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2 BEFORE THE TEACHER STANDARDS AND PRACTICES COMMISSION
3 OF THE STATE OF OREGON
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7 In the Matter of the)
8 Teaching License of) FINAL ORDER
9)
10 JOSE JESUS SANDOVAL) Case No. 1102276
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13 On October 28, 2011, Senior Administrative Law Judge (ALJ) Ken L. Betterton issued a
14 Proposed Order in this case. Aruna Masih, Attorney at Law, on behalf of Jose Jesus Sandoval
15 filed exceptions to the Proposed Order on November 10, 2011.
16

17 On February 3, 2012, the Commission considered Mr. Sandoval's written exceptions to
18 the Proposed Order. The Commission has fully considered the written exceptions and is now
19 fully advised.
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21 The Commission does not find Mr. Sandoval's exceptions persuasive, and hereby adopts
22 in its entirety the Findings of Fact, Conclusions of Law and Order contained in the attached
23 Proposed Order as the Final Order.
24

25 ORDER
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27 The Commission adopts the Proposed Order in its entirety and suspends Jose Jesus
28 Sandoval's teaching license for sixty (60) days.
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31 Dated this 9th day of February 2012.
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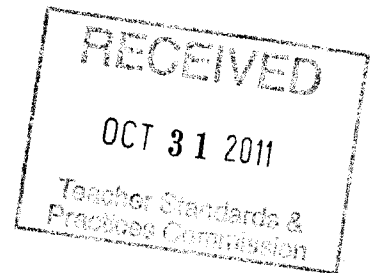
33 TEACHER STANDARD AND PRACTICES COMMISSION
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36 By: Victoria Chamberlain
37 Victoria Chamberlain, Executive Director
38 Teacher Standards and Practices Commission
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43 **NOTICE:** You are entitled to judicial review of this order. Judicial review may be obtained by
44 filing a petition for review within 60 days of the service of this order. Judicial review is pursuant
45 to the provision of ORS 183.482 to the Oregon Court of Appeal.

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
TEACHER STANDARDS AND PRACTICES COMMISSION**

IN THE MATTER OF THE TEACHING) **PROPOSED ORDER**
LICENSE OF:)
)
JOSE JESUS SANDOVAL) OAH Case No.: 1102276
)



HISTORY OF THE CASE

On September 13, 2010, the Teacher Standards and Practices Commission (TSPC) issued a Notice of Opportunity for Hearing to Jose Jesus Sandoval (Licensee), seeking to discipline him for violating laws regarding his licensure. Licensee filed a timely request for hearing on September 24, 2010.

TSPC referred the case to the Office of Administrative Hearings on March 31, 2011. The case was assigned to Senior Administrative Law Judge Ken L. Betterton.

A telephone pre-hearing conference was held on May 24, 2011. Attorney Aruna A. Masih (Masih) represented Licensee. Assistant Attorney General (AAG) Raul Ramirez (Ramirez) represented TSPC.

A hearing was held in Salem, Oregon on October 6 and 7, 2011. Attorney Masih represented Licensee. AAG Ramirez represented TSPC.

The following witnesses testified for TSPC: Licensee; Stuart Foster, Woodburn School District teacher; Larry Conley, former Woodburn School District administrator; and Rebecca Torres, former French Prairie Middle School assistant principal.

The following witnesses testified for Licensee: Eric Swenson, former principal at French Prairie Middle School; Veronica Montes, Woodburn School District teacher; and George Finch, TSPC legal liaison. Licensee also testified on his own behalf.

The record closed on October 7, 2011, and the matter was taken under advisement.

ISSUES

(1) Whether Licensee engaged in gross neglect of duty under ORS 342.175(1)(b) and OAR 584-020-0040(4)(n), as incorporated in OAR 584-020-0010(5) (use of

professional judgment), OAR 584-020-0015(2)(a)¹ (use of state and district adopted curriculum and goals), and OAR 584-020-0025(2)(e) (using district lawful and reasonable rules and regulations), by allowing students to use unauthorized materials to take an exam.

(2) Whether Licensee engaged in gross neglect of duty under ORS 342.175(1)(b) and OAR 584-020-0040(4)(n), as incorporated in OAR 584-020-0010(5) (use of professional judgment), and OAR 584-020-0040(4)(c) (knowing falsification of any document or knowing misrepresentation directly related to licensure, employment or professional duties), by leading a teacher to believe the materials had been approved by the assistant principal.

