contract teacher’s teaching license,” the panel noted that the TSPC rules set forth the grounds for discipline of teachers, including revocation of a teaching license. Those grounds include gross neglect of duty and gross unfitness. OAR 584-020-0040(3). The panel found that the teacher’s sexual conduct with his minor step-daughter constituted both gross neglect of duty and gross unfitness to be a teacher.

J. PROCEDURAL MATTERS

(a) Status of Teachers and Administrators

1. ***Edwards v. Riverdale School District***, FDA 06-4 (2007), remanded 220 Or App 509, review allowed 345 Or 417 (2008), dismissed 346 Or 66 (2009):

The school district terminated the employee’s employment and did not comply with the procedures required for the dismissal of a contract teacher. The employee appealed to FDAB, and the district challenged FDAB’s jurisdiction on the grounds that the employee was a first-year probationary administrator and not a contract teacher. Both parties agreed that if FDAB determined that the employee was a contract teacher, the remedy was reinstatement. Following a hearing limited to the jurisdictional issue, FDAB ruled that the employee was a contract teacher and issued an order for reinstatement with back pay.

The panel found that the employee served as a probationary P.E. teacher for two years. At the end of the second school year, he was appointed District Athletic Director, but that position was eliminated in November of the following school year, and the employee was reassigned to his prior position as a P.E. teacher while also assuming duties as Athletic Director. The district offered the employee a two-year teaching contract for the 2005-2006 and 2006-2007 school years, and the employee was assigned to work 0.75 as an Athletic Director and 0.25 as a teacher. The employee’s duties included supervising coaches (who were generally not licensed teachers), making hiring recommendations to the district’s principals, and monitoring the athletic budget.

FDAB used the language of the statute that defines “contract teacher” and “administrator” (ORS 342.815) to analyze the situation. FDAB based its decision that the employee was not an administrator on the fact that, notwithstanding his title, he was not a “director of a department” because he did not do performance evaluations for coaches, he did not have final authority on budgetary or hiring decisions, and the district did not treat him as an administrator.

The district appealed the issue of whether the employee was a contract teacher or a probationary administrator to the Court of Appeals. In an opinion issued June 18, 2008, the Court of Appeals held that FDAB's interpretation of the statute was erroneous. In reaching that conclusion, the Court closely analyzed the language of ORS 342.815(1), which defines the term "administrator" by listing examples of administrative jobs, including "director of a department or the equivalent." The Court held that the term "director" is not limited to an employee who has the highest rank of authority to make decisions, but should instead be viewed "broadly" to embrace "one who administers, regulates or supervises the activities of a department." The Court remanded the case to FDAB for reconsideration.

NOTE: A petition for review of this case was filed with the Oregon Supreme Court on July 24, 2008, and review was granted on November 26, 2008. Thereafter the parties settled the case and it was dismissed on February 27, 2009.

Prior to the Court of Appeals' decision, the district filed a petition for reconsideration of FDAB's opinion and contended that FDAB's award of back pay should be modified. The district asserted that ORS 342.905(5)(b), which requires FDAB to issue a final order within 140 days after the appeal is filed, implied a 140-day cap on back pay awards. FDAB rejected that argument, explaining that the 140-day requirement was intended to allow for due process rather than as a limit on remedies. Ultimately, FDAB adhered to its original ruling on both the jurisdictional and back pay issues.

2. ***Maxwell, et al v. North Wasco County School District #21***, FDA 07-01, FDA 07-02, FDA 07-03, FDA 07-04, FDA 07-05, FDA 07-06 (2007); affirmed without opinion, 224 Or App 477 (2008):

Six retired teachers employed by the district filed appeals with FDAB after the district notified them that they would not be offered teaching contracts for the 2007-08 school year. The teachers' appeals were consolidated for hearing. The teachers, who had contract status before retirement, asserted that that status survived retirement. The district challenged FDAB's jurisdiction, arguing that the teachers were not contract teachers following retirement. In a majority opinion, FDAB ruled that the teachers' retirement severed their employment relationships with the district and ended their status as contract teachers.

FDAB examined the objective indicators of the teachers' intent with respect to their employment, holding that the teachers' subjective intent to retain their contract status was irrelevant. FDAB reasoned that in electing to retire from PERS and seek reemployment, a teacher undergoes a two-step process: first, retirement is a separation of employment, and second, re-hiring begins a new period of employment. Accordingly, like any intentional resignation, retirement severed the employment relationship and eliminated the teachers' contract status. Further, FDAB reasoned that its analysis was consistent with the discretion provided to public employers in deciding whether to reemploy retired individuals under ORS 238-082(1). Based on those factors, FDAB dismissed the teachers' appeals.

There was a dissenting opinion that viewed the PERS retirement process as separate from the employment relationship between the district and the teachers. The dissent viewed the teachers as contract teachers because they did not miss any work and were employed under contract both before and after retirement.

This case was appealed to the Oregon Court of Appeals on September 13, 2007. On December 3, 2008, the Court of Appeals affirmed the FDAB order without issuing a written opinion.

3. **Finholt v. Salem-Keizer School District, FDA 07-08 and FDA 07-10 (2008):**

Employee was a contract teacher who was placed on medical leave from her music teacher position for the 2006-2007 and 2007-2008 school years due to an accepted worker's compensation injury that affected her vocal chords. While she was on leave, as part of the worker's compensation program, the district offered her a classified non-teaching position as an instructional assistant. The non-teaching position fit her medical restrictions, but was subject to a six-month probationary period. The district terminated the employee from the non-teaching position during the probationary period and the employee appealed the termination to FDAB.

