2018-2023 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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This case arose from an incident in which a contract teacher accidentally projected a highly inappropriate, sexually explicit picture from his personal cell phone to a classroom of high school students. The panel found that the District did not prove sufficient facts to sustain the dismissal on the basis of immorality.

Appellant was a well-regarded math teacher in the Beaverton School District. The District permitted teachers to use personal telephone and computer devices in the classroom, yet had not provided training on wireless networking processes. Prior to his termination, Appellant had used his personal Apple iPad Pro in the classroom to demonstrate math problems by projecting them on a screen, using the school's wi-fi connection and his personal Apple ID. One afternoon, during a math class in which he was projecting math problems on to the screen, Appellant's devices automatically 'synced.' To Appellant's horror, a picture of his naked genitals appeared on a large screen projected to the class. Appellant had taken the picture a day earlier, during his personal time and using his private cell phone; it was intended for his adult romantic partner in a consensual erotic exchange. Following the incident, the District terminated Appellant.

The panel found that even though the incident was highly inappropriate and likely damaging to several students, the District had not presented sufficient evidence to support a finding of immorality under the current FDAB definition and interpretation of that standard. Appellant was not shown to have acted excessively selfishly or with harmful intent – the required elements to establish immorality.

2. *Jennifer Crouch v. Springfield Public Schools,* FDA-17-02 (2018)

This case arose from a contract teacher's off-duty conduct that resulted in criminal charges of cocaine possession and driving under the influence of alcohol, but no convictions for either charge. The panel found that the District had not proven the facts necessary to sustain a dismissal for immorality.

Appellant worked as a part-time language arts teacher at Briggs Middle School in the Springfield School District for four years. At the time of the incident that led to her dismissal, she would occasionally use alcohol and recreational drugs off duty, to self-medicate certain medical conditions that had not yet been diagnosed or sufficiently treated. On a Friday night, Appellant ingested a small amount of cocaine. She then consumed alcohol and went to a movie with her friend, where she drank more and consumed another small amount of cocaine. After leaving the movie theater, Appellant attempted to call a taxi but learned it would take close to an hour for it to arrive. Appellant felt anxious but did not feel impaired and decided to drive herself home.

After failing to signal when exiting the movie theater parking lot, she was pulled over by a police officer, who observed signs of intoxication. He searched her car and belongings and found

a small bag of cocaine and pills, which Appellant admitted were LSD, and marijuana. Following her arrest, she was charged with misdemeanor Driving Under the Influence of Intoxicants (D.U.I.I.) and felony possession of cocaine, to which she pleaded guilty. However, under the terms of a plea deal, Appellant was not convicted of any crime; instead, she was ordered to complete a rigorous drug and alcohol treatment program (diversion). At the time of the school board's dismissal and the panel's order in this case, Appellant was still in the treatment program which, if completed successfully, would result in her not having any conviction on her record.

In reversing the termination, the panel concluded that the District has not presented sufficient evidence to support a finding of immorality, as that term is defined under statute and FDAB precedent. An illegal act is not per se immoral, and the District lacked evidence to establish the necessary elements of immorality required by FDAB — namely, that Appellant acted "selfishly" and caused actual, tangible harm to others. The District's HR Director, who had recommended her dismissal, testified that he did not view driving under the influence as "selfish," and there were other teachers with D.U.I.I. charges who had remain employed. As for Appellant's cocaine use, the panel concluded that the District had not offered any evidence showing how Appellant's cocaine use was "selfish," let alone to the "excessive" degree required by FDAB under prior precent. The District had also not provided persuasive evidence of how her off-duty cocaine use had damaged anyone but Appellant herself. Moreover, Appellant presented evidence that her conduct was connected to a substance abuse disorder and other medical conditions, for which she subsequently sought treatment.

C. INSUBORDINATION

1. ***Juline Walker v. Mapleton School District***, FDA-22-01 (Findings of Fact, Conclusions of Law and Order, January 27, 2023, Order on Petition for Reconsideration and Rehearing, April 17, 2023)

The District terminated the Appellant's employment, effective immediately, after Appellant declined to provide proof of vaccination against COVID-19 or provide documentation of a medical or religious exemption. After Appellant indicated that she would not be seeking a medical or religious exception to the vaccination requirement, the District superintendent identified four options for Appellant to choose from. Those options included taking a leave of absence for the remainder of the school year, resigning, agreeing to follow safety protocols (double-masking and keeping three feet of distance from others), or becoming fully vaccinated by October 18, 2021. In response, Appellant stated that she did not intend to comply with the vaccination requirement under OAR 333-019-1030 and did not intend to request a leave of absence or submit her resignation.