(3) Whether Licensee engaged in gross neglect of duty under ORS 342.175(1)(b) and OAR 584-020-0040(4)(n), as incorporated in OAR 584-020-0010(5) (use of professional judgment), and OAR 584-020-0040(4)(o), as incorporated in OAR 584-020-0035(1)(c)(D) (maintain an appropriate professional student-teacher relationship by honoring appropriate adult boundaries with students in conduct and conversation at all times), by making inappropriate comments to students.

(4) If Licensee committed one or more of the above violations, what discipline should be imposed?

EVIDENTIARY RULING

Exhibits A1 through A23, offered by TSPC, were admitted into evidence over Licensee's objection that the exhibits were not timely filed and served on Licensee's attorney. Exhibits A25 and A26, offered by TSPC, were admitted without objection. Exhibit A24 was excluded from evidence based on Licensee's objection as to its relevance.

Exhibits R1 through R4, R9 through R12, and R20 through R24, offered by Licensee, were admitted into evidence without objection. Exhibits R5 through R8, R13 through R19, and R25 through R32 were admitted into evidence over TSPC's objection as to relevance.

Pleadings P1 through P6 were also made a part of the record.

The parties stipulated at the hearing to amend paragraphs 2 and 3 in the Notice to read, "During February 2009 * * *," instead of "On February 20, 2009 * * *."

¹ The Notice of Opportunity for Hearing read "OAR 584-020-0015(a)." The parties agreed at the beginning of the hearing to amend the Notice by interlineation to correctly read "OAR 584-020-0015(2)(a)."

FINDINGS OF FACT

(1) Licensee has a bachelor's degree and a Master's of Arts in Teaching from Western Oregon University. (Ex. R1.) He has been licensed as a teacher in Oregon since January 2006. Licensee currently holds an Initial II Teaching License. (P1.)

(2) License started working for the Woodburn School District as a teacher at French Prairie Middle School (French Prairie) in 2006. He has taught at French Prairie since then. French Prairie has students in the sixth, seventh and eighth grades. Licensee has taught seventh grade language arts and social studies classes at the school. Seventh graders typically are between 11 to 13 years old. Licensee has between 25 and 32 students in a class and teaches six classes a day. Children of Licensee's relatives have attended French Prairie during the time he has taught at the school. (Licensee's testimony.)

(3) A large percentage of students at French Prairie are Hispanic and are ESL (English-as-a-second-language) students. Licensee also is Hispanic and identifies with his students. He applied for the job at French Prairie in part because of his cultural heritage and the school's multi-cultural demographics. Prior to attending college, and since getting his college degrees, Licensee has worked as a youth mentor and coordinator with various not-for-profit groups that focus on helping disadvantaged Hispanic youths. (Licensee's testimony.) Licensee was a probationary teacher for the first three years at French Prairie. He became a contract teacher beginning with the 2009-2010 school year. (Eric Swenson (Swenson's) testimony.)

(4) Through the No Child Left Behind (NCLB) Act, federal law requires states and local school districts to periodically test students on standardized tests in order to meet certain federal benchmarks for student performance. States are required to implement and monitor the testing process and report results to the federal Department of Education. The Oregon Department of Education (ODE) is charged with that responsibility in Oregon. ODE delegates the responsibility to administer the tests to local school districts. Individual teachers in each school district actually administer the tests. (Larry Conley (Conley's) testimony.)

(5) ODE decides what testing procedures and protocols the districts must follow. ODE decides what materials students can use as tools or aids when they take tests. ODE publishes a Test Administration Manual (Manual) each school year for school districts to use that school year to administer tests. The 120-page Manual sets forth the testing protocols and procedures that school districts and teachers must follow to give the tests. (Conley's testimony.)

(6) Under the NCLB Act, all teachers and staff must be trained on test protocol and procedures, not just the teachers administering tests. It is a breach of test protocol and procedures for a teacher or staff person to enter a room where a test is being given if that teacher or staff person has not been trained on test protocol and procedures. (Rebecca Torres (Torres's) testimony.)

(7) Each year, schools in Oregon give the Oregon Assessment Knowledge and Skills (OAKS) reading, writing, math and science tests to students. The OAKS writing test is given to seventh grade students. As a teacher, Licensee was a test administrator. (Torres's testimony.) He had given the OAKS writing test to his seventh grade students for two school years prior to the 2008-2009 school year. (Licensee's testimony.) ODE and school districts expect teachers to follow the Manual and ODE rules and school district policies in administering the tests. Teachers have no discretion to alter ODE directives as to how the tests are administered. (Conley's testimony.)

(8) Conley, Woodburn School District's Assistant Director of Curriculum and District Testing Coordinator, was responsible for training school district teachers and staff for the 2008-2009 school year. He trained French Prairie teachers and staff shortly after school started in September 2008. The training lasted approximately one hour. Approximately 50 teachers and staff attended, including Licensee. (Conley's testimony.) The training covered all subjects, reading, math, science and writing. (Torres's testimony.)

