BEFORE THE FAIR DISMISSAL APPEALS BOARD

OF THE

STATE OF OREGON

In the Matter of the Appeal of LAURA MARTIN, Appellant, *v.* GRESHAM-BARLOW SCHOOL DISTRICT, District.	**Case No.** FDA-24-06 **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

INTRODUCTION

Appellant, a contract teacher, was dismissed from her employment with the Gresham-Barlow School District ("District") on August 28, 2024. She timely appealed to the Fair Dismissal Appeals Board ("FDAB" or the "panel") on September 4, 2024. Both Appellant and the District waived the requirement that a contested case hearing be held by an FDAB panel within 100 days of the receipt by the teacher of the notice of dismissal. *See* ORS 342.905(5)(a). A hearing on the merits was conducted in Portland, Oregon on February 25, 2025. Appellant appeared *pro se*, and the District was represented by Nancy Hungerford, Attorney at Law, The Hungerford Law Firm. The hearing was conducted by a panel appointed from the FDAB, consisting of Chair Robert Sconce, Panelist Tory McVay, and Panelist Jim Westrick. The panel, having considered the evidence and the arguments of counsel, makes the following rulings, findings, conclusions of law, and order.

PANEL RULINGS

Partial Consolidation With Case No. FDA-24-02, *Bill Martin v. Gresham-Barlow School District*

During prehearing proceedings held pursuant to OAR 586-030-0037(9), the parties agreed that this case would be consolidated for hearing with Case No. FDA-24-02, *Bill Martin v. Gresham-Barlow School District*. Subsequently, the panel decided that the hearing in this case would take place

first, on February 25, 2025, and the hearing in Case No. FDA-24-02 would take place second, on February 26, 2025. The panel did not rely on the record in Case No. FDA-24-02 in deciding this case.

Evidentiary Rulings

The panel admitted Appellant's Exhibit A-1, comprised of documents, as well as Exhibits A-2 through A-5, comprised of four excerpts from the August 28, 2024 Gresham-Barlow School Board meeting regarding Appellant's recommended dismissal, as follows: Exhibit A-2 (video excerpt beginning at 22:03), Exhibit A-3 (video excerpt beginning at 27:39), Exhibit A-4 (video excerpt beginning at 12:13) and Exhibit A-5 (video excerpt beginning at 35:56).

The panel admitted the District's Exhibits D-1 through D-10.

FINDINGS OF FACT

Appellant's Employment and Background Facts

1. Appellant was an English teacher at Sam Barlow High School. Appellant's letters of recommendation reflect that she was viewed as bringing to her teaching "a level of humility and professionalism that is commendable" and as "a woman of integrity and high moral character[.]" Exh. A-1 at 5. According to her supervisor, Appellant displayed a "commitment to student literacy and development of strong reading skills" and successfully used different strategies and technology to engage students and help evaluate their writing. Exh. A-1 at 56.

2. Over the course of her employment, Appellant informed the District that she had asthma and requested accommodations. *See, e.g.*, Exh. A-1 at 21; Exh. D-2 at 8. Over time, the District and Appellant engaged in discussions to identify possible accommodations. Tr. 53:6-22. In 2019, the District and Appellant engaged in an interactive process to discuss whether the District could offer reasonable accommodations to enable Appellant to perform the essential functions of her job. Exh. A-1 at 14-15. Appellant submitted a note from her physician stating that it was medically necessary that she be provided a window in her workspace. Exh. D-2 at 17. Appellant was placed in a classroom that met her need for an accommodation. Later, after Appellant expressed concerns that the

classroom was in an area of ongoing construction, the District offered the accommodation of a different classroom. See Exh. D-3 at 1.

3. On January 22, 2020, Appellant and her spouse, Bill Martin, also a teacher at SBHS, expressed concerns to Superintendent James Hiu about the work performed by the District with funds resulting from a bond issuance. Exh. A-1 at 40; Exh. D-7 at 20.

4. Over the course of her employment, Appellant submitted numerous complaints about her work environment. *See, e.g.*, Exh. A-1 at 6 (referring to complaint filed with the Bureau of Labor and Industries in 2020 alleging that the District failed to engage in an interactive process and refused to provide reasonable accommodations); Exh. A-1 at 11 and 26 (referring to an appeal filed with the Oregon Department of Education); Exh. A-1 at 29 (transmitting Appellant's whistleblower complaint against Superintendent James Hiu); Exh. A-1 at 30 (recognizing Appellant had "filed several board complaints against members of the school board, administrators, and employees of the district"); Exh. A-1 at 32 (referring to a complaint against Human Resources Specialist Noelle Thelen); Exh. A-1 at 40 (complaint alleging that Appellant and her spouse met with Superintendent James Hiu "and provided him with information regarding [Principal Bruce] Schmidt's unlawful employment practices, SBHS furniture issues, SBHS bond fraud and misuse of funds"); Exh. A-1 at 51 (complaint against Superintendent Hiu for "[u]nlawful practice based on disability").

5. Ultimately, Appellant, along with her spouse, filed a lawsuit against the District, James Hiu, and Bruce Schmidt, Jr. in Multnomah County Circuit Court. Appellant alleged disability discrimination under ORS 659A.030 and retaliation under ORS 659A.030, 659A.199, and 659A.203. *See* Exh. D-8 at 7.

Events Related to the 2022-2023 School Year

6. Appellant was absent from work at the beginning of the 2022-2023 school year. Exh. D-5 at 1-9. On September 20, 2022, the District provisionally granted Appellant medical leave under the Family and Medical Leave Act (FMLA) and the Oregon Family Leave Act (OFLA). Exh. D-5 at 10.

7. In a letter dated December 2, 2022, District human resources employee Randall Bryant reminded Appellant that she had exhausted all available paid leaves and that her absence beginning November 14, 2022 was unpaid leave. The District noted that her provisionally designated FMLA leave would be exhausted on December 6, 2022 and her provisionally designated OFLA leave would be exhausted on December 8, 2022. Exh. D-5 at 24.