The District placed Appellant on unpaid administrative leave to provide time for either Appellant to change her mind or for the regulations requiring vaccination to change. Ultimately, Appellant was provided a hearing before the school board. The Board asked Appellant if she would comply with the vaccine mandate or request a religious or medical exception. Appellant stated that she would not comply and that requiring an exemption was a violation of her rights. The Board voted to accept the recommendation of the superintendent to terminate Appellant's contract, effective immediately.

The panel concluded that Appellant's refusal to become vaccinated against COVID-19 or to request a medical or religious exemption constituted insubordination within the meaning of ORS 342.865(1)(c). To establish insubordination due to disobedience of a direct order, there must be credible evidence that the District imposed a lawful order or directive, that it clearly communicated that order or directive, and that the teacher willfully refused to obey the order. *Sherman v. Multnomah Education Service Dist.*, FDA-95-4 at 23 (1996).

The panel concluded that the District imposed a lawful order or directive based on OAR 333-019-1030, which generally required teachers to either provide their school with proof of COVID-19 vaccination or with documentation of a medical or religious exception. The rule was adopted at the direction of Oregon Governor Kate Brown. The panel rejected Appellant's arguments that the vaccination requirement was unlawful because it conflicted with federal or state law. The panel also concluded that the District clearly communicated the vaccination order to Appellant on multiple occasions both in writing and orally. Finally, the panel concluded that Appellant willfully refused to obey the District's order. The record indicated that Appellant simply chose, as a matter of personal principle, not to comply. She explained in her letter to the school board, "I chose to exercise my right to medical privacy by not submitting documentation to the District of having been 'fully vaccinated' against COVID-19 and by not applying for a religious or medical exception beyond those which are already provided by law."

After the panel's order, Appellant, pursuant to OAR 586-030-0075, filed a petition for reconsideration and rehearing, which repeated many of the arguments she made in her closing argument. Because Appellant did not deny that she failed to obtain the COVID-19 vaccine by October 18, 2021 or request a medical or religious exemption, the panel denied the petition for reconsideration or hearing.

D. NEGLECT OF DUTY

1. ***Juline Walker v. Mapleton School District***, FDA-22-01 (Findings of Fact, Conclusions of Law and Order, January 27, 2023, Order on Petition for Reconsideration and Rehearing, April 17, 2023)

The District terminated the Appellant's employment, effective immediately, after Appellant declined to provide proof of vaccination against COVID-19 or provide documentation of a medical or religious exemption. After Appellant indicated that she would not be seeking a medical or religious exception to the vaccination requirement, the District superintendent identified four options for Appellant to choose from. Those options included taking a leave of absence for the remainder of the school year, resigning, agreeing to follow safety protocols (double-masking and keeping three feet of distance from others), or becoming fully vaccinated by October 18, 2021. In response, Appellant stated that she did not intend to comply with the vaccination requirement under OAR 333-019-1030 and did not intend to request a leave of absence or submit her resignation.

The District placed Appellant on unpaid administrative leave to provide time for either Appellant to change her mind or for the regulations requiring vaccination to change. Ultimately, Appellant was provided a hearing before the school board. The Board asked Appellant if she

would comply with the vaccine mandate or request a religious or medical exception. Appellant stated that she would not comply and that requiring an exemption was a violation of her rights. The Board voted to accept the recommendation of the superintendent to terminate Appellant's contract, effective immediately.

The panel concluded that Appellant's refusal to become vaccinated against COVID-19 or to request a medical or religious exemption constituted neglect of duty within the meaning of 342.865(1)(d). Neglect of duty means the "failure to engage in conduct designed to result in proper performance of duty." *Wilson v. Grants Pass School District*, FDA-04-07, at 9 (2005). "FDAB has interpreted 'neglect of duty' to mean the failure of a teacher to engage in conduct designed to bring about a performance of his or her responsibilities." *Bellairs v. Beaverton Sch. Dist.*, 206 Or App 186, 196 (2006) (internal citations omitted). Neglect of duty can be demonstrated through evidence of "repeated failures to perform duties of a relatively 'minor importance or a single instance of a failure to perform a critical duty.'" *Wilson*, FDA-04-07, at 10.

The panel reasoned that the District imposed a duty on Appellant to obtain the COVID-19 vaccination by October 18, 2021, or to request a medical or religious exception. The purposes of that requirement were to protect students and to maximize the possibility of students learning in person by lowering the chances of COVID-19-related isolations and quarantine. Appellant was not able to lawfully teach or work at the school unless she complied with this duty. The panel concluded that Appellant chose, for her own reasons, not to comply with the duty, despite having been told about it and the possibility of dismissal if she did not comply multiple times. Her failure to comply constituted neglect of duty.