(9) Copies of the Manual were made available to teachers and staff at the training session in September 2008. Appendix M—Requirements of OAKS Writing Performance Administration in the Manual set forth testing protocol, including what materials students could use while taking the test. Teachers and staff had to sign a Test Administrator Assurances of Test Security form, acknowledging that they had read and understood the Manual and all the appendices. Teachers and staff did not have to sign the Test Administrator Assurances of Test Security form during or at the conclusion of the training session. They could take the manual from the training room and study it and sign the acknowledgment form later. Teachers and staff were encouraged to ask questions of the test coordinator or their school's onsite test coordinator, if they had questions about the testing protocol or what materials students could use while taking the test. (Conley's testimony; Torres's testimony.) Licensee signed the Test Administrator Assurance of Test Security form on September 24, 2008. (Ex. A16.)

(10) During the September 2008 training, Conley reviewed the allowable resources in Appendix M, and explained that the two ODE provided graphic organizers were the only graphic organizers allowed. (Conley's testimony.)

Appendix M read, in part, as follows:

Using materials from a previous test window is a violation of test security. Student responses to materials from a previous test window will NOT be scored and will not count toward participation or meeting the standards!

(Ex. A15 at 3.) (Emphasis in original.)

Appendix M also contained the following text:

Allowable Resources

Only those allowable resources listed below may be provided to students during the OAKS Writing Performance Assessment. Remind students that they may use only these allowable resources prior to each Writing Performance testing event:

ALLOWABLE RESOURCES DURING ADMINISTRATION OF THE OAKS WRITING PERFORMANCE ASSESSMENT

- ODE-provided Guide to Revision:
 - **Only the ODE-provided Guide to Revision found online at <http://www.ode.state.or.us/search/page/?=486> is allowed during the Writing Performance Assessment.** They should be made available to students at any grade in printed form, if requested.
- Official State Writing Scoring Guide
- Blank scratch paper (Must be securely shredded immediately following a testing event)
- Dictionary
- Thesaurus
- ODE-provided graphic organizers:
 - **Only the ODE-provided graphic organizers found online at <http://www.ode.state.or.us/search/page/?=486> are allowable during the OAKS Writing Performance Assessment.** They should be made available to students at any grade in printed form, if requested.
- Computer/word processor:
 - Word processing applications used during testing should be those used during instructions so they are familiar to the students.
- Electronic spellchecker
 - The student may only use spellchecking at the individual word level.
 - Spellcheckers that automatically identify spelling errors for the student are not allowed.
- Teacher-provided spelling list:
 - The list should be created before test administration begins.

- Once an assessment has begun, students may add additional words that they look up independently in the dictionary.
- Once an assessment had begun, test administrators must not urge students to add specific words.
- Lists of common transitions/transitional phrases:
 - The list should be created before test administration begins.
 - The list must not include examples (i.e., as used in a sentence).

(*Id.* at 4.) (Emphasis in original.)

(11) Torres was the assistant principal at French Prairie during the 2008-2009 school year and the school's onsite test coordinator for the OAKS tests. Torres had been the assistant principal at the school for three years. Prior to being the assistant principal, she had been a teacher at French Prairie. As the onsite test coordinator, Torres was responsible for ensuring that testing protocol and procedures were followed. (Torres's testimony.)

(12) Following the all-staff training in September 2008 for all OAKS subjects, the OAKS writing test was scheduled for French Prairie during the week of Monday, February 9 through Friday, February 13, 2009. The test was to be given to students in three separate sessions over three days. Licensee and several other seventh grade language arts teachers were scheduled to give the writing test. (Torres's testimony.)

(13) In anticipation of the writing test being administered, Torres met in her office with Licensee and other seventh grade language arts teachers on January 26, 2009 for approximately 40 minutes, specifically to review the instructions for administering the writing test. Torres went over Appendix M and the resources that were allowable for students to use during the test. Torres went over each allowable resource on Appendix M, including the only two ODE-provided graphic organizers that were permitted. Torres discussed with the teachers that the four-square organizer was not one of the two ODE-provided graphic organizers and that it could not be used for testing in the 2008-2009 school year. The four-square graphic organizer had been an allowable graphic organizer for tests given in prior years. (Torres's testimony.)

(14) On Friday, February 6, 2009, Licensee was photocopying materials for the writing test in the school's copy room. Stuart Foster (Foster), another seventh grade language arts teacher who also attended the meeting with Torres on January 26, saw that Licensee was copying resource materials that Foster believed students could not use for the writing test. Foster told Licensee that he did not believe those resource materials could be used, and that he (Licensee) should check with Torres. (Foster's testimony.)