8. In the December 2, 2022 letter, the District asked Appellant to let the District know her intentions and asked her to share: "1. Is it your intention to seek sick leave from the Sick Leave Bank (Article 13 – Collective Bargaining Agreement); 2. Is it your intention to request an Unpaid Leave (Article 15 – Collective Bargaining Agreement); 3. Is it your intention to return to work." Exh. D-5 at 24. Mr. Bryant wrote, "It is extremely important that you reach out to me if you have any questions regarding the content of this email, and your intentions moving forward when your protected leave has been exhausted. If we do not hear from you by December 8, 2022, we will be forced to consider other options." *Id*.

9. In a letter to Appellant dated January 25, 2023, Dr. Angela Freeman, Executive Director of Human Resources, explained that the District had sent communications to Appellant throughout the provisionally designated FMLA and OFLA leave, and "[t]o date, we have not received any communication from you related to your intent of returning to your position. At the current time, you have exhausted all statutory and contractual leave and accordingly are considered to be absent without approval." Exh. D-5 at 25. The letter explained that as a result of Appellant's failure to make arrangements for either continued absence or a return to work, Dr. Freeman was "forced to proceed with this recommendation for the termination of your employment." *Id*.

10. In a letter dated February 1, 2023, Superintendent James Hui provided Appellant with a 20-day notice of his intent to recommend Appellant's dismissal to the school board. Exh. D-5 at 26. Superintendent Hiu wrote that he intended to make the recommendation to the board on March 1, 2023.

11. In response to the letter, attorney Noah Barish, acting on Appellant's behalf, requested an unpaid leave of absence for Appellant. Exh. D-5 at 28. The District approved the unpaid leave of absence for the remainder of the 2022-2023 year. *Id*. In the letter notifying Appellant that the District approved the unpaid leave for the 2022-2023 school year, Mr. Bryant wrote, "A notification to the District of your intent to return to your active employment is needed by April 14, 2023." *Id*. The letter further informed Appellant that "[w]ith the approval of this leave, the District will not be proceeding at this time with a recommendation for your termination from employment with the District." *Id*.

12. Appellant did not report to work for any portion of the 2022-2023 school year.

Events Related to the 2023-2024 School Year

13. On July 7, 2023, attorney David Higgs, acting on Appellant's behalf, emailed the District's attorney and requested an interactive process to enable Appellant to return to work in fall 2023 for the 2023-2024 school year. Exh. D-6 at 2.[1]

14. On August 13, 2023, the District and Appellant held an interactive process meeting to discuss possible accommodations. On August 17, 2023, Attorney Higgs submitted Appellant's requested accommodations. Exh. D-6 at 4-5. Appellant requested:

a. An air quality monitor and air purifier in the classroom;

b. The ability to remain in Room 500 for the duration of her employment;

c. A reduced class size to a maximum of 25 students;

d. A written agreement "with students and parents, and substitutes/other staff entering Ms. Martin's classroom to be fragrance-free, to be signed before they enter the room, and enforced through assistance from GBSD administration";

e. A panic/alert button for Appellant if she was unable to communicate because of an asthma attack;

[1] At this time, Appellant's litigation against the District, Superintendent Hiu, and Principal Schmidt was pending. In his email, Attorney Higgs wrote, "I believe it is appropriate to initiate this request via counsel considering the ongoing litigation." Exh. D-6 at 2.

f. The ability to leave the classroom temporarily to prevent an asthma attack, and coverage during the absence, as well as a walkie-talkie or other device (such as a panic/alert button) to request such coverage;

g. That no scented cleaning products or scented hand sanitizer would be used in Appellant's classroom;

h. A designated fragrance-free bathroom for Appellant's sole use;

i. An understanding that no other teachers, students, or groups would use Appellant's classroom when she was not present (such as during a prep period);

j. An understanding that Appellant would not be required to cover classes in other classrooms;

k. Appellant would not be required to perform any out-of-classroom duties, except for assembly duty served in the hallway;

l. The ability to leave any in-person and/or group meeting if an asthma attack seemed imminent;

m. The ability to attend meetings outside of Appellant's classroom (such as departmental meetings) virtually;

n. An air purifier in the nurse's office;

o. The ability to alter the physical layout of Appellant's classroom to limit asthma reactions, including desk and student seating locations; and

p. The ability of Appellant to remove herself from stress-inducing situations that may trigger asthma attacks, including but not limited to in-person interactions with Bruce Schmidt and James Hiu.

15. In addition to the above requested accommodations, Attorney Higgs requested leave as an accommodation, and/or pursuant to the collective bargaining agreement, while the parties resolved within the interactive process which accommodations could be provided. Exh. D-6 at 4.

16. The District granted or substantially granted most of the accommodations, and noted that others were already in place as a result of collective bargaining agreement provisions. *See* Exh. D-6 at 6-8. Specifically, the District granted the following requested accommodations:

a. The District agreed to provide an air quality monitor and air purifier in the classroom;

b. The District agreed that Appellant could remain in Room 500 for the duration of her employment;

c. In response to Appellant's request for a written agreement "with students and parents, and substitutes/other staff entering Ms. Martin's classroom to be fragrance-free, to be signed before they enter the room, and enforced through assistance from GBSD administration[,]" the District agreed that Appellant could notify students, families and staff that she has a fragrance sensitivity. However, the District declined to agree to exclude or discipline students for wearing fragrances. Exh. D-6 at 6;

d. In response to Appellant's request for a panic/alert button for Appellant if she was unable to communicate because of an asthma attack, the District noted that this accommodation was already in place because all employees have the ability to call 911 or notify the office in case of an emergency;

e. In response to Appellant's request for the ability to leave the classroom temporarily to prevent an asthma attack, and coverage during the absence, as well as a walkie-talkie or other device (such as a panic/alert button) to request such coverage, the District explained that this accommodation was already in place with the District's current building safety protocols, but, in addition, the District agreed to provide a walkie-talkie;

f. In response to Appellant's request that no scented cleaning products or scented hand sanitizer would be used in Appellant's classroom, the District agreed that it would notify facilities and custodians of fragrance sensitivity in Appellant's classroom and request that they limit the use of unnecessary cleaners that emit fragrance;

g. In response to Appellant's request for a designated fragrance-free bathroom for Appellant's sole use, the District agreed that it would post signage on the identified staff bathroom door requesting that it be fragrance-free;

h. In response to Appellant's request that no other teachers, students, or groups would use Appellant's classroom when she was not present (such as during a prep period), the District granted the accommodation, noting that Appellant's room would not be used by outside groups, except for emergencies or other unforeseen circumstances;