After the panel's order, Appellant, pursuant to OAR 586-030-0075, filed a petition for reconsideration and rehearing, which repeated many of the arguments she made in her closing argument. Because Appellant did not deny that she failed to obtain the COVID-19 vaccine by October 18, 2021 or request a medical or religious exemption, the panel denied the petition for reconsideration or hearing.

2. ***Benjamen Wichser v. Beaverton School District 48J,*** FDA-19-02 (2021)

This case arose from an incident in which a contract teacher accidentally projected a highly inappropriate, sexually explicit picture from his personal cell phone to a classroom of high school students. The panel found that the District did not prove sufficient facts to sustain the dismissal decision for neglect of duty.

Appellant was a well-regarded math teacher in the Beaverton School District. The District permitted teachers to use personal telephone and computer devices in the classroom, yet had not provided training on wireless networking processes. Prior to his termination, Appellant had used his personal Apple iPad Pro in the classroom to demonstrate math problems by projecting them on a screen, using the school's wi-fi connection and his personal Apple ID. One afternoon, during a math class in which he was projecting math problems on to the screen, Appellant's devices automatically 'synced.' To Appellant's horror, a picture of his naked genitals appeared on a large screen projected to the class. Appellant had taken the picture a day earlier, during his personal

time and using his private cell phone; it was intended for his adult romantic partner in a consensual erotic exchange. Following the incident, the District terminated Appellant.

The panel found that even though the incident was highly inappropriate and likely damaging to several students, the District had not presented evidence that Appellant had acted intentionally to harm anyone. Relying on prior FDAB cases interpreting the neglect of duty standard, the panel concluded that the District had not established the degree of fault or intentionality necessary to justify dismissal on that basis; the incident was clearly an accident.

3. ***Virgil Ruiz v. Forest Grove School District,*** FDA-17-04 (2018)

This case arose from a contract teacher's use of a blade on a multi-tool to cut cupcakes for a class of second-grade students; a student later claimed he was nicked by the blade. The panel concluded that the true and substantiated facts were insufficient to support dismissal on the basis of neglect of duty and reversed the school board's termination.

On March 16, 2017, Appellant was teaching a class of second graders and wanted to cut cupcakes to share with the children. After unsuccessfully trying to cut the cupcakes with a popsicle stick, he used a 1.5-1.75-inch blade on a multi-tool in a pouch on his belt, which he regularly carried at school. There was no written policy or verbal direction prohibiting teachers from carrying knives. Appellant took out his multi-tool to cut the cupcakes. When a student got out of his seat and rushed toward Appellant, he placed his hand over the blade to shield it and directed the student to return to his seat. Appellant did not perceive any contact between the blade and the student.

The student then started crying and touching his shoulder. Appellant examined the student's shoulder and noticed a small indent but no blood. Appellant considered the possibility that the blade may have inadvertently made contact with the student. He asked the student if he wanted a band-aid or ice, or go to the front office, which the student declined. Appellant directed the student to wash the area with soap and water. Appellant also observed the student smiling at this point. Appellant did not direct the student to seek medical attention, nor did he report the incident to any administrator or parent after class.

Later that day, the student's parent reported the incident to law enforcement and the school principal and produced a photograph showing a very faint mark on the student's arm. The principal interviewed the student, who claimed Appellant had poked him with a knife. The principal also interviewed two other students, who said they did not see any contact with the knife but heard Appellant ask the student whether he wanted medical attention. Law enforcement also interviewed witnesses and Appellant. The case did not result in any criminal prosecution. The school board terminated Appellant for neglect of duty.

The panel found that the District had failed to prove critical facts supporting dismissal for neglect of duty. It had not been established that Appellant's knife had made contact with the student as alleged, or that the student had in fact been injured. The student did not testify at the FDAB hearing and the District did not produce any other witness testimony or other direct evidence of contact or harm; the photograph of the alleged injury, taken by the parent, showed a miniscule, faint mark.

In reaching its conclusion, the panel concluded that this singular incident, where there was insufficient proof it actually occurred and no evidence of impropriety or intentional conduct, could not establish a failure of a critical duty. As for Appellant's failure to self-report the incident after class, the panel relied on well-established FDAB precedent that failure to report an incident does not constitute neglect of duty when the teacher does not have a reasonable basis to believe the incident itself (a reportable event) had occurred. Here, the Appellant credibly testified he had not observed any blood or serious injury, that the student declined his offer for a band-aid or medical attention, and even smiled. Appellant therefore reasonably concluded it was a minor event. The panel also noted that the District had not presented evidence of any policy, rule, or expectation relating to the reporting of incidents, including potential injuries; given these circumstances, Appellant was reasonable in concluding he did not have to report the matter.

