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DEPARTMENT OF JUSTICE  
GENERAL COUNSEL DIVISION

January 16, 2013

**Via U.S. Mail and Email**

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Re: In the Matter of the Appeal of Suzanne Lynch v. Klamath County School District  
FDA# 12-12  
DOJ File No. 581-010-GL0362-12

Dear Counsel:

Enclosed is the Board's Findings of Fact, Conclusions of Law and Order in the above-captioned matter.

Sincerely,

  
Tom C. Lenox  
Assistant Attorney General  
Labor & Employment Section

TCL:clr/DM3929884  
Enclosure  
e w encl: Cynthia Hunt, ODE (email)



1 Based on the parties' submissions and written arguments, and for the reasons that follow, the  
2 panel decides that Appellant was not "dismissed" or "nonextended" as contemplated by ORS 342.905  
3 and, consequently, the Fair Dismissal Appeals Board has no jurisdiction in this case.<sup>2/</sup>

4 **FINDINGS OF FACT<sup>3/</sup>**

5 1. The parties did not provide evidence that Appellant was a contract teacher  
6 employed by the District, nor did any party contend that Appellant was not a contract teacher.  
7 The fact is presumed for purposes of this Order.

8 2. The District did not give Appellant a written dismissal notice pursuant to  
9 ORS 342.895(3)(a), nor did the District school board take any type of action to dismiss  
10 Appellant pursuant to ORS 342.895(3)(b). The parties do not dispute that there is no dismissal  
11 notice or school board action to dismiss Appellant pursuant to these statutes.

12 3. The parties do not dispute that both Appellant and Scott Lynch, Appellant's  
13 husband during the events giving rise to this appeal, were employed by the District and  
14 scheduled to return to work at Gilchrist School for the 2012-13 school year. The parties agree  
15 that Mr. Lynch was employed by the District as a special education paraprofessional.

16 4. On or about August 15, 2012, Appellant obtained a Restraining Order against  
17 Mr. Lynch, which prohibited him from entering the area within 1000 feet of Gilchrist School.<sup>4/</sup>

18 5. On or about August 16, 2012, Appellant met with Kevin McDaniel, principal of  
19 Gilchrest School, and informed him about the Restraining Order.<sup>5/</sup>

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21 ///

22  
23 \_\_\_\_\_  
24 <sup>2</sup> FDAB's limited jurisdiction over school district dismissal and nonextension actions does not  
25 preclude Appellant from seeking recourse based on her allegations through other forums, a subject upon  
26 which this panel expresses no opinion.

<sup>3</sup> The panel makes these findings of fact based on the documents and affidavits submitted with the  
parties' briefs.

<sup>4</sup> Attachment to Appellant's Opposition to Respondent's Motion, pp. 45 of 124.

<sup>5</sup> Affidavit of Appellant, p. 4, ¶ 22; Affidavit of McDaniel, p. 2, lines 2-7.

1           6.       On or about August 21, 2012, Appellant contacted Ken Volante, Uniserve  
2 Consultant for the Oregon Education Association, regarding her concerns about returning to  
3 work when Mr. Lynch was also employed there.<sup>6/</sup>

4           7.       On August 23, 2012, Lynch told McDaniel “that she could not return to work if  
5 Scott still worked there because of a lack of personal safety.”<sup>7/</sup>

6           8.       On August 23, 2012, Mr. Volante emailed Mark Greif stating:

7                   Ms. Clark does not intend to return to work. KCEA<sup>8/</sup> would like to  
8 negotiate a resignation agreement on her behalf that she would also sign if  
KCSD<sup>9/</sup> were so amenable to:

- 9                   • Fiscal and disciplinary amnesty for use of District cell phone  
10                   • Health insurance through December 2012  
11                   • Resignation effective end of 2011-12 SY  
12                   • Neutral reference  
13                   • No contest unemployment

14                   This would avoid any potential issues involved with the restraining (sic)<sup>10/</sup>  
15 as applied to the Gilchrist work location. I am in a Staff Meeting at OEA HQ and  
16 would like to know your thoughts about this.<sup>11/</sup>

17           9.       On August 23, 2012, Mr. Greif responded to Mr. Volante’s earlier email stating:

18                   First, I believe you are referring to Suzanne Lynch, not Clark. We as a  
19 District value Suzanne’s work in our District and have no desire to have  
20 her leave our employ. Thus, there is no motivation on our part to offer  
21 incentives for a settlement. It is our expectation that Suzanne will be at  
22 work on Monday per her contract. Her failure to show up to work will be  
23 grounds for potential disciplinary action.<sup>12/</sup>

24 ///

25 ///

26                   <sup>6</sup> Affidavit of Appellant, p. 4, ¶ 33; Affidavit of Ken Volante, pp. 1-2, ¶ 4.

<sup>7</sup> Affidavit of Appellant, p. 4, ¶ 34.

<sup>8</sup> “KCEA” refers to the Klamath County Education Association.

<sup>9</sup> “KCSD” refers to Klamath County School District.

<sup>10</sup> Based on the facts outlined above, it is apparent Mr. Volante was referring to the Restraining Order against Mr. Lynch.

<sup>11</sup> Exhibit 2 of Respondent’s Motion.