i. In response to Appellant's request that she not be required to cover classes in other classrooms, the District explained that this accommodation was already granted by the collective bargaining agreement, which gave Appellant the right to decline;

j. In response to Appellant's request that she have the ability to leave any in-person and/or group meeting if an asthma attack seemed imminent, the District granted this accommodation, noting that all employees can take care of their needs if there is an emergency situation;

k. In response to Appellant's request that she have the ability to attend meetings outside of her classroom (such as departmental meetings) virtually, the District offered that Appellant could socially distance (remain approximately six to eight feet away) from participants in any meeting;

l. The District agreed to provide an air purifier in the nurse's office; and

m. The District agreed to allow Appellant to alter the physical layout of her classroom as long as it did not impact students' opportunity to learn, did not limit the number of students who could occupy the classroom space, did not create physical or emotional safety concerns for students, and aligned with best practices for teaching and learning.

17. On or around August 29, 2023, Human Resources Specialist Noelle Thelen sent Appellant an email informing her that the District was "amenable to granting you a full time, unpaid leave of absence for the 2023-2024 school year, as a matter of accommodation." Exh. D-6 at 5. In the email, Human Resources Specialist Thelen wrote, "We are requesting that you inform the District by replying to this email of your intent to do one of the following by 5:00 p.m. on September 5, 2023: (1)

Accept the accommodations list as presented and report to work; or (2) Accept the accommodation of full-time, unpaid leave for the 2023-2024 school year; or (3) Reply to the email to offer questions or clarifications regarding the listed accommodations." *Id.*

18. The District declined to cap Appellant's class size at a maximum of 25 students because capping the class size for one teacher affects the master schedule, which limits the class options available for students, including classes needed for graduation. Tr. 60:1-23. In addition, capping class size results in other teachers having larger classes and, if the District's enrollment continued to increase, would result in the District needing to hire additional teachers to equalize class sizes and ensure that students have access to graduation-required classes. Exh. D-6 at 11; Tr. 154:22 to 155:6.

19. In response to Appellant's request that the District require written agreements "with students and parents, and substitutes/other staff entering Ms. Martin's classroom to be fragrance-free, to be signed before they enter the room, and enforced through assistance from GBSD administration[,]" the District declined to require such agreements and declined to agree to exclude or discipline students for wearing fragrances. The District declined this proposed accommodation because it has no control over fragrances or scents that students may wear. Exh. D-6 at 11; Tr. 71:5-18. A typical teacher at SBHS has approximately 180 students and expecting all 180 students to be fragrance-free is not possible. Tr. 153:11-24. In addition, there are a variety of reasons why a student might emit an odor, such as allergies (preventing wearing of deodorant) or other cultural reasons. Tr. 157:16 to Tr. 158:9. Because all students have a right to a public education, it is not possible at a comprehensive high school such as SBHS to exclude a student from a classroom for wearing a fragrance. Tr. 152: 25 to 153:10.[2]

[2] The District offered to consider other options—such as an air filter her doctor might recommend—for filtering fragrances in lieu of excluding students from class. Tr. 73:2-14. In response to that proposal, Appellant never responded with any options. 78:3-12.

20. The District declined to exempt Appellant from out-of-classroom duties (except for assembly duty served in the hallway) out-of-class because those duties are an essential job function. D-6 at 12.

21. The District declined to agree that Appellant could remove herself from stress-inducing situations because stressful situations are an inherent part of the high school setting, making it impossible for the District to provide this accommodation. Exh. D-6 at 12. Although Appellant wanted to remove herself from interactions with Principal Schmidt and Superintendent Hiu, they were not based at the high school in the 2023-2024 year, so it was highly unlikely that Appellant would encounter them. Tr. 75:18-23; Tr. 76:4-19.

22. On September 5, 2023, Appellant sent an email to Human Resources Specialist Thelen. Appellant wrote, "I do not wish to take unpaid leave for another year." Exh. D-6 at 9.

23. In her September 5 email, Appellant wrote that although she appreciated "some of the accommodations set forth in your letter, other necessary accommodations are not acceptable to me and are inconsistent with my needs as stated in the information I've provided from my doctor." Appellant wrote that the "following items need to be addressed," identifying reduced class size; fragrance-free support in her classroom; unscented cleaning supplies; fragrance-free designation for the bathroom; outside of classroom coverage; meeting attendance issues; ability to remove self from stress-inducting situations including in-person interactions with Principal Bruce Schmidt and Superintendent Hiu; and additional leave. Exh. D-6 at 9.

24. On September 8, 2023, by email, Dr. Freeman responded to Appellant's email, providing further explanations for the District's response to each of Appellant's requested accommodations. Exh. D-6 at 11-12. Regarding leave, Dr. Freeman explained that it would be an undue hardship for the District to provide paid leave for an undetermined amount of time. She also explained that providing paid leave not set forth in the collective bargaining agreement would constitute a change in a mandatory subject of bargaining and therefore would be contrary to Oregon labor law. Exh. D-6 at 12.

25. The September 8 email explained that Appellant had one paid sick day and two paid personal days remaining. The email also explained that, under the collective bargaining agreement, when a teacher has exhausted all available sick days, the teacher loses "only the amount of salary the District would have to pay a substitute member whether or not a substitute is actually required, up to seven days." Exh. D-6 at 13.

26. In the September 8 email, Dr. Freeman asked Appellant to identify by September 12, 2023 which of the following three options she elected: (1) apply for FMLA/OFLA leave or leave under Paid Leave Oregon; (2) request unpaid leave; or (3) accept the accommodations and return to work. The email provided, "If there is no response by this date, the district will assume you have chosen to enter into unpaid leave for the 2023-24 school year." Exh. D-6 at 13.

27. On September 12, 2023, Appellant sent an email to Dr. Freeman notifying her that Appellant wished to apply for FMLA/OFLA leave "if the district declines to request and/or provide paid leave for me." In response to the District's concern about violating labor law by providing paid leave, Appellant stated her belief that the Gresham-Barlow Education Association would be able to approve paid leave. Exh. D-6 at 14. Appellant stated that she believed the District and she had "more to discuss" regarding the accommodations she listed, and reiterated her belief that the District could cap her classes "at a reasonable size." *Id*.