E. PHYSICAL OR MENTAL INCAPACITY (no cases)

F. CONVICTION OF FELONY OR CRIME INVOLVING MORAL TURPITUDE

1. *Jennifer Crouch v. Springfield Public Schools,* FDA-17-02 (2018)

This case arose from a contract teacher's off-duty conduct that resulted in criminal charges of cocaine possession and driving under the influence of alcohol, but no convictions for either charge. The panel found that the District had not proven the facts necessary to sustain dismissal on, among other criteria, conviction of a felony or crime involving moral turpitude.

Appellant worked as a part-time language arts teacher at Briggs Middle School in the Springfield School District for four years. After ingesting cocaine and alcohol on a weekend night, she was pulled over by a police officer for failing to use a turn signal. The officer observed signs of intoxication. Following her arrest, she was charged with misdemeanor Driving Under the Influence of Intoxicants (D.U.I.I.) and felony possession of cocaine, to which she pleaded guilty. However, under the terms of a plea deal, Appellant was not convicted of any crime; instead, she was ordered to complete a rigorous drug and alcohol treatment program (diversion). At the time of the school board's dismissal and the panel's order in this case, Appellant was still in the treatment program which, if completed successfully, would result in her not having any conviction on her record.

In reversing the termination, the panel found that the District has not proven the facts necessary to sustain the dismissal on the grounds of a criminal conviction, since Appellant had not in fact been "convicted" of any crime, nor would she be if she successfully completed her diversion program.

G. INADEQUATE PERFORMANCE

1. *Benjamen Wichser v. Beaverton School District 48J,* FDA-19-02 (2021)

This case arose from an incident in which a contract teacher accidentally projected a highly inappropriate, sexually explicit picture from his personal cell phone to a classroom of high

school students. The panel found that the District did not prove sufficient facts to sustain the dismissal decision for neglect of duty.

Appellant was a well-regarded math teacher in the Beaverton School District. The District permitted teachers to use personal telephone and computer devices in the classroom, yet had not provided training on wireless networking processes. Prior to his termination, Appellant had used his personal Apple iPad Pro in the classroom to demonstrate math problems by projecting them on a screen, using the school's wi-fi connection and his personal Apple ID. One afternoon, during a math class in which he was projecting math problems on to the screen, Appellant's devices automatically 'synced.' To Appellant's horror, a picture of his naked genitals appeared on a large screen projected to the class. Appellant had taken the picture a day earlier, during his personal time and using his private cell phone; it was intended for his adult romantic partner in a consensual erotic exchange. Following the incident, the District terminated Appellant.

The panel found that even though the incident was highly inappropriate and likely damaging to several students, the District had not established facts to support a finding of inadequate performance, which, under well-established FDAB precedent, involves repeat behavior and an opportunity to correct on the part of the teacher. The event in this case did not relate to Appellant's teaching performance or ability to teach successfully, in particular students who had not seen the picture.

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. *Jennifer Crouch v. Springfield Public Schools,* FDA-17-02 (2018)

This case arose from a contract teacher's off-duty conduct that resulted in criminal charges of cocaine possession and driving under the influence of alcohol, but no convictions for either charge. The panel found that the District had not proven the facts necessary to sustain dismissal on, among other bases, cause which constitutes grounds for revocation of the Appellant's teaching certificate.

Appellant worked as a part-time language arts teacher at Briggs Middle School in the Springfield School District for four years. At the time of the incident that led to her dismissal, she would occasionally use alcohol and recreational drugs off duty, to self-medicate certain medical conditions that had not yet been diagnosed or sufficiently treated. On a Friday night, Appellant ingested a small amount of cocaine. She then consumed alcohol and went to a movie with her friend, where she drank more and consumed another small amount of cocaine. After leaving the movie theater, Appellant attempted to call a taxi but learned it would take close to an hour for it to arrive. Appellant felt anxious but did not feel impaired and decided to drive herself home.

After failing to signal when exiting the movie theater parking lot, she was pulled over by a police officer, who observed signs of intoxication. He searched her car and belongings and found a small bag of cocaine and pills, which Appellant admitted were LSD, and marijuana. Following her arrest, she was charged with misdemeanor Driving Under the Influence of Intoxicants (D.U.I.I.) and felony possession of cocaine, to which she pleaded guilty. However, under the terms of a plea deal, Appellant was not convicted of any crime; instead, she was ordered to complete a rigorous drug and alcohol treatment program (diversion). At the time of the school board's dismissal and the panel's order in this case, Appellant was still in the treatment program which, if completed successfully, would result in her not having any conviction on her record.