The district filed a motion to dismiss, arguing that FDAB did not have jurisdiction because the employee was not terminated from her contract teacher position, but only from the classified non-teaching position.

FDAB reasoned that because the employee remained "employed" as a contract teacher while she was on medical leave, she had not been terminated from her position as a contract teacher. Under ORS 342.905(1), FDAB's authority is limited to dismissals and non-extensions of contract teachers with regard to their teaching positions. FDAB does not have jurisdiction over disputes about the placement or removal of contract teachers in non-teaching jobs. Based on that reasoning, the case was dismissed for lack of jurisdiction.

(b) Timeliness of Appeal (no cases)

(c) Pay Reductions (no cases)

(d) Layoffs, Resignations and Retirement

1. ***Maxwell, et al v. North Wasco County School District #21*, FDA 07-01, FDA 07-02, FDA 07-03, FDA 07-04, FDA 07-05, FDA 07-06 (2007); affirmed without opinion, 224 Or App 477 (2008):**

Six retired teachers employed by the district filed appeals with FDAB after the district notified them that they would not be offered teaching contracts for the 2007-08 school year. The teachers' appeals were consolidated for hearing. The teachers, who had contract status before retirement, asserted that that status survived retirement. The district

challenged FDAB's jurisdiction, arguing that the teachers were not contract teachers following retirement. In a majority opinion, FDAB ruled that the teachers' retirement severed their employment relationships with the district and ended their status as contract teachers.

FDAB examined the objective indicators of the teachers' intent with respect to their employment, holding that the teachers' subjective intent to retain their contract status was irrelevant. FDAB reasoned that in electing to retire from PERS and seek reemployment, a teacher undergoes a two-step process: first, retirement is a separation of employment, and second, re-hiring begins a new period of employment. Accordingly, like any intentional resignation, retirement severed the employment relationship and eliminated the teachers' contract status. Further, FDAB reasoned that its analysis was consistent with the discretion provided to public employers in deciding whether to reemploy retired individuals under ORS 238-082(1). Based on those factors, FDAB dismissed the teachers' appeals.

There was a dissenting opinion that viewed the PERS retirement process as separate from the employment relationship between the district and the teachers. The dissent viewed the teachers as contract teachers because they did not miss any work and were employed under contract both before and after retirement.

This case was appealed to the Oregon Court of Appeals on September 13, 2007. On December 3, 2008, the Court of Appeals affirmed the FDAB order without issuing a written opinion.

(e) Evidentiary Matters

1. ***Waisanen v. Clatskanie School District***, FDA 05-02 (2006); affirmed 229 Or App 563 (July 15, 2009):

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 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.

This case was appealed to the Oregon Court of Appeals on October 2, 2006. On July 15, 2009, the Court of Appeals issued its decision affirming the Fair Dismissal Appeals Board order as follows: (1) FDAB properly complied with the procedures under ORS 342.906(6) as the statutes compel FDAB to consider "all the circumstances and additional facts developed at the hearing" and does not limit FDAB to the facts before the school board; (2) under the circumstances of the case, the admission of polygraph examination results was not error; and (3) the findings of fact in FDAB's final order were supported by substantial evidence.

(f) Miscellaneous Issues (no cases)

K. REMEDIES

(a) Reinstatement (no cases)

(b) Back Pay

1. ***Edwards v. Riverdale School District***, FDA 06-4 (2007), remanded 220 Or App 509, review allowed 345 OR 417 (2008), dismissed 346 Or 66 (2009):

The school district terminated the employee's employment and did not comply with the procedures required for the dismissal of a contract teacher. The employee appealed to FDAB, and the district challenged FDAB's jurisdiction on the grounds that the employee was a first-year probationary administrator and not a contract teacher. Both parties agreed that if FDAB determined that the employee was a contract teacher, the remedy was reinstatement. Following a hearing limited to the jurisdictional issue, FDAB ruled that the employee was a contract teacher and issued an order for reinstatement with back pay.

The district filed a petition for reconsideration of FDAB's opinion and contended that FDAB's award of back pay should be modified. The district asserted that ORS 342.905(5)(b), which requires FDAB to issue a final order within 140 days after the appeal is filed, implied a 140-day cap on back pay awards. FDAB rejected that argument, explaining that the 140-day requirement was intended to allow for due process rather than as a limit on remedies. Ultimately, FDAB adhered to its original ruling on both the jurisdictional and back pay issues.

The district appealed the issue of whether the employee was a contract teacher or a probationary administrator to the Court of Appeals. In an opinion issued June 18, 2008, the Court of Appeals held that FDAB's interpretation of the statute was erroneous. In reaching that conclusion, the Court closely analyzed the language of ORS 342.815(1), which defines the term "administrator" by listing examples of administrative jobs, including "director of a department or the equivalent." The Court held that the term "director" is not limited to an employee who has the highest rank of authority to make

decisions, but should instead be viewed “broadly” to embrace “one who administers, regulates or supervises the activities of a department.”

NOTE: A petition for review of this case was filed with the Oregon Supreme Court on July 24, 2008, and review was granted on November 26, 2008. Thereafter the parties settled the case and it was dismissed on February 27, 2009.