<sup>12</sup> *Id.*

1           10.     At some point after Mr. Greif's August 23, 2012, email to Mr. Volante, Appellant  
2     communicated to Mr. Volante an intention to resign from employment with the District. She also  
3     communicated to Mr. Volante her desire that the District confirm her resignation in writing.<sup>13/</sup>

4           11.     On August 24, 2012, Mr. Volante responded to Mr. Greif's August 23 email,  
5     stating:

6                     Yes, Lynch, sorry for the slip.

7                     We request that she be released from her contract given the duress and  
8                     danger she has advised me of. She has advised me that she is waiting for a  
9                     reimbursement for a class from the summer so I expect that those monies  
10                    can be used to absorb the cell phone charges. She further advises that  
11                    there is a [paraprofessional] named Mary who is close to Special Ed  
12                    Licensure that may be in the position to take over her duties.<sup>14/</sup>

11           12.     On August 27, 2012, Mr. Greif responded by email to Mr. Volante's August 24  
12     request that Appellant be released from her contract, by stating:

13                    I will accept Suzanne Lynch's resignation based on your email today, your  
14                    email dated August 23, and her verbal resignation to her principal, Kevin  
15                    McDaniel on August 23. Her effective date of resignation will be  
16                    August 27, 2012. I will commence resignation proceedings and Suzanne  
17                    will soon be receiving information pertaining to medical insurance and  
18                    COBRA.<sup>15/</sup>

17           13.     On September 6, 2012, Mr. Volante emailed Mr. Greif, stating in pertinent part:

18                    I write to you regarding Ms. Lynch and her status. As we  
19                    discussed before, Ms. Lynch, in response to the potential danger inherent  
20                    in the restraining order against her husband (also employed at Gilchrist)  
21                    wished, at that time to resign. Subsequent to follow-up discussions with  
22                    her and in consultation with legal counsel we request that the resignation  
23                    be moved to an unpaid leave of absence under FMLA, DVHSAS Act (see  
24                    below) and/or under the Collective Bargaining Agreement.

22                    The reason for this request is that Ms. Lynch was under extreme  
23                    duress at the time. We hereby assert her rights under the Protections  
24                    because of Domestic Violence, Harassment, Sexual Assault or Stalking  
25                    Act.<sup>16/</sup>

25                    <sup>13</sup> Affidavit of Appellant, p. 4, ¶ 36.

26                    <sup>14</sup> Exhibit 3 of Respondent's Motion.

<sup>15</sup> *Id.*

<sup>16</sup> Attachment to Appellant's Opposition to Respondent's Motion, p. 28 of 124.



1 For the reasons that follow, this panel finds (1) that FDAB has the inherent authority to  
2 review the circumstances surrounding an alleged resignation and/or rescission of a resignation to  
3 address preliminary motions challenging the Board's jurisdiction, and (2) FDAB does not have  
4 jurisdiction over alleged constructive discharge claims; therefore, it is not necessary for the panel  
5 to reach a conclusion about whether the circumstances surrounding Appellant's resignation  
6 constituted a constructive discharge. The panel further finds that in this case, Appellant resigned  
7 and the circumstances surrounding the District's decision not to accept her attempted rescission  
8 did not constitute a "dismissal" or "nonextension" under Fair Dismissal Law. Consequently,  
9 FDAB does not have jurisdiction over this matter.

10 **1. FDAB has the inherent authority to consider the circumstances surrounding**  
11 **an alleged resignation and/or rescission of the resignation to determine**  
12 **jurisdiction.**

13 This panel finds that FDAB has the inherent authority to review the circumstances  
14 surrounding an alleged resignation and/or rescission of a resignation to address preliminary  
15 motions challenging the Board's jurisdiction.

16 OAR 586-030-0025, "Preliminary Matters," establishes that FDAB has authority to  
17 consider preliminary motions challenging the Board's jurisdiction. Where a party files a motion  
18 to dismiss for lack of jurisdiction under OAR 586-030-0025(1) arguing that appellant resigned,  
19 the panel must determine whether the circumstances surrounding the resignation constituted a  
20 "dismissal" or "nonextension" under Fair Dismissal statutes. *See, e.g., Pierce v. Douglas Sch.*  
21 *Dist. No. 4*, 297 Or 363, 686 P2d 332 (1984); *Hardy v. Baker Sch. Dist.*, FDA-12-05 (2012);  
22 *Gilman v. Medford Sch. Dist.*, FDA-10-03 (2010); *Zellner v. Forest Grove Sch. Dist.*, FDA-05-  
23 01 (2005). Where the panel is able to determine that a resignation occurred, it is well-established  
24 that FDAB lacks jurisdiction to hear the appeal. *Pierce*, 297 Or at 365, 374, 686 P2d at 339;  
25 *Hardy*, FDA-12-05 at 3; *Gilman*, FDA-10-03 at 4; *Zellner*, FDA-05-01 at 1, 5. This is because a  
26 resignation is not a "dismissal" or "nonextension" under Fair Dismissal law. *Pierce*, 297 Or at

1 365, 686 P2d at 333. By logical extension, FDAB also has authority to consider whether the  
2 circumstances surrounding a District's decision not to accept a teacher's request to rescind a  
3 resignation constitutes a "dismissal" or "nonextension" under Fair Dismissal Law to determine  
4 its jurisdiction over the case.

5 **2. Appellant effectively resigned from employment with the District.**

6 This panel finds that based on the undisputed facts in this case, Appellant resigned from  
7 employment with the District. The Oregon Supreme Court in *Pierce v. Douglas School District*  
8 *No. 4* acknowledged that the contractual relationship between a school district and a teacher can  
9 be terminated (other than by dismissal or nonextension) in four ways:

- 10 1. A teacher could resign by giving the notice required by ORS 342.553(1)  
11 \* \* \*
- 12 2. A teacher could resign (or quit or leave) without giving the notice required  
13 by the statute, risking decertification and possibly other legal actions.
- 14 3. The board could terminate the contract teacher due to "sickness or other  
15 unavoidable circumstances \* \* \*" ORS 342.545(1). [or]
- 16 4. The contract could terminate by mutual agreement. ORS 342.545(2).