In reversing the termination, the panel found that the District had not established sufficient facts to establish that her teaching license would be revoked. Based on the evidence submitted at hearing relating to revocation decisions by the Teachers Standards and Practices Commission – the state body with authority over discipline and revocation of licenses – the panel noted that teachers who admit to engaging in off-duty criminal acts are often disciplined, but they are only stripped of their ability to teach if determined to be "grossly unfit" to perform the duties of a teacher or to have engaged in a "gross neglect of duty" relating to the profession under the standards applied by the Teacher Standards and Practices Commission. Here, Appellant's conduct leading to her dismissal occurred off-duty, and the panel was not persuaded that Appellant had lost the ability to be an effective teacher. Appellant offered live testimony from parents and also a student who explained that they would not be concerned if she returned to the classroom after pursuing recovery.

J. PROCEDURAL MATTERS

(a) Status of Teachers and Administrators

1. *Jill Bong v. Douglas County School District #15, Days Creek Charter School,* FDA-21-03 (2021)

This case arose from a dismissal of a probationary teacher from a charter school. Upon reviewing the statutory definition of "probationary teacher" under ORS 342.815(6), the panel concluded that the District, not FDAB, was the proper forum for hearings involving probationary teachers. The Oregon Court of Appeals had previously held that FDAB lacked jurisdiction over appeals filed by teachers who had not completed their probationary periods and were therefore not yet a "contract teacher" – the status conferring FDAB with jurisdiction to hear dismissal appeals. The panel dismissed the case, noting that the teacher could seek a hearing with the District, and subsequently petition the Circuit Court in the District's county to hear any appeal of the District's disposition.

(b) Timeliness of Appeal

1. *Chuck Calhoun v. Vernonia School District 47J*, FDA-23-01 (2023)

In this case, the District did not issue a written notice of non-extension or communicate a decision to dismiss Appellant. Appellant contended that he had been told by the principal in a

meeting on February 8 or 9, 2023, that his contract was not being renewed, according to Appellant, "effective immediately." Appellant had turned in his keys and cleaned out his office thereafter. The principal sent Appellant a memorandum dated February 13, 2023, in which the principal asked Appellant to clarify whether he had resigned when he handed in his keys. The memorandum also notified Appellant of a meeting with the principal on February 16, 2023.

Appellant received the memorandum on February 18, and therefore did not attend the February 16 meeting. Appellant called the principal and explained his understanding that "the board had not renewed" his contract "and it was effective immediately." Thereafter, the principal left Appellant a voicemail asking him to contact the school. Appellant did so and told the secretary that he was getting phone calls about school closures and asked to be removed from the list. The secretary connected Appellant to the assistant superintendent, who did not answer. According to Appellant's appeal, "Being unsure what else was required, I hung up and did not call again."

On February 20, 2023, the District superintendent sent Appellant a memorandum informing Appellant that the District accepted Appellant's "resignation as of February 9, 2023."

On March 13, 2023, Appellant posted his appeal by certified mail.

The District filed a motion to dismiss asserting that the appeal was untimely. The panel agreed with the District. ORS 342.905 provides, in relevant part:

> (1) If the district school board dismisses the teacher or does not extend the contract of the contract teacher, the teacher or the teacher's representative may appeal that decision to the Fair Dismissal Appeals Board established under ORS 342.930 by depositing by certified mail addressed to the Superintendent of Public Instruction and a copy to the superintendent of the school district:
>
> (a) In the case of dismissal, within 10 days, as provided in ORS 174.120, after receipt of notice of the district school board's decision, notice of appeal with a brief statement giving the reasons for the appeal.

ORS 342.905(1)(a). In this case, Appellant received the superintendent's February 20, 2023 memorandum on February 28, 2023. The panel reasoned that, even if that memorandum were somehow construed as a notice of the school board's dismissal decision, the deadline for Appellant to appeal that action was March 10, 2023. Appellant did not deposit a notice of appeal by certified mail until March 13, 2023. Therefore, the appeal was untimely.

The panel also reasoned that it was not plausible to view either letter received by Appellant as a written notice of non-extension of Appellant's contract because, according to Appellant's version of events, he was told he was "terminated effective immediately" on February 8 or 9, 2023—*e.g.*, he was dismissed with immediate effect, rather than merely having his contract nonextended at the end of its term.