28. Dr. Freeman replied to Appellant's email on September 12, 2023. Dr. Freeman wrote, "I have provided a detailed reply to your questions and concerns regarding the approved accommodations in my previous emails. Those are the accommodations that we have approved. I am accepting your email as well as your notification of your intent to apply for FMLA/OFLA as your rejection of the approved accommodations." Exh. D-6 at 16. Dr. Freeman attached the documents Appellant needed to apply for FMLA/OFLA leave. Dr. Freeman also explained how Appellant could apply for Paid Leave Oregon and for leave from the sick leave bank provided by the collective bargaining agreement. Exh. D-6 at 16-17.

29. On September 18, 2023, Appellant sent an email to Dr. Freeman stating, "If the 'approved accommodations' offered so far are GBSD's final word, then no, I cannot accept them." Exh. D-6 at 18. Appellant then stated that her "first request is for paid leave, perhaps with cooperation with the GBEA. If that doesn't work, I want to use my remaining 4 days and will try to use the sick leave bank. If more time is required after that, would I want [sic] to use FMLA/OFLA so that any additional leave is protected leave." *Id.*

30. Dr. Freeman acknowledged Appellant's email on September 20, 2023, and notified her that as of September 22, 2023, Appellant would have exhausted all applicable paid leave. Dr. Freeman again provided instructions for how Appellant could apply for Paid Leave Oregon and the sick leave bank available under the collective bargaining agreement. Exh. D-6 at 18-20.

31. Beginning in September 2023, Appellant was in an unpaid status.

32. In early 2024, Multnomah County Circuit Court Judge Katharine von Ter Stegge granted summary judgment in favor of the District in the litigation filed against it by Appellant and her spouse alleging retaliation and discrimination claims. See Exh. D-8 at 1; Tr. 112: 1-5.

33. The collective bargaining agreement between the District and the Gresham-Barlow Education Association requires teachers who are on unpaid leave of any kind to submit to the human resources office by March 1 "[n]otification of intent to return to active employment the next school year or written request to extend the leave for the following school year." Exh. D-10 at 1.

34. The human resources office did not hear from Appellant by March 1 about her intent to return to work the following year or receive a written request for leave. Tr. 168:2-5; Tr. 173:1-6.

35. The District thereafter attempted to invite and negotiate Appellant's return to work. Tr. 112:6-18; 140:1-6.

36. In a memorandum dated May 20, 2024, Superintendent Hiu notified Appellant that Dr. Freeman had informed him that Appellant had declined to accept the proposed ADA accommodations and report to work. Superintendent Hiu notified Appellant of a virtual pretermination hearing scheduled for May 28, 2024. Exh. A-1 at 53.

37. On May 28, 2024, the District held the pretermination hearing. The District's purpose in holding the meeting was to determine, in light of the resolution of Appellant's litigation against the District, whether Appellant would be returning to work for the 2024-2025 school year.[3] Tr. 141:6-20. If Appellant accepted the accommodations, the District would return Appellant to work. Tr. 83:8-17.

38. At the May 28 meeting, through her attorney, Appellant explained that she was unsure of her employment status. Tr. 114:2-4; Tr. 134:13-18; Exh. D-7 at 1. The District decided to adjourn the pretermination hearing in light of Appellant's stated confusion about her employment status to provide time for Appellant to decide what she wanted to do. Tr. 114:2-9; Tr. 134:13-18; Tr. 140:2-15.

39. Appellant did not report to work on any workday during the 2023-2024 school year.

Events Related to the 2024-2025 School Year and Appellant's Dismissal

40. On June 3, 2024, the District asked Appellant to provide information about her intentions regarding the upcoming 2024-2025 school year. The District's email stated:

> "To correctly review your employment status, additional information is needed. Please provide me with the answers to the following questions:
>
> (1) Is it your intention to return to work for the 2024-2025 school year under the most recent accommodations offered as part of the ADA interactive process?
>
> (2) If not, has your medical condition changed? If your condition has changed, we need a current medical statement from your healthcare provider to consider additional accommodations that will suit your current condition." Exh. D-1 at 2; Tr. 117:1 to 118:3.[4]

The email directed Appellant to provide a response by June 11, 2024, and stated, "If no reply has been received by that date, the District will understand your position to be that you do not intend to return to work under the offered accommodations and have no updated medical information to provide. Accordingly, the District will understand you to be indicating your intent to be absent without approved leave, and termination proceedings will be reinstated." Exh. D-1 at 2; Tr. 117:1 to 118:3.

41. Appellant did not respond. Tr. 114:10-11; Tr. 118:4-5; Tr.126:5-17.

[3] The District had paused its inquiries into Appellant's concerns and intent to return to work while Appellant's litigation was ongoing.

[4] The excerpt of the June 3, 2024 email quoted in the August 8, 2024 notice of recommendation for dismissal (Exh. D-1) is "an exact copy of the email that was sent to [Appellant]." Tr. 117:22 to 118:3.

42. After the June 3 email, the District's legal counsel contacted Appellant's legal counsel, Noah Barish. Tr. 118:19 to 119:18. The District asked Mr. Barish to clarify Appellant's intentions and informed him that if the District had not received a response by the end of the week, the District would move forward with the dismissal process. Exh. D-1 at 2. Mr. Barish responded, "Ms. Martin has no additional information to provide to the District in response to your request for clarification about her intent." Exh. D-1 at 2; Tr. 119:6-18.

43. Accordingly, the District scheduled a second pretermination hearing for July 17, 2024. Exh. D-7 at 1. Before the meeting, Appellant informed the District that neither she nor any representative on her behalf would attend. Tr. 114:13-17.

44. On or about July 19, 2024, the Multnomah County Circuit Court entered a general judgment of dismissal in favor of Gresham-Barlow School District, Superintendent Hiu, and Principal Schmidt, and against Appellant and her husband, William Martin, in the case entitled *Laura Martin and William Martin v. Gresham-Barlow School District, et al.,* Multnomah County Circuit Court Case No. 22C21885. Exh. D-8 at 1.