(15) Foster saw Licensee again Monday morning, February 9, before the testing started. Foster asked Licensee if he had checked with Torres about the materials he had seen Licensee copying the previous Friday. Licensee told Foster he had checked with Torres and that the materials he had been copying were allowable resources. Based on

Licensee's assurance that Torres had told Licensee the resources materials could be used, Foster copied the resource materials Licensee had copied previously. Foster allowed his students to use some or all of those resources to take the writing test. (Foster's testimony.)

(16) Licensee allowed his students to use the following resource materials during the OAKS writing test: A four-square graphic organizer (Ex. R9.); a list of Homophones (Ex. A22 at 5 and 6); a Parts of Speech page (*Id.* at 4); and an Improve Your Writing handout (*Id.* at 7 and 8.) Licensee placed the resource materials on a table in the classroom for students to access. (Licensee's testimony.)

(17) After an OAKS test is given, teachers are required to gather and secure all test materials, including allowable resources used by the students, and turn them in to the onsite test coordinator.

(18) On February 20, 2009, Licensee turned in all his testing materials for the writing test to Torres, including the resource materials he had allowed his students to use. As Torres reviewed the testing materials, she quickly saw that Licensee had allowed his students to use resource materials that were not allowable on the OAKS writing test. The four-square graphic organizer, the list of Homophones; the Parts of Speech page; and the Improve Your Writing handout that Licensee allowed his students to use were not allowed under Appendix M. (Torres's testimony.)

(19) Torres also learned on or about February 20 that Foster had allowed his students to use some or all of the same unauthorized resource materials that Licensee used. Torres reported the test protocol violations to Conley. (Torres's testimony.) Conley, in turn, reported the violations to ODE. (Conley's testimony.)

(20) Conley commenced an investigation into the test protocol violations. He interviewed Licensee, Foster, other teachers and some students. Torres also participated in the investigation. (Conley's testimony.)

(21) Conley interviewed Licensee on February 24, 2009. Torres was also present during the interview. (Ex. A2.) Licensee was informed that he could have a union representative present, but chose not to have one. (Torres's testimony.) Conley asked Licensee specific questions about the materials he allowed students to use. Licensee told Conley he could not recall telling Foster and other teachers that Torres had approved the materials for use. Earlier, Foster had told Conley that Licensee told him that Torres had approved the materials. When Licensee was asked by Conley if the specific materials had been approved by Torres, he responded, "not those especially. I felt really good about what I was using." (Ex. A2 at 2.) When asked by Conley to review the resource materials he allowed students to use, and explain how they aligned with Appendix M, Licensee responded that he "felt comfortable with the list." (*Id.*) When asked again to re-read the resource section of Appendix M and identify what portions of the handouts would meet the criteria of a "spelling list," Licensee acknowledged that the spelling list he allowed students to use did not meet the criteria. (*Id.*)

(22) When the interview started on February 24, Licensee acted relaxed and confident. By the end of the interview, he acted anxious and tense. He apologized for his mistakes and acknowledged that the materials he allowed students to use were not allowable under Appendix M. (Torres's testimony.)

(23) At the hearing, Licensee insisted that after the January 26, 2009 meeting and before testing began on February 9, he showed Torres the resource materials he planned to let his students use on the writing test and that she approved them. (Licensee's testimony.) Torres denied that Licensee showed her the materials he planned to use and denied that she approved them. If Licensee had questions about what materials were allowable and had gone to Torres to discuss them after the January 26 meeting, Torres again would have gone over with Licensee the allowable materials that his students could have used for the test. (Torres's testimony.)

(24) As a result of the investigation, Conley determined that 89 seventh grade students, out of 150 students in Licensee's and in Foster's classes (50 in Licensee's classes and 39 in Foster's classes), had used resource materials that were not allowable. ODE invalidated the test results for the 89 students. Because the number of invalidated tests was a significant percentage of the total tests given at French Prairie, administrators at the school and with the Woodburn School District were worried that French Prairie's overall pass rate would fall below standards acceptable under the NCLB Act. For several years, French Prairie had been on a list of schools in Oregon that needed to increase its students' reading and writing test scores to meet NCLB Act standards. Parents of students at French Prairie learned about the invalidated test results and became alarmed about the stigma that might be attached to their children's educational progress. Schools and school districts can be subject to administrative sanctions under the NCLB Act and from ODE for not meeting educational benchmarks. (Conley's testimony.)