17 297 Or at 372, 686 P2d at 337-38.

18 A teacher may resign by oral or written communication showing evidence of an intent to  
19 terminate the employment relationship or not return to work. *Pierce*, 297 Or at 371, 686 P2d at  
20 337; *Zellner*, FDA-05-01 at 5. Despite ORS 342.553(1), and related district policies requiring  
21 60-days written notice prior to resigning, a teacher may, nonetheless, resign and stop working at  
22 any time. *Pierce*, 297 Or at 371, 686 P2d at 337; *Gilman*, FDA-10-03 at 3; *Zellner*, FDA-05-01  
23 at 5. A teacher's resignation is not required to take any particular form or use any specific words  
24 to be valid. *Zellner*, FDA-05-01 at 6, 9. Further, there is no requirement that a school board or  
25 school official accept a resignation for the resignation to be valid under the law. *Pierce*, 297 Or  
26 at 371, 686 P2d at 337; *Gilman*, FDA-10-03 at 4. Even though an acceptance is not required to  
make a resignation effective, a school district superintendent, or other administrator with

1 authority to accept resignations on behalf of the district, can both accept and act upon a teacher's  
2 communicated resignation. *See Pierce*, 297 Or at 373, 686 P2d at 338; *Zellner*, FDA-05-01 at  
3 10. A school district is not obligated to wait until the end of the 60-day notice period to accept  
4 and take appropriate action to fill the vacancy created by a teacher resignation. *See Pierce*, 297  
5 Or at 373, 686 P2d at 338; *Zellner*, FDA-05-01 at 10.

6 In considering the present motion, it is important to consider the Oregon Supreme Court's  
7 decision in *Pierce v. Douglas School District No. 4* and the procedural history of that case. In  
8 *Pierce*, a teacher provided a written notice of resignation, but offered to work during the 60-day  
9 notice period. 60 Or App 285, 287, 686 P2d 243, 244 (1982). Instead of requiring the teacher to  
10 work the additional 60 days, the superintendent accepted her resignation immediately and then  
11 employed a replacement teacher the same day. *Id.*, 686 P2d at 244-45. Three days later, the  
12 teacher attempted to rescind her resignation. *Id.* at 288, 686 P2d at 245. The superintendent  
13 declined to accept the teacher's attempt to rescind her resignation because the teacher's  
14 resignation had already been accepted and relied upon in hiring a replacement. *Id.*, 686 P2d at  
15 245. The school board later approved and ratified the resignation at its next scheduled meeting.  
16 *Id.*, 686 P2d at 245.

17 On appeal to FDAB, the teacher argued that the school board's action in ratifying her  
18 resignation despite her attempted rescission constituted a "dismissal" under Fair Dismissal Law  
19 because she attempted to rescind her resignation prior to the school board's official action. *Id.*,  
20 686 P2d at 245. FDAB dismissed the appeal, finding the district did not "dismiss" or  
21 "nonextend" the teacher; rather she resigned, and thus, FDAB lacked jurisdiction to consider the  
22 case. *Id.*, 686 P2d at 245. The teacher appealed to the Oregon Court of Appeals.

23 The Court of Appeals rejected FDAB's reasoning. The Court of Appeals held that in the  
24 context of ORS 342.553(1), the teacher's initial notice of resignation was "an offer" to resign  
25 that could only be officially accepted by the school board. *Id.* at 290-91, 686 P2d at 246-47.  
26 Thus, the court reasoned that because the teacher's notice was not "immediately effective," she

1 could rescind it prior to school board action. *Id.* at 290-91, 686 P2d at 246. Therefore the court  
2 concluded that the district's refusal to permit petitioner to fulfill her contractual duty to work  
3 during the 60-day notice period required under ORS 342.553(1) constituted a "de facto"  
4 dismissal over which FDAB had jurisdiction. *Id.* at 291, 686 P2d at 247. Both parties appealed  
5 to the Oregon Supreme Court.

6 The Oregon Supreme Court reversed the Court of Appeals, holding that a teacher has the  
7 power to quit at any time, regardless of the consequences that may flow from the failure to  
8 provide 60-day notice under ORS 342.553(1). 297 Or at 371, 686 P2d at 337. The Court held  
9 that there was no requirement that the district accept a teacher's resignation for the resignation to  
10 be valid under the law. *Id.*, 686 P2d at 337. Consistent with the Court's holding that the teacher  
11 resigned, the Court also held that the superintendent's letter accepting the resignation did not  
12 constitute a "dismissal." *Id.* at 373, 686 P2d at 338. The district, through its chief administrative  
13 officer, relied upon and acted upon the resignation. *Id.*, 686 P2d at 338. Because the teacher  
14 was not "dismissed," under the facts of the case, the Court ruled that FDAB did not have  
15 jurisdiction to consider the matter: "The court concludes that Pierce was not dismissed, which  
16 ruling precludes FDAB jurisdiction." *Id.* at 365, 374, 686 P2d at 333, 339.