45. After considering the situation and consulting with Chief of Operations John Koch, Superintendent Hiu decided to recommend to the school board that Appellant be dismissed. Exh. D-7 at 4-7; Tr. 115:6-8. In a letter dated August 8, 2024, Superintendent Hiu notified Appellant that he would recommend to the school board at its August 28, 2024 meeting that Appellant be dismissed on the grounds of neglect of duty and insubordination. The letter informed Appellant that she neglected the duty of "prompt and regular attendance." The District views teacher attendance as critical because it affects student instruction. Tr. 120:13-23. The letter stated that Appellant was "directed by District officials on multiple occasions to provide information concerning your employment status. You had a duty to be responsive to such requests so that the District could adequately plan for its staffing, both in 2023-24 and 2024-25." Exh. D-7 at 6.

46. The August 8 letter also stated that Appellant's refusal, in response to the August 29, 2023 letter, to either accept accommodations and return to work, or to request the offered unpaid leave

of absence for the 2023-2024 school year, constituted insubordination. The letter also alleged that Appellant's failure to clarify her employment status and intentions by June 11, 2024 in response to the June 3, 2024 letter constituted insubordination. Exh. D-7 at 7.

47. On August 28, 2024, the Gresham-Barlow School District Board considered Superintendent Hiu's recommendation that Appellant be dismissed from employment. The Board met via videoconference. Tr. 115:18-19. The hearing took place in public session at Appellant's request. Tr. 124:16-18; Exh. D-7 at 18. Chief of Operations Koch explained to the Board that the Superintendent's dismissal recommendation was based solely on Appellant's absence without approved leave during the 2023-2024 school year, continued absence without an approved leave, and failure to provide the District with any indication of when she would return to work. *Id.* The District's focus was on Appellant not coming to work in response to the District's offers of reasonable accommodation. Tr. 115:16-25.

48. Appellant's attorney, Noah Barish, asserted at the meeting that Appellant had received an email from Dr. Freeman on September 28, 2023 informing Appellant that she could (1) apply for FMLA/OFLA leave or Paid Leave Oregon; (2) she could request an unpaid leave; or (3) she could accept the accommodations and return to work. The letter informed Appellant that if it did not hear from Appellant, it would assume that she had chosen to take unpaid leave for 2023-2024, which, in Appellant's view, is precisely what happened. Exh. D-7 at 19. Mr. Barish contended that Appellant was on a protected unpaid leave for the 2023-2024 school year. Mr. Barish also asserted that the fact that the District began termination proceedings before the end of the school year indicated that the real reason for Appellant's termination was retaliation against Appellant because she had identified issues with a bond issued by the District and the resulting reconstruction of the high school. Mr. Barish also contended that Appellant was being terminated because she invoked her rights under the Americans With Disabilities Act to request accommodations for a disability. *Id.*

49. Appellant also addressed the Board during the meeting. She explained her fears about Principal Schmidt, her concerns about her room assignment in a construction zone related to her health

condition, the timing of an interactive process meeting, and the District's silence in response to her concerns about Superintendent Hiu. Appellant offered no indication that she was ready to come back to work with the accommodations that the District had offered. Tr. 125:19-22.

50. The Board asked questions of Chief of Operations Koch and Dr. Freeman. Board Chair Kris Howatt noted that the question of "bond fraud" raised by Appellant and her husband was not part of the consideration for the two statutory bases for dismissal: neglect of duty and insubordination. After discussion, the Board voted unanimously to accept the recommendation of Superintendent Hiu that Appellant be dismissed.

51. On August 29, 2024, Gresham-Barlow School District Board Chair Howatt sent Appellant a letter dismissing Appellant from employment, effective August 28, 2024, on the grounds of neglect of duty and insubordination. Exh. D-7 at 9.

CONCLUSIONS OF LAW

1. The District is a "fair dismissal district" under the Accountability for Schools for the 21st Century Law. Appellant is a "contract teacher" entitled to a hearing before this panel.

2. The factual allegation that Appellant did not notify the District about her intention to report to work after exhaustion of any approved leave during the 2023-2024 school year is true and substantiated.

3. The factual allegation that Appellant was on unapproved, unpaid leave for the 2023-2024 school year is true and substantiated.

4. The factual allegation that Appellant did not notify the District about whether she intended to report to work for the 2024-2025 school year is true and substantiated.

5. The true and substantiated facts are adequate to support the charge of neglect of duty as a ground for dismissal.

6. The true and substantiated facts are not adequate to support the charge of insubordination as a ground for dismissal.

7. The District's dismissal of Appellant was not arbitrary, unreasonable, or an excessive remedy within the meaning of ORS 342.905(6).

DISCUSSION

Applicable Legal Standard.

In Oregon, the permissible grounds for terminating a contract teacher are as follows:

(a) Inefficiency;

(b) Immorality;

(c) Insubordination;

(d) Neglect of duty, including duties specified by written rule;

(e) Physical or mental incapacity;

(f) Conviction of a felony or of a crime according to the provisions of ORS 342.143;

(g) Inadequate performance;

(h) Failure to comply with such reasonable requirements as the board may prescribe to show normal improvement and evidence of professional training and growth; or

(i) Any cause which constitutes grounds for the revocation of such contract teacher's teaching license.

ORS 342.865. At the conclusion of a hearing appealing a district's dismissal decision, the panel reviews the evidence pursuant to the legal standard set forth in ORS 342.905(6), which provides:

> The Fair Dismissal Appeals Board panel shall determine whether the facts relied upon to support the statutory grounds cited for dismissal or nonextension are true and substantiated. If the panel finds these facts true and substantiated, it shall then consider whether such facts, in light of all the circumstances and additional facts developed at the hearing that are relevant to the statutory standards in ORS 342.865(1), are adequate to justify the statutory grounds cited. In making such determination, the panel shall consider all reasonable written rules, policies and standards of performance adopted by the school district board unless it finds that such rules, policies, and standards have been so inconsistently applied as to amount to arbitrariness. The panel shall not reverse the dismissal or nonextension if it finds the facts relied upon are true and substantiated unless it determines, in light of all the evidence and for reasons stated with specificity in its findings and order, that the dismissal or nonextension was unreasonable, arbitrary, or clearly an excessive remedy.