2. ***Theresa Seeley v. Portland Public Schools,*** FDA-21-01 (2021) (affirmed without opinion by the Oregon Court of Appeals, A177275 (Oct. 5, 2022))

In this case, the panel held that it did not have jurisdiction to hear the contract teacher's appeal of her termination decision because she did not provide timely notice to the District as required under ORS 342.905. That statute required reasonable notice to be filed by "certified mail addressed to the Superintendent of Public Instruction and a copy to the superintendent of the school district," within ten days of dismissal or 15 days in the case of nonextended contracts. Even though Appellant testified she sent a copy of her appeal to the FDAB, she did not provide a copy of the appeal to the District within the statutory time period.

(c) Pay Reductions (no cases)

(d) Layoffs, Resignations and Retirement

1. *Chuck Calhoun v. Vernonia School District 47J*, FDA-23-01 (2023)

This case arose from a contract teacher's assertion that the District had informed him that it had not renewed his contract, "effective immediately." The District disputed that assertion, and filed a motion to dismiss contending that FDAB did not have jurisdiction because the Appellant had resigned. The Appellant did not file an opposition to the motion.

The panel found that it was undisputed that the District did not issue a written notice of non-extension or communicate a written decision to dismiss Appellant. The panel also found that, on or about February 8 or 9, 2023, after a conversation with the principal, Appellant cleaned out his office, left his laptop on the desk, intended to turn his keys in at the school office and, believing the office to be closed, gave his keys to a District employee. On February 18, 2023, the principal and Appellant conferred. The principal explained the District's understanding that Appellant had "quit." Rather than express an intention to continue working for the District, Appellant explained his belief that he had been "terminated effective immediately."

The panel also found that, at some point thereafter, in response to a voicemail left by the principal, Appellant called a District secretary and asked to be removed from the list of people who receive notice of school closures. When the secretary forwarded Appellant's call to the assistant superintendent and the assistant superintendent did not answer, Appellant, in his words, "hung up and did not call again." After receiving confirmation from the District superintendent in writing that the District understood that Appellant had resigned, Appellant did not inform the District that it had misunderstood his intentions. Appellant did not return to work or inform the District that its belief that he had resigned was incorrect. On this record, the panel concluded that Appellant resigned his employment.

The panel concluded that, because Appellant resigned, it lacked jurisdiction to hear the appeal. The Fair Dismissal Appeals Board's jurisdiction is defined by ORS 342.905, which provides:

> If the district school board *dismisses* the teacher or *does not extend* the contract of the contract teacher, the teacher or the teacher's representative may appeal that decision to the Fair Dismissal Appeals Board established under ORS 342.930[.]

ORS 342.905(1) (emphasis added). The Fair Dismissal Appeals Board has long held that it lacks jurisdiction when a teacher resigns, a conclusion the Oregon Supreme Court has affirmed. *See Pierce v. Douglas School District No. 4,* 297 Or 363, 365, 686 P2d 332 (1984); *Lynch v. Klamath County School District*, FDA-12-12 at 6 (2013) (if a teacher resigns, "it is well-established that FDAB lacks jurisdiction to hear the appeal"); *Hardy v. Baker School District 5J*, FDA-12-05 at 3 (2012) (resignation of employment "precludes jurisdiction"); *Gilman v. Medford School District 549C*, FDA-10-03 at 4 (2010) (FDAB does "not have jurisdiction over resignations"); *Zellner v. Forest Grove School District*, FDA-05-01 at 5 (2006) (FDAB "does not have jurisdiction to hear an appeal if the teacher or administrator resigned from their position or otherwise informs the school district of their intention not to return to their current position").

The panel granted the District's motion to dismiss based on lack of jurisdiction.

(e) Evidentiary Matters

1. *Juline Walker v. Mapleton School District*, FDA-22-01 (Findings of Fact, Conclusions of Law and Order, January 27, 2023; Order on Petition for Reconsideration and Rehearing, April 17, 2023)

The panel overruled Appellant's objection that the procedures for approving the testimony of witnesses by telephone or electronic means pursuant to OAR 586-030-0040 were not followed because the hearing was conducted partially by videoconference. OAR 586-030-0040 governs the testimony of witnesses who are *not present* at a hearing. The panel reasoned that, in a hearing conducted by videoconference, all witnesses are present in the same format as the parties and the panelists. The panel thus questioned whether the rule applies to a hearing by videoconference. But even assuming that the rule did apply, Appellant was not unfairly prejudiced by the failure to follow procedures for approving witness testimony by videoconference. OAR 586-030-0040(6) states that requests to have witnesses testify by telephone or by electronic means "shall normally be granted * * * ." In addition, postponing the hearing so that witnesses could have been available for in-person testimony would likely have led to a significant delay in finding mutually agreeable hearing dates. The potential risk for further delay was exacerbated by the COVID-19 venue restrictions. Within this context, the parties agreed to the nature of the witness appearances and the hearing dates.