17 After the *Pierce* decision, FDAB considered a similar fact pattern in *Zellner v. Forest*  
18 *Grove School District*. FDA-05-01. There, appellant informed the assistant superintendent by  
19 telephone that he would not be returning to work and wanted to retrieve his personal possessions  
20 and return his keys to the school. *Id.* at 3. Later that same day, the district's attorney informed  
21 appellant's attorney that appellant indicated he had no intention of returning to work. *Id.* at 3-4.  
22 About a month later, the district posted a job announcement for appellant's vacant position.  
23 *Id.* at 4. After the district posted the job announcement, appellant, through his attorney, sent the  
24 district a letter stating appellant would return to work on a certain date. *Id.* The district,  
25 however, did not agree to reinstate appellant, asserting that he had resigned his position. *Id.*  
26 Appellant appealed to FDAB.

1 In response to the district's motion to dismiss for lack of jurisdiction, the panel found that  
2 appellant's oral communications and actions indicated an intention not to return to work and thus  
3 constituted a resignation. *Id.* at 6. Following the holding in *Pierce*, the panel further found that  
4 neither ORS 342.553(1), "Discipline for resigning without providing required notice," nor the  
5 district's policy that required a written resignation precluded appellant's oral resignation. *Id.* at  
6 9. The panel noted that in *Pierce* the Oregon Supreme Court specifically held that a contractual  
7 relationship between the district and an employee may be terminated without giving the notice  
8 required under ORS 342.553. *Id.* The panel also held that a district policy requiring a written  
9 resignation did not prevent the district from taking appropriate actions to fill the vacant position  
10 when the employee did not provide written and/or sufficient notice of his resignation. *Id.*

11 Like the facts in *Pierce* and *Zellner*, in the present case, the undisputed facts show that  
12 Appellant communicated an intent to terminate her employment with the District as well as her  
13 intent not to return to work. While the facts leading up to the key communications between  
14 Appellant and Appellant's union representative and the District provide context, they are largely  
15 inconsequential for purposes of answering the jurisdictional question presented by the present  
16 motion. These background facts included in this panel's Findings of Fact include that Appellant  
17 and her husband both worked at Gilchrist School; Appellant had obtained a Restraining Order  
18 against her husband restricting his access to the school; Appellant informed the District about the  
19 Restraining Order; and Appellant contacted her union representative regarding her concerns  
20 about returning to Gilchrist School if her husband was still working there. With this background,  
21 the key communications relevant to the disposition of this motion began on August 23, 2012.

22 On August 23, 2012, Lynch told McDaniel, her principal, "that she could not return to  
23 work if Scott still worked there because of a lack of personal safety." The same day, Volante  
24 emailed Greif, indicating that Appellant *did not intend to return to work* and requesting to  
25 negotiate a resignation agreement on Appellant's behalf with a resignation effective at the end of  
26 the 2011-12 school year (the previous school year). After the District declined to enter into

1 resignation negotiations, Volante emailed Greif on August 24, requesting that Appellant *be*  
2 *released from her contract*. In the same email, Volante indicated that Appellant advised him that  
3 charges from her personal use of the District's cell phone could be offset by money the District  
4 owed her for a summer class. He also indicated that Appellant advised him that there was a  
5 paraprofessional close to Special Education Licensure that could take over her duties. Appellant  
6 does not argue, nor does she offer evidence indicating that she did not request that Volante  
7 communicate with the District on her behalf or that Volante's communications were inconsistent  
8 with her requests.

9 Appellant admits that on or about August 27, 2012, she told Volante that she intended to  
10 resign given that she felt she had no other alternatives and conveyed she wanted any resignation  
11 to be confirmed in writing. The same day, Greif responded to Volante's August 24 email  
12 accepting Appellant's resignation *effective August 27* on the basis of (1) Volante's August 24  
13 email, (2) his August 23 email noting Appellant did not intend to return to work, and (3) her oral  
14 resignation to McDaniel.<sup>19/</sup>

15 Appellant offers no evidence that subsequent to Greif's August 27 email, and prior to  
16 Volante's September 6 email nine days later attempting to rescind Appellant's resignation, she or  
17 Volante sought to challenge the understanding that Appellant had resigned effective August 27.  
18 Furthermore, Volante's September 6 email acknowledged that due to the potential danger  
19 inherent in the restraining order against her husband, Appellant previously *wished to resign*.  
20 This communication from Volante attempting to rescind what he acknowledged was Appellant's  
21 earlier resignation only confirms that all parties involved considered Appellant's previous  
22 communications to the District as a resignation.<sup>20/</sup>

23 <sup>19</sup> The evidence is inclusive that Appellant orally resigned to Mr. McDaniel, even though Mr.  
24 Greif included this in his August 27 email. Appellant denies she orally resigned to Mr. McDaniel at p. 8  
25 of Appellant's Opposition to Respondent's Motion. Her October 19, 2012 letter appealing her dismissal  
26 to FDAB, however, admits at p. 2 that she orally resigned. This panel finds that regardless of whether  
Appellant orally resigned to Mr. McDaniel, the undisputed facts show her actions constituted an effective  
resignation under the law.

<sup>20</sup> Appellant also admits she resigned in her October 19, 2012 letter appealing her dismissal to  
FDAB (p. 2, first line at the top of the page).

1 In sum, the undisputed evidence clearly shows that Appellant communicated her intent to  
2 terminate her employment with the District, as well as her intent not to return to work through  
3 her admitted and documented correspondence through her union representative to the District  
4 human resources director.