ORS 342.905(6) (emphases added). The "degree of proof of all factual determinations by the panel shall be based on the preponderance of the evidence standard." OAR 586-030-0055(5). At the hearing, evidence of "a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs" is admissible. OAR 586-030-0055(1). Thus, ORS 342.905(6) creates a three-step review process this panel must follow:

> First, the [FDAB] panel determines whether the facts upon which the school board relied are true and substantiated. Second, the panel determines whether the facts found to be true and substantiated constitute a statutory basis for dismissal. Third, even if the facts constitute a statutory basis for dismissal, the panel may reverse the school board's dismissal decision if the decision nonetheless was 'unreasonable, arbitrary[,] or clearly an excessive remedy.'

Bergerson v. Salem-Keizer School District, 341 Or. 401, 412 (2006) (footnote omitted). If the panel determines "the facts are not true and substantiated, or even if true and substantiated, are not relevant or adequate to justify the statutory grounds cited by the district, the appellant shall be reinstated with any back pay that is awarded in the order." OAR 586-030-0070(3).

I. The True and Substantiated Facts Are Adequate to Justify the Statutory Ground of Neglect of Duty.

The panel concludes that the District established facts adequate to support the statutory ground of neglect of duty. The Fair Dismissal Appeals Board has defined neglect of duty to mean a teacher's failure to engage in conduct designed to bring about a performance of his or her responsibilities, either by engaging in "repeated failures to perform duties of relatively minor importance" or "a single instance of failure to perform a critical duty." *Meier v. Salem-Keizer School District*, FDA-13-01 at 30 (2013), *aff'd,* 284 Or. App. 497, 508-509 (2017), *rev den*, 362 Or. 175 (2017).

The panel concludes that the true and substantiated facts in this case are adequate to show that Appellant failed to perform the critical duty of reporting to work (unless on District-approved leave, such as legally protected medical leave or leave approved as a reasonable accommodation). The true and substantiated facts are also adequate to show that Appellant failed to perform the critical duty of communicating with the District about whether she intended to report to work. Appellant was aware of

these duties as an experienced licensed educator in Oregon and through the repeated requests from the District that she tell the District whether she intended to report for work.

It is fundamental that teachers are expected to report to work unless on approved leave. Teachers' reliable attendance is critical to planning for and providing continuous instruction to students. This duty is straightforward and critical. A teacher who fails to fulfill this duty during a school year can cause substantial interference with student supervision and instruction. In addition, teachers have a duty to communicate with their school about whether they will be at work. School administrators need to know whether a particular teacher will report to work so that a substitute teacher can be put in place. In addition to this general duty, in the District, during the spring, teachers on unpaid leave are expected to let their school administrators know whether they will be returning during the following school year. That duty is set forth in the collective bargaining agreement, which provides that a teacher on unpaid leave of any kind must notify the District by March 1 of intent to return to active employment the next school year or must ask to extend the leave during the following school year.

The panel finds, without difficulty, that Appellant neglected both these duties. To begin, at the beginning of the 2023-2024 school year, after an interactive process as required by the Americans With Disabilities Act and parallel state law, Appellant unambiguously declined the multiple workplace modifications offered by the District, such as an air quality monitor or purifier and the ability to retain Room 500 as her classroom. *See* Exh. D-6 at 18. The District also offered Appellant an unpaid leave as an accommodation, and Appellant declined that accommodation. Exh. D-6 at 9. Accordingly, after she had exhausted all legally protected medical leave, Appellant was absent without leave or approval for the 2023-2024 school year. By failing to report to work after declining all the District's offered accommodations, Appellant neglected the critical duty of reliable attendance.[5]

[5] To the extent that Appellant contends that her absence was somehow excused because the District was obligated to grant her the accommodations she preferred, Appellant is incorrect. It is well-accepted that an employer is not required to grant the employee's preferred accommodations; it is required only to provide reasonable accommodations. *Zivkovic v. Southern California Edison Co*., 302 F3d 1080, 1089 (2002) ("[a]n 'employer is not obligated to provide an employee the accommodation he requests or prefers, the employer need only provide some reasonable accommodation.'") (quoting *E.E.O.C. v. Yellow Freight Sys. Inc*., 253 F.3d 943, 951 (7th Cir 2001) (en banc) (citation and internal quotation marks

In reaching this conclusion, the panel is not persuaded by the argument advanced by Appellant's counsel to the school board that the District had, in fact, placed Appellant on an approved leave for the 2023-2024 school year. It is accurate that, on September 8, 2023, the District informed Appellant that if it did not hear from her by September 12, 2023, it would assume that Appellant had chosen to enter into unpaid leave for the 2023-2024 school year. *See* Exh. D-6 at 13. However, after that, on September 18, 2023, Appellant clearly declined an unpaid leave, informing the District that if the accommodations offered were the District's "final word, then no, I cannot accept them." Exh. D-6 at 18. Later, on September 20, 2023, the District explained to Appellant that she would exhaust all her paid leave on September 22, 2023. Exh. D-16 at 18. Despite having clearly been told that she had no paid leave to cover her absence, and despite having clearly and unambiguously declined the offer of unpaid leave as an accommodation, Appellant did not report to work for the remainder of the 2023-2024 school year. That absence was not, as Appellant argued to the school board, an approved leave. Appellant was offered an approved leave and expressly declined it.

This panel also finds, without difficulty, that Appellant neglected the duty of informing school administrators about whether she intended to report to work. There is no question that Appellant was well-aware that she needed to tell the District whether she would return to work after an absence. She received multiple communications over two school years emphasizing the importance of informing the District of her intentions about reporting to work. *See* Exh. D-5 at 24; D-6 at 5; D-6 at 13; D-1 at 2; Tr. 117:1 to 118:3. Despite these communications, Appellant did not notify the District by March 1, 2024 whether she would report to work for the 2024-2025 school year. Tr. 168:2-5; Tr. 173:1-6. Likewise, when directly asked by the District in June 2024 about whether she intended to return to work for the 2024-2025 school year, she declined to respond, communicating through her attorney only that she

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omitted)). Here, the District offered reasonable workplace modifications, such as an air purifier and the classroom Appellant preferred, and, as an alternative, an unpaid leave for the 2023-2024 school year. An unpaid leave may be a reasonable accommodation. *See, e.g., Nunes v. Wal-Mart Stores, Inc*., 164 F3d 1243, 1247 (9th Cir 1999) ("[u]npaid medical leave may be a reasonable accommodation under the ADA"); 29 CFR pt. 1630 app. § 1630.2(o) (accommodations include permitting the use of accrued paid leave or providing additional unpaid leave); U.S. Equal Employment Opportunity Commission, "Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA" ("employer does not have to provide paid leave beyond that which is provided to similarly situated employees"). Appellant rejected out of hand the District's offer of an approved leave. Appellant's choice to decline to report to work rather than accept the approved leave offered by the District meant that Appellant was absent without approval.

had no information to provide. Exh. D-1 at 2; Tr. 119:6-18. By failing to tell the District whether she would return to work for the 2024-2025 school year, Appellant neglected the duty of keeping the District informed about whether she would come to work—information the District needed to ensure that it had adequate teacher staffing to instruct its students.