2. *Tina Tressel v. Sweet Home School District*, FDA Case No. 21-04 (2023)

The panel excluded witnesses from the hearing when they were not testifying. OAR 586-030-0060 generally provides rules for the conduct of contested case proceedings. While that rule generally allows parties to examine their own witnesses, no rule requires the FDAB to allow those witnesses to attend the hearing before giving their testimony. Excluding witnesses from the hearing avoids the risk that their testimony will be affected by the testimony of other witnesses. The panel has the inherent authority, in conducting the hearing, to exclude witnesses. The panel also relied on OAR 586-030-0060(6), which provides that "the general procedure and conduct of the hearing will be similar to a court proceeding, although not as formal."

(f) Miscellaneous Issues[1]

1. *Juline Walker v. Mapleton School District*, FDA-22-01 (Findings of Fact, Conclusions of Law and Order, January 27, 2023, Order on Petition for Reconsideration and Rehearing, April 17, 2023)

Hearing by Videoconference and Public Hearing via YouTube: The panel ruled that providing Appellant with an in-person hearing for the first day of hearing, followed by a second day of hearing by videoconference, complied with Appellant's due process rights. When scheduling this case for hearing, the State of Oregon and the FDAB were emerging from restrictions imposed by COVID-19. The FDAB was concerned about resurgence of the COVID-19 virus and the difficulty of securing a venue that met the safety concerns of all the parties and witnesses. The FDAB statutes and rules do not explicitly require an in-person hearing. FDAB rules explicitly permit preliminary hearings "by phone or in person." OAR 586-030-0025(1); OAR 586-030-0037(9). The FDAB considers due process protections preserved to the same extent whether the parties appear in-person or by videoconference.

ORS 342.905(5)(b) requires FDAB hearings to "be private unless the teacher requests a public hearing." On June 21, 2022, Appellant requested a public hearing. For the same COVID-19 and venue reasons described above, the panel ruled that it met this obligation by providing a live weblink, via YouTube, of the hearing on both hearing dates.

2. *Tina Tressel v. Sweet Home School District*, FDA Case No. 21-04 (2023)

Representation by Lay Representatives: ORS 342.905(5)(b) provides that "the contract teacher shall have the right * * * to be represented by counsel[.]" Further, in contested case proceedings, a party may not be represented by a *non*-attorney representative unless specifically authorized by law. *See* ORS 183.457. Although ORS 183.457(1) permits persons in contested cases to be represented by lay representatives in contested cases before the agencies enumerated in that subsection, the FDAB is not included on that list. Therefore, the panel concluded that Appellant was not permitted to be represented in proceedings before FDAB by lay representatives.

3. *Tina Tressel v. Sweet Home School District*, FDA Case No. 21-04 (2023)

Hearing by Videoconference and Public Hearing via YouTube: The panel ruled that it was appropriate under FDAB rules to set this case for a video hearing. The FDAB statutes and rules do not explicitly require an in-person hearing. FDAB rules explicitly permit preliminary hearings "by phone or in person." OAR 586-030-0025(1); OAR 586-030-0037(9). The FDAB considers due process protections preserved to the same extent whether the parties appear in-person or by videoconference. When scheduling this case for hearing, the State of Oregon and the FDAB were emerging from restrictions imposed due to COVID-19. The panel was concerned

[1]By later dated June 22, 2022, the FDAB Executive Secretary informed Appellant in *Joel Nye v. Prospect Charter School*, FDA 22-02 (2022), that the charter contract between Prospect Charter School and Prospect School District #59 did not include an agreement to make the fair dismissal appeals law applicable to the charter school. Therefore, the appeal was dismissed. *See Joel Nye v. Prospect Charter School*, FDA 22-02 (2022).

about the resurgence of the COVID-19 virus and the difficulty of securing a venue that met the safety concerns of all the parties and witnesses. For this reason, a video hearing was appropriate.

Relatedly, ORS 342.905(5)(b) requires FDAB hearings to "be private unless the teacher requests a public hearing." Appellant requested a public hearing. The panel concluded that, because of the COVID-19 and venue reasons described above, the panel met this obligation by providing a live weblink, via YouTube, of the hearing on both hearing dates.