5 **3. Appellant's argument that her resignation was procedurally invalid.**

6 Appellant argues that her resignation was not procedurally valid despite her  
7 communications to the District evidencing her intent to resign. Appellant argues that *Pierce* left  
8 open the question of whether a resigning teacher has a right to withdraw the resignation before  
9 there has been a change in the school district's position or before the resignation has been acted  
10 upon by the board or its agents.<sup>21/</sup> Appellant also contends that *Pierce* did not address whether a  
11 resignation was processed under contractual or district procedures and whether a resignation was  
12 voluntary. Based on these assertions, Appellant argues (1) she did not provide 60-days written  
13 notice to the superintendent as required by District policy; (2) Appellant never communicated a  
14 resignation, orally or otherwise, directly to the District; (3) Greif's response to Appellant's  
15 request to be released from her contract (a) did not indicate Appellant had been released from all  
16 possible sanctions for resignation, (b) did not indicate Appellant had been released from her  
17 contract, and (c) stated that resignation proceedings would follow, suggesting the resignation was  
18 incomplete; (4) Greif did not have authority to accept Appellant's resignation; and (5) Appellant  
19 rescinded her resignation prior to school board acceptance and prior to the District changing its  
20 position.<sup>22/</sup> Based on a review of the evidence and case law outlined throughout this decision,  
21 this panel rejects Appellant's procedural arguments.

22 At the outset, this panel holds that even if Appellant's procedural arguments were true,  
23 this panel would still lack jurisdiction over the matter. This is because, a review of the  
24 undisputed circumstances surrounding Appellant's separation from employment with the District  
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26 <sup>21</sup> Appellant's Opposition to Respondent's Motion, p. 8 (citing *Pierce*, 297 Or at 374, n. 5, 686 P2d at 338).

<sup>22</sup> Appellant's Opposition to Respondent's Motion, pp. 8 – 9.

1 do not involve a “dismissal” or “nonextention” based on the statutory grounds for dismissal  
2 under ORS 342.865(1). Here, there is no dismissal notice and no school board action to dismiss  
3 based on the statutory grounds as contemplated by Fair Dismissal Law. This finding is more  
4 fully explained below regarding Appellant’s constructive discharge claim. Despite this holding,  
5 this panel, nonetheless, specifically addresses Appellant’s procedural arguments as follows:

6 First, Appellant’s argument that her resignation was invalid because she did not provide  
7 60-days written notice to the superintendent under District policy is without merit. *Pierce*  
8 establishes that ORS 342.553 does not limit a teacher’s ability to resign without providing  
9 60-days notice, although doing so can subject a teacher to TSPC discipline. District policy  
10 GCPB/GDPB, “Resignation of Staff,”<sup>23/</sup> merely restates the requirement under ORS 342.553(1)  
11 that teachers provide 60-days notice prior to resigning or risk suspension of their license. The  
12 policy further establishes that the superintendent *may* accept a teacher resignation immediately  
13 and waive the 60-day notice period or inform the teacher that he/she must continue teaching for  
14 part or all of the 60-day period. Consistent with the reasoning in *Pierce* regarding the statutory  
15 notice requirement, the District’s policy does not, and cannot, preclude a teacher from resigning  
16 in violation of the policy, even though legal consequences may result.

17 Second, regarding Appellant’s contention that she did not provide an oral or written  
18 resignation directly to the District, *Pierce* and *Zellner* establish that a teacher can resign in any  
19 way that communicates to the District the intention of terminating the employment relationship or  
20 not returning to work. In other words, it is not necessary for a teacher to provide a formal written  
21 or oral resignation for the resignation to be effective. Furthermore, under the facts of this case, it  
22 is clear that Appellant requested that Volante communicate with the District on her behalf through  
23 multiple emails of her intention to resign from the District. Appellant offers no support for the  
24 argument that these email communications are insufficient to constitute a written resignation.

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<sup>23</sup> Attachments to Appellant’s Opposition to Respondent’s Motion, p. 72 of 24.

1 Third, this panel also rejects Appellant's contention that her resignation was invalid because  
2 Greif's August 27 email responding to Appellant's request to be released from her contract (a) did  
3 not indicate Appellant had been released from all possible sanctions for resignation, (b) did not  
4 indicate Appellant had been released from her contract, and (c) stated that resignation proceedings  
5 would follow, suggesting the resignation was incomplete. It is true that Greif's August 27 email did  
6 not address whether the District would release Appellant from possible sanctions for resignation  
7 without 60-days notice under ORS 342.553(1), but this does not render Appellant's resignation  
8 ineffective under *Pierce* and *Zellner*.

9 The sequence of events surrounding Greif's August 27 email clearly demonstrate Appellant  
10 communicated an intent to resign, which Greif accepted. Greif clearly communicated the District's  
11 desire and expectation that Appellant return to work in his August 23 email in response to  
12 Appellant's request to enter into resignation agreement negotiations. Volante's email on  
13 Appellant's behalf in response to Greif's August 23 email communicated a request that Appellant  
14 be released from her contract. This communication, along with Appellant's other communications  
15 to the District leading up to it, clearly communicated an intent not to return to work. Greif  
16 responded on August 27 by accepting Appellant's resignation effective that day based on these  
17 communications. Neither Appellant nor Volante challenged the fact that Appellant had resigned  
18 after Greif's August 27 email. Appellant's next communication through Volante in his September 6  
19 email affirmed Appellant wished to resign at the time.