The panel is not persuaded that Appellant's concerns, first stated in 2020, about the District's use of funds from a bond issuance played any role in the District's decision to end Appellant's employment. It is clear that Appellant was simply absent for the 2023-2024 school year. It is likewise clear that Appellant simply failed to tell the District whether she would return for the 2024-2025 school year. There is nothing in the record to indicate that the District's dismissal decision was motivated by anything other than Appellant's absence in 2023-2024 without approved leave and failure to tell the District whether she would return in 2024-2025.

In keeping with previous FDAB cases involving neglect of duty, the panel examines the degree of intentionality or "fault" on the part of the teacher engaged in problematic conduct. *See Wilson v. Grants Pass School District,* FDA 04-07 at 10 (2008), *citing Enfield v. Salem-Keizer School District*, FDA 91-1 (1992), *aff'd without opinion*, 118 Or. App. 162 (1993), *rev den.* 316 Or. 142 (1993). Many neglect of duty cases concern an underlying act that involves some type of intentionality or wrongdoing, designed to injure or harm someone else. *See, e.g*. *Kristen Kibbee v. Bethel School District*, FDA 13-09 (2013) (dismissal of administrator for neglect of duty upheld where administrator with prior history of discipline, grabbed a student's forearm in frustration and then initially lied to her supervisor about the incident); *Thomas v. Cascade Union High School No. 5*, FDA 84-7 (1987) (dismissal of teacher for neglect of duty upheld, where the teacher reacted to a student who had thrown a ball at her by intentionally kicking the student in anger); *Thyfault v. Pendleton School District*, FDA 90-4 (1992) (dismissal of teacher for neglect of duty upheld, where teacher forcefully spanked, grabbed and pulled student in anger); *Webster v. Columbia Education School District,* FDA 96-1 (1998) (neglect of duty upheld for teacher who purchased narcotic drugs on campus and then lied);

Bergerson v. Salem-Keizer School Distr., 194 Or. App. 301, 324 (2004) (neglect of duty found where educator intentionally drove her van into estranged husband's truck).

Here, the panel concludes that the District met its burden to prove Appellant's intentionality or "fault." The panel is persuaded that Appellant was aware of the importance of reporting to work. The duty of reporting to work (except to the extent the employer has approved a leave) is a fundamental duty. The instruction of students depends, in the very first instance, on a teacher's presence in the classroom. There is also no serious question that Appellant was aware of the duty *to tell the District* whether she intended to report to work. She received multiple communications from the District about the importance of telling the District whether she would report to work for the 2023-2024 school year and, subsequently, whether she would work during the 2024-2025 school year.

Despite knowing these duties, Appellant disregarded them. At the outset of the 2023-2024 school year, the District clearly communicated the accommodations that it could offer and those that it could not. The District also offered an unpaid leave of absence as an accommodation. Appellant continued to advocate that the District grant all her requested accommodations, which certainly was her right. On September 20, 2023, the District told Appellant that she would exhaust all applicable leave as of September 22, 2023, and explained her options for taking FMLA/OFLA leave, taking leave under the Paid Leave Oregon plan, and requesting sick leave from the sick leave bank under the collective bargaining agreement. At that point, Appellant knew that the District had offered all the accommodations it would offer. Ultimately, Appellant clearly and unambiguously rejected unpaid leave as an accommodation and simply chose not to come to work. The panel concludes that Appellant was aware that after the exhaustion of any approved leaves, such as FMLA/OFLA leave or leave granted under the collective bargaining agreement, she was absent without approved leave. Appellant's failure to report to work in the face of this knowledge rises to the level of intentionality or fault required by FDAB's caselaw.

The panel also finds that Appellant's lack of communication at the end of the 2023-2024 school year about whether she would report to work the next school year also demonstrates sufficient

intentionality or fault. By June 2024, the District had adjourned the pretermination meeting in May 2024 in response to Appellant's stated confusion about her employment status. That reprieve gave Appellant time to consider whether she wanted to report to work for the 2024-2025 school year. Then, on June 3, 2024, the District asked Appellant whether she intended to return to work for the 2024-2025 school year. Appellant failed to respond and, when the District contacted her attorney, her attorney responded only that Appellant had no additional information to provide. On this record, the panel concludes that Appellant made a knowing choice not to tell the District whether she wanted to return to work for the 2024-2025 school year. That choice meets the standard for intentionality or fault required by FDAB's caselaw.

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

II. The True and Substantiated Facts Are Not Adequate to Justify the Statutory Ground of Insubordination.

Insubordination within the meaning of ORS 342.865(1)(c) means "disobedience of a direct order or unwillingness to submit to authority," and must be accompanied by a defiant intent or attitude on the part of the teacher. *Bellairs v. Beaverton Sch. District*, 206 Or App 186, 199, 136 P3d 93 (2006). To establish insubordination, there must be credible evidence that the District imposed a lawful order or directive, that it clearly communicated that order or directive, and that the teacher willfully refused to obey the order. *Sherman v. Multnomah Education Service Dist*., FDA-95-4, 22-23 (1996).

The District relies on two purported directives—its communication on August 29, 2023 and its communication on June 3, 2024. For the following reasons, the panel concludes that Appellant's conduct in response to these communications does not rise to the level of insubordination.