4. ***Tina Tressel v. Sweet Home School District***, FDA Case No. 21-04 (2023)

Dismissal for Failure to Comply with FDAB Rules: The panel issued a dismissal order in this case as a result of Appellant's failure to comply with FDAB rules.

At the prehearing conference, Appellant appeared with multiple individuals who spoke on her behalf. The individuals were introduced as counsel, although none of them were licensed to practice law. One of Appellant's representatives asked the panel's counsel, who was speaking on behalf of the panel, whether she was "under the influence of any drug at the moment." Another lay representative for Appellant later interrupted panel counsel, asserting, "Excuse me. It is not your turn to speak." When panel counsel attempted to discuss scheduling the hearing, lay representative for Appellant asserted, referring to FDAB, "[Y]ou folks have no jurisdiction." The lay representative also asserted that the people affecting Appellant's rights "do so at your individual peril." Later, apparently describing the requirement that teachers receive the COVID-19 vaccine or provide proof of a religious or medical exemption, Appellant's lay represented stated, "Nazi is as Nazi does."

After panel counsel attempted to discuss and plan for a mutually agreed upon hearing date, lay representative White told panel counsel, "Excuse me. You're wasting our time." During one exchange, Appellant's lay representative interrupted panel counsel and interjected, "Would you be willing to submit to a drug test?" After both panel counsel and the school district's counsel responded that the question was inappropriate, the lay representative nonetheless asserted, "Well, I think you need to submit to a drug test."

Later, FDAB issued an electronic invitation for a hearing by videoconference, which Appellant declined. On three occasions, Appellant's lay represented filed documents with FDAB, in one email directing FDAB to stop "harassing" Appellant.

On September 9, 2022, in response to Appellant's lay representatives submitting documents on her behalf, the panel issued an order on "lay representation and document submission." The order informed Appellant that she could appear *pro se* or through a licensed attorney, and that documents or filings that were not submitted by the parties or their legal counsel would not be considered for admission into evidence. The same day, panel issued a second letter order regarding the hearing process, requiring the parties to comply with FDAB rules and creating a schedule for witness and exhibit production.

Despite the September 9 order, a lay representative for Appellant emailed arguments and documents to FDAB on September 13, 16, and 20. On September 20, 2022, the panel

issued another ordered regarding lay representation and document submission. In the order, the panel notified Appellant that it did not have authority to recognize the five non-licensed individuals who had sought to represent Appellant "as counsel for the Appellant and will not be doing so in this case." Despite the September 9 and September 20 orders, a lay representative for Appellant submitted documents on three additional occasions (September 27 and 28 and on October 21).

On September 27, Appellant provided a list of "witnesses"; the list named her lay representatives. The next day, the District moved for the exclusion of witnesses. At the hearing on September 30, 2022, the panel chair granted the District's motion and informed Appellant that she could not have witnesses present until called to testify. Appellant's lay representatives declined to recognize FDAB as having authority to convene a contested case hearing. When the panel chair explained that only licensed attorneys could represent Appellant at the hearing, a lay representative responded, "You don't have the authority to state that or make that demand."

The panel chair repeatedly asked Appellant if she was willing to comply with the procedures and orders of FDAB. Appellant refused to state that she would comply. When another panelist explained that the hearing was Appellant's opportunity to be heard, but that Appellant was required to comply with FDAB rules, Appellant and her lay representative asserted that FDAB's rules "go against" the law and the constitution. Appellant further denied that FDAB had authority to make rulings to control the hearing. The panel chair terminated the hearing and stated that the panel would dismiss the appeal.

In its order, the panel dismissed the appeal, finding that Appellant failed to comply with OAR 586-030-0037, which requires that parties to FDAB proceedings cooperate before and during the hearing. The panel reasoned that Appellant repeatedly ignored or disputed the panel's directives and orders, including the notice on four occasions that lay representatives could not represent Appellant. Those lay representatives also submitted, on Appellant's behalf, numerous documents despite repeated orders not to do so, disputed the authority of the panel, and declined to recognize the panel's authority to adjudicate the appeal. Appellant also failed to comply with the panel's order that witnesses be excluded until called to testify.

The panel also dismissed the appeal because Appellant failed to comply with OAR 586-030-0060(5), which requires parties to conduct themselves in a respectful manner at all times and provides that parties are "subject to sanction—up to summary dismissal of their claims—for violation of this rule." Appellant's representatives were uncooperative during the prehearing conference. One representative told the panel that it was "wasting our time." One representative accused panel counsel of being under the influence of drugs and asserted that counsel needed "to submit to a drug test."

K. REMEDIES

(a) Reinstatement (no cases)

(b) Back Pay (no cases)