20 Greif's August 27 email clearly communicated Greif's acceptance of Appellant's  
21 resignation, given the circumstances of which Greif was aware, and clearly states the resignation  
22 would be *effective August 27*. Appellant, however, argues that Greif did not have the authority to  
23 accept Appellant's resignation. As explained above, District Policy GCPB/GDPB does not indicate  
24 that only the superintendent can accept a teacher's resignation on behalf of the District, as Appellant  
25 asserts. Moreover, *Zellner* explains that a resignation can be accepted by authorized school district  
26 agents other than the superintendent. In this case, even though it has little bearing on the

1 jurisdictional issue in this motion, Greif, as the District's human resources director, had authority to  
2 receive and accept Appellant's resignation on behalf of the District. It is apparent that Appellant  
3 and Volante recognized Greif's authority to make personnel decisions because they chose to  
4 communicate Appellant's desire to be released from her contract to Greif. Indeed, Volante admits  
5 that he recognizes Greif as "the District's primary representative on collective bargaining and  
6 personnel matters and as [Volante's] primary counterpart."<sup>24/</sup>

7 Finally, Appellant argues that even if she did resign, and her resignation was accepted, she  
8 effectively rescinded her resignation on September 6 before the District school board accepted it  
9 and before the District changed its position. This panel agrees that *Pierce* leaves open the  
10 question of whether a teacher can rescind a resignation before the District has changed its position  
11 or before the resignation has been acted upon by the school board or its agents; however, this  
12 panel concludes that the disposition of this matter, is not necessary to determine the jurisdictional  
13 question at issue in this motion.<sup>25/</sup> Again, this is because the undisputed facts establish that the  
14 District's decision not to accept Appellant's requested rescission was not based on the statutory  
15 grounds listed under ORS 342.865(1). As explained more fully below regarding Appellant's  
16 constructive discharge claim, for FDAB to have jurisdiction, the District must act to dismiss or  
17 nonextend based on the statutory grounds listed in ORS 342.865(1). Here, the evidence shows the  
18 District's decision not to accept Appellant's requested rescission was based on the rationale that  
19 Appellant resigned and the District already replaced Appellant prior to her requested rescission.<sup>26/</sup>  
20 Thus, upon review of the circumstances surrounding Appellant's requested rescission, this panel

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22 <sup>24</sup> Affidavit of Volante, p. 2, ¶ 6.

23 <sup>25</sup> The parties disagree as to whether the District changed its position prior to Appellant's  
24 requested resignation; the District arguing that it hired a replacement who started working prior to  
25 Appellant's September 6 request to rescind. Affidavit of Greif, pp. 2-3. As explained in this section,  
however, resolution of this matter is not necessary for disposition of this motion.

26 <sup>26</sup> Attachment to Appellant's Opposition to the District's Motion, pg. 29. While Appellant's  
arguments that the District's proffered reasons are untrue or pretextual may be relevant in other forums (a  
topic upon which this panel does not offer an opinion), the evidence does not show that the District's  
decision was based on the statutory grounds listed in ORS 342.865(1).

1 concludes that the District's decision not to accept the rescission did not constitute a "dismissal"  
2 as contemplated by Fair Dismissal Law.

3 **4. Appellant's argument that her resignation was invalid because it was**  
4 **involuntary.**

5 Appellant also argues that even if she did resign, and her resignation was accepted and  
6 relied upon, her resignation was, nevertheless, involuntary and thus ineffective. Appellant  
7 argues that she was in an "extreme trauma and anxiety" and did not have the appropriate mental  
8 state to convey a voluntary resignation. While Appellant's allegations regarding her mental state  
9 could be true and may be relevant to proceedings in other forums (again, a topic upon which this  
10 panel express no opinion), as explained more fully below with regard to Appellant's  
11 constructive discharge claim, it is not within FDAB's statutory authority to determine the mental  
12 state of teachers at the time they resign.

13 **5. Appellant's claim that constructive discharge constitutes a "dismissal" under**  
14 **Fair Dismissal Law.**

15 Even though this panel concludes that Appellant effectively resigned, rather than being  
16 dismissed or nonextended, the panel also finds it necessary to address Appellant's supplemental  
17 argument that she was constructively discharged. Appellant argues that even if she resigned, she  
18 did so under circumstances amounting to a "constructive discharge," which she argues is the  
19 equivalent of a "dismissal" under Fair Dismissal Law. This panel finds, however, that a  
20 constructive discharge is not a "dismissal" or "nonextension" under Fair Dismissal Law, and  
21 therefore, FDAB does not have jurisdiction to consider constructive discharge claims.

22 FDAB's authority is derived from its authorizing statutes. *See TreBesch v. Employment*  
23 *Division*, 300 Or 264, 267, 710 P2d 136, 138 (1986) (considering whether authorizing statutes  
24 required agency to promulgate rules in advance of adjudication). The authorizing statutes specify,  
25 among other things, the "agency's tasks, the breadth of agency's discretion in carrying out those  
26 tasks, and the process by which they are to be accomplished." *Id.*, 710 P2d at 138. Terms capable of

1 multiple meanings in the authorizing statutes must be interpreted consistently with the legislative  
2 intent and consistent with “the range of discretion allowed by the more general policy  
3 of the statute.” *Bergerson v. Salem Keiser Sch. Dist.*, 341 Or 401, 413-14, 144 P3d 918, 925 (2006).

4 The general policy of the statute is a matter of statutory construction. *Id.* at 413, 144 P3d at 925.

5 The first and most important level of analysis for ascertaining legislative intent begins with  
6 the text and context of the statutory provision, which includes other provisions of the same statute  
7 and other related statutes. *See State v. Gaines*, 346 Or 160, 171, 206 P3d 1042, 1050 (2009); *PGE*  
8 *v. Bureau of Labor and Industries*, 317 Or 606, 610-11, 859 P2d 1143, 1146 (1993).