The panel concludes that the August 29, 2023 communication was not a direct order. Human Resources Specialist Thelen's email stated, "We are *requesting* that you inform the District by replying to this email of your intent to do one of the following by 5:00 p.m. on September 5, 2023: (1)

Accept the accommodations list as presented and report to work; or (2) Accept the accommodation of full-time, unpaid leave for the 2023-2024 school year; or (3) Reply to the email to offer questions or clarifications regarding the listed accommodations." Exh. D-6 at 5 (emphasis added). The email also stated that if Appellant did not respond by the stated deadline, "the district will assume you have chosen to enter into unpaid leave for the 2023-24 school year." Exh. D-6 at 5. This communication, properly understood, was a request. It was the District's attempt to understand what Appellant wanted as part of the interactive process. Although it was a directive to the extent it sought certain conduct from Appellant (*e.g.*, a response by a stated deadline), it was not a directive to engage in or refrain from engaging in particular conduct. Indeed, by the very terms of the email, the District told Appellant that if she did not respond by the deadline, the District would assume that Appellant wanted unpaid leave. On the facts in this particular case, the panel concludes that the August 29, 2023 communication was the District's attempt to induce Appellant to disclose whether she wanted unpaid leave or workplace modifications, such as the air purifier and assignment to a particular classroom. It did not constitute an order or directive sufficient to support dismissal on the basis of insubordination.

Likewise, the District's June 3, 2024 communication also requested that Appellant provide the District with a response to specific questions by a deadline. Unlike the August 29, 2023 communication, this communication *did* refer to dismissal. The District informed Appellant that if she did not reply by the deadline, the District "will understand you to be indicating your intent to be absent without approved leave, and termination proceedings will be reinstated." Exh. D-1 at 2. This communication, properly understood, was *notice* to Appellant, not a directive. With this communication, the District was informing Appellant that it would proceed to separate her employment if she did not let the District know whether she wanted the accommodations it had offered or, if her medical condition had changed, would cooperate with the District so that it could consider additional accommodations. This communication, like the August 29, 2023 communication, did not constitute an order or directive sufficient to support dismissal on the basis of insubordination. It was notice.

In addition, the panel finds that the District did not meet its burden to prove disobedience by Appellant or unwillingness to submit to authority. In response to Human Resource Specialist Noelle Thelen's August 29, 2023 email, Appellant did respond by September 5, 2023 at 5:00 p.m. She responded at 3:06 p.m., clearly stating that she did not "wish to take unpaid leave for another year." Exh. D-6 at 9. She also asked questions about the accommodations the District had declined. Appellant was merely advocating for herself. Although the District ultimately did not wish to continue to engage with Appellant about the requested accommodations the District had declined, Appellant questioning the District's decision was not unwillingness to submit to authority.

The panel also finds that Appellant's silence in response to the June 3, 2024 communication was not disobedience or unwillingness to submit to authority. By its own terms, the communication notified Appellant that if she did not respond, the District would understand her silence to be communicating that she intended to be absent without approved leave. In other words, the District conveyed that her conduct (silence) would be interpreted to have a specific meaning. Appellant chose to be silent, conveying that meaning. Appellant made a choice to communicate with the District through her silence. On this record, the panel does not interpret Appellant's decision to be silent—which resulted in the separation of her employment—as unwillingness to submit to authority, Rather, Appellant simply chose not to return to work with the accommodations offered by the District.

III. The Dismissal Decision Was Not Unreasonable, Arbitrary, or Clearly an Excessive Remedy.

Because the panel finds that the true and substantiated facts are adequate to support the statutory ground of neglect of duty, the panel next considers whether the dismissal was arbitrary, unreasonable, or clearly an excessive remedy. If so, the panel may reverse the dismissal for reasons stated with specificity in this opinion. ORS 342.905(6). When the facts justify the grounds stated for dismissal, however, the panel may engage in "only a deferential review" of the school board's decision to dismiss. *Ross v. Springfield Sch. Dist*., 294 Or. 357, 363 (1982). The panel may not set aside a dismissal unless it can say, as a matter of law, that no reasonable school board would have found the

relevant facts sufficient for dismissal. *Bergerson*, 194 Or. App. At 313, *aff'd*, 341 Or. 401 (2006); *Lincoln County Sch. Dist. v. Mayer*, 39 Or. App. 99 (1979).

Here, the panel does not conclude that the dismissal was unreasonable, arbitrary, or clearly an excessive remedy. As discussed above, Appellant was expected to report to work (unless on approved leave) and to let the District know whether and when she would report to work, two critical duties that she neglected to perform on more than one occasion. Ultimately, in June 2024, Appellant faced the choice of whether or not to return to work for the 2024-2025 school year with the accommodations offered by the District. Appellant chose not to return. Based on the evidence submitted to the panel, we cannot say that no reasonable school board would have found the facts sufficient for dismissal.

The panel understands Appellant to argue that her dismissal was unreasonable, arbitrary, and/or clearly an excessive remedy because, according to Appellant, the real reason for her termination was that she had expressed concerns about the way the District used funds from a bond issuance. Appellant refers to the District's choices as "bond fraud." The problem with Appellant's argument is that she presented no evidence in support of it. To the contrary, the record is clear that the District told Appellant on June 3, 2024 that if she did not let the District know that she intended to return to work for the 2024-2025 school year, it would interpret her silence as communicating that she did "not intend to return to work under the offered accommodations and ha[d] no updated information to provide." Exh. D-1 at 2. Appellant chose to be silent. That silence resulted in the District dismissing Appellant. There is no evidence in the record that in any way ties or connects Appellant's dismissal to her expressed concerns about "bond fraud." Consequently, the panel does not find that her dismissal was unreasonable, arbitrary, or clearly an excessive remedy.

ORDER

The appeal is dismissed.

DATED this 23rd day of April 2025

/s/ Robert Sconce
Robert Sconce, Panel Chair

DATED this 23rd day of April 2025

/s/ Tory McVay
Tory McVay, Panel Member

DATED this 23rd day of April 2025

/s/ Jim Westrick
Jim Westrick, Panel Member

Notice: Under ORS 342.905(9), this order may be appealed in the manner provided for in ORS 183.480, and any appeal must be filed within 60 days from the date of service of this order.

CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2025, I served a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** by email:

Laura Martin P.O. Box 413 Eagle Creek, OR 97022 Email: lem6870@yahoo.com	[ ] [ ] [ ] [ ] [X]	HAND DELIVERY U.S. MAIL OVERNIGHT MAIL TELECOPY (FAX) ELECTRONICALLY
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