9 ORS 342.930 establishes the Fair Dismissal Appeals Board and ORS 342.905 describes  
10 the Board’s role, responsibilities, and the Board’s authority to order remedies when it considers  
11 appeals of school district dismissal and nonextension actions. The text of ORS 342.905(1)  
12 provides in pertinent part:

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

15 (emphasis added). While the statute does not provide an explicit definition of what constitutes a  
16 “dismissal” or “nonextension” for purposes of FDAB jurisdiction, the text and context of  
17 ORS 342.905 establish that the FDAB’s jurisdiction does not extend to considering resignations  
18 or alleged constructive discharges.

19 Recently, another FDAB panel considered whether an alleged coerced resignation or  
20 constructive discharge may be considered a “dismissal” by the FDAB in *Hardy v. Baker Sch.*  
21 *Dist. 5J*, FDA-12-05 (2012). After considering the text and context of the Fair Dismissal  
22 statutes, the panel concluded that “a ‘dismissal’ sufficient to support FDAB’s jurisdiction must  
23 result from some action of the school board that includes ‘statutory grounds cited.’” *Id.* at 5.  
24 The *Hardy* panel noted the consistent use of the word “statutory grounds cited” throughout the  
25 statutes and found that it is the “statutory grounds cited” that FDAB has authority to consider at  
26 hearing. *Id.* *Hardy* went on to reason:

1 Given the statute's context, a "dismissal" cannot logically arise solely from an  
2 alleged constructive discharge. To illustrate, if this panel were to determine that  
the Fair Dismissal Appeals Board does have jurisdiction in this case, it is unclear

3 what facts the panel would consider at a hearing on the merits of the case, in light  
4 of the absence of any "statutory grounds cited" by the school district. Although a  
constructive discharge may be sufficient to prove a discharge for some purposes  
\* \* \* This panel concludes that an alleged constructive discharge is not sufficient  
5 to support jurisdiction under ORS 342.905 in this case. Appellant may have some  
6 claim to pursue in another forum (a subject on which this panel expresses no  
opinion), but there is no dismissal to support jurisdiction in this forum. It is  
7 undisputed that there is no dismissal notice or letter in this case.

8 *Id.* at 5.

9 This panel is persuaded by the findings and analysis in the *Hardy* decision. The precision  
10 of *Hardy's* analysis is undeniable upon a thorough review of the statutes in question. Considering  
11 the text and sequential progression of the Fair Dismissal statutes leading up to ORS 342.905,  
12 which, as noted above, defines FDAB's authority, conclusively demonstrates the intended  
13 meaning of "dismissal" under Fair Dismissal Law. The applicable statutes provide as follows:

14 First, ORS 342.865(1) precludes a dismissal of a teacher for any other reason except for  
15 statutory grounds listed (i.e., inefficiency, immorality, insubordination etc.). Therefore, in the  
16 context of the Fair Dismissal statutes a school district cannot act to "dismiss" a contract teacher  
17 without citing one or more of the grounds listed under ORS 342.865.

18 Second, ORS 342.895 defines the procedures a district must follow when dismissing a  
19 teacher. *See* ORS 342.895(2), (3)(a) – (b), and 4(b) – (c). If a district fails to follow the  
20 statutory procedures, the district's action is deemed invalid. *Robinson v. Salem Kaiser Sch.*  
21 *Dist.*, FDA-11-05 (2011); *Russom v. Salem Kaiser Sch. Dist.*, FDA-11-06 (2011); *Harlow v.*  
22 *Salem Kaiser Sch. Dist.*, FDA-11-07 (2011).

23 Third, after the statutes define the grounds for dismissal and the procedures for  
24 dismissing based on those grounds, then the statutes define how a dismissal action can be  
25 appealed to FDAB and FDAB's purpose and authority in reviewing the appeal. As noted above,  
26 ORS 342.905(6) explicitly limits FDAB's review authority to considering situations where the

1 district has acted to dismiss a teacher based on the statutory grounds cited in ORS 342.865(1).  
2 Further, FDAB's authority to order a remedy is circumscribed and includes only situations in  
3 which it finds that the statutory grounds cited are not supported by the facts. ORS 342.905(7).  
4 Therefore, as recognized by *Hardy*, where a district has not taken an action to dismiss or  
5 nonextend a teacher based on the statutory grounds listed in ORS 342.865(1), FDAB has no  
6 authority to review or order a remedy under ORS 342.905(6) and (7).

7 The *Hardy* panel also found support for its holding in *Pierce*, explained in detail above.  
8 297 Or 363, 686 P2d 332. Appellant argues, however, that *Hardy* misconstrued *Pierce* and that  
9 *Pierce* does not preclude FDAB from considering whether a school district's actions constitute a  
10 constructive discharge.<sup>27/</sup> While Appellant is correct that *Pierce* is not dispositive on this issue,  
11 this panel agrees that the logic in *Pierce* supports the finding that FDAB lacks jurisdiction over  
12 claims where the district has not dismissed or nonextended a teacher under the statutory  
13 framework and based on the statutory grounds.

14 *Pierce* is not the only case that supports this panel's finding. In *Bergerson v. Salem*  
15 *Keizer School District*, the Oregon Supreme Court interpreted ORS 342.905(6) to create the  
16 following three-stage review process:

17 First, the FDAB panel determines whether the facts upon which the school board  
18 relied are true and substantiated. Second, the panel determines whether the facts  
19 found to be true and substantiated *constitute a statutory basis for dismissal*.  
20 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.

21 341 Or at 412, 144 P3d at 924 (emphasis added). See also *Weisenan v. Clatskanie Sch. Dist.*,  
22 299 Or App 563, 572, 215 P3d 882, 887 (2008) (Under the text of ORS 342.905(6), the FDAB

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<sup>27</sup> Appellant's Sur-Reply, p. 2 (second paragraph from bottom).

1 panel is charged with determining whether the facts relied on *to support the statutory grounds*  
2 cited for dismissal are true and substantiated).

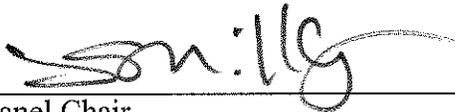
3 While Oregon state court cases have not squarely addressed whether a constructive  
4 discharge constitutes a dismissal under Fair Dismissal Law, *Pierce, Bergerson, and Weisenan*  
5 interpret FDAB's authority and establish a decision-making process consistent with this panel's  
6 findings.

7 In sum, the text and context of ORS 342.905, as well as the case law interpreting that  
8 statute discussed throughout this opinion, support the conclusion that FDAB does not have  
9 jurisdiction to consider claims of alleged constructive discharge.<sup>28/</sup>

10 **ORDER**

11 For the reasons discussed above, Respondent's Motion to Dismiss for Lack of  
12 Jurisdiction is hereby granted.

13 DATED this January 16, 2013.

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15 \_\_\_\_\_  
Panel Chair

16 \_\_\_\_\_  
17 Panel Member

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19 Panel Member

20 **Notice: Under ORS 342.905(9), this Order may be appealed in the manner provided for in**  
21 **ORS 183.480, and any appeal must be filed within 60 days from the date of service of this**  
22 **Order.**  
23

24 \_\_\_\_\_  
25 <sup>28</sup> This panel acknowledges Appellant's concern that a finding consistent with *Hardy* precludes  
26 access to FDAB proceedings and remedies where a District takes actions that may amount to "de facto"  
dismissals, such as in the case of a constructive discharge. FDAB's limited statutory jurisdiction,  
however, does not preclude appellants from seeking redress in other forums, a subject upon which this  
panel expresses no opinion in this decision.

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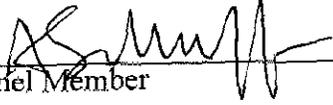
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9 jurisdiction to consider claims of alleged constructive discharge.<sup>28/</sup>

10 ORDER

11 For the reasons discussed above, Respondent's Motion to Dismiss for Lack of  
12 Jurisdiction is hereby granted.

13 DATED this January 16<sup>th</sup>, 2013.

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Panel Chair

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Panel Member

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19 \_\_\_\_\_  
Panel Member

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4 discharge constitutes a dismissal under Fair Dismissal Law, *Pierce, Bergerson, and Weisenan*  
5 interpret FDAB's authority and establish a decision-making process consistent with this panel's  
6 findings.

7 In sum, the text and context of ORS 342.905, as well as the case law interpreting that  
8 statute discussed throughout this opinion, support the conclusion that FDAB does not have  
9 jurisdiction to consider claims of alleged constructive discharge.<sup>28/</sup>

10 **ORDER**

11 For the reasons discussed above, Respondent's Motion to Dismiss for Lack of  
12 Jurisdiction is hereby granted.

13 DATED this January 16<sup>th</sup>, 2013.

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Panel Chair

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17 \_\_\_\_\_  
Panel Member

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Panel Member

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however, does not preclude appellants from seeking redress in other forums, a subject upon which this  
panel expresses no opinion in this decision.

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on January 16<sup>th</sup>, 2013, I served a true and correct copy of FINDINGS  
3 OF FACT, CONCLUSIONS OF LAW AND ORDER by the method indicated below:

<p>5 <u>For Appellant:</u>          6 Patrick N. Bryant          McKanna Bishop Joffe &amp; Arms, LLP          1635 NW Johnson St.          7 Portland, OR 97209          pbryant@mbjlaw.com</p>	<p><input type="checkbox"/>  <input checked="" type="checkbox"/>  <input type="checkbox"/>  <input type="checkbox"/>  <input checked="" type="checkbox"/></p>	<p>HAND DELIVERY          U.S. MAIL          OVERNIGHT MAIL          TELECOPY (FAX)          ELECTRONICALLY</p>
<p>8 <u>For School District:</u>          9 Bruce Zagar          Garrett Hemann Robertson PC          10 111 Commercial St. NE          PO Box 749          11 Salem, OR 97308-0749          12 bzagar@ghrlawyers.com</p>	<p><input type="checkbox"/>  <input checked="" type="checkbox"/>  <input type="checkbox"/>  <input type="checkbox"/>  <input checked="" type="checkbox"/></p>	<p>HAND DELIVERY          U.S. MAIL          OVERNIGHT MAIL          TELECOPY (FAX)          ELECTRONICALLY</p>

13 Respectfully submitted,

14 ELLEN F. ROSENBLUM  
15 Attorney General

16   
 17 Tom C. Lenox, OSB 094199  
 18 Assistant Attorney General  
 Of Attorneys for Fair Dismissal Appeals Board  
 19 thomas.lenox@doj.state.or.us

20 c: Cindy Hunt, FDAB