(25) French Prairie petitioned ODE to allow those students whose tests were invalidated to retake the test. ODE agreed to allow French Prairie to retest the students whose tests were invalidated. (Conley's testimony.)

(26) Following the investigation, Torres gave Licensee a written reprimand on March 16, 2009 for neglect of duty for the test security violations over the OAKS writing test. (Ex. R3.)

(27) When school started in September 2009, two female eighth grade students complained to Torres that during the previous school year, Licensee had used language that made them feel uncomfortable and that they believed was inappropriate. (Torres's testimony; Ex.A9 at 1 through 4.)

(28) Torres began an investigation into the allegations and interviewed approximately ten students, both male and female, about Licensee's use of language during the previous school year. (Torres's testimony; Ex. A9 at 5 through 9.)

(29) Some male students told Torres that Licensee sometimes would ask them if they had "wiped their butt," or "wiped their ass," when they returned to class after scheduled bathroom breaks. Licensee's comments made some of the students uncomfortable and embarrassed them. (Torres's testimony.)

(30) Some female students told Torres that on occasion Licensee would refer to them as "mi amor." "Mi amor" translated from Spanish to English means "my love." (Torres's testimony.) "Mi amor" can also mean "honey" or "sweetie." (Veronica Montes's testimony.) The term is sometimes used in the Hispanic culture affectionately to refer to young children, particularly family members. (Licensee's testimony; Swenson's testimony.)

(31) Torres learned from students that Licensee sometimes used the term "pendejo" around students. "Pendejo" translated from Spanish to English means "dumb ass," "stupid," or "idiot." (Torres's testimony.)

(32) Students also reported to Torres that Licensee talked about sexual topics in class. Licensee told students that he had sex in college and that he got his girlfriend pregnant. (Ex. A9; Torres's testimony.)

(33) Torres questioned Licensee about the allegations of inappropriate language around students. Licensee acknowledged that he sometimes referred to female students as "mi amor" when he could not remember their names. (Torres's testimony.) At the hearing, Licensee explained that he uses "mi amor" around the children of his family members, and opined that the term may have "slipped out" at school. Licensee contended at the hearing that he used the term "pendejo" as a teaching tool to give students examples of inappropriate words to use. Licensee acknowledged that he sometimes asked male students returning from bathroom breaks if they had "wiped," but did so as a "joke." (Licensee's testimony.)

(34) Following the investigation into Licensee's use of language, French Prairie Principal Swenson gave Licensee a written reprimand on November 2, 2009 for improper conduct for using inappropriate language with students during the 2008-2009 school year. (Ex. R20.)

(35) There were no reported instances of Licensee not following the correct testing procedures after the March 16, 2009 written warning. There were no reported instances of Licensee using inappropriate language around students after the start of the 2009-2010 school year. (Swenson's testimony.)

(36) Swenson hired Licensee as a teacher at French Prairie in 2006. He was Licensee's principal from through the 2009-2010 school year, when he left to take a job with another school district. Swenson gave Licensee his annual written evaluations for 2007 through 2010. (Exs. R21 through R24.) Swenson reported on each evaluation that Licensee met or exceeded each performance standard. Swenson considers Licensee an outstanding teacher who cares about his students, has good relationships with students

and parents, and believes that students in his classes generally perform at high levels. Swenson recommended that Licensee be retained as a contract teacher for the 2009-2010 school year, following his three-year probationary period. (Swenson's testimony.)

(37) On May 9, 2008, Swenson gave Licensee a written reprimand for improper conduct earlier in the 2007-2008 school year when Licensee offered to sell DVDs to his students' parents and to co-workers. (Ex. A13.)

(38) At the hearing, Licensee insisted that he kept a list of DVDs that others could access themselves from the internet and that he did not intend to sell or profit from the sale of any DVDs. (Licensee's testimony.)

(39) On January 31, 2008, Licensee emailed a co-worker a list of movies that he had available through his brother. Licensee explained in his email that the DVDs were normally \$8, but that for the co-worker they would only be \$6. Licensee further explained that he would give his brother the money on a Monday or Tuesday and that he could have the DVDs by Friday. (Ex. A25.)

(40) On May 12, 2008, Swenson gave Licensee a written letter of warning for physical intervention with a student. In January 2008, Licensee pulled on a student's ear in class because he believed the student acted up in class. The student was embarrassed and went to a counselor in tears. Licensee explained that he had pulled the student's ear "jokingly." (Ex. A14.)

(41) On September 13, 2010, TSPC issued a Notice of Opportunity for Hearing to Licensee, seeking to discipline him for misconduct. (P1.) TSPC seeks to suspend Licensee's teaching license for a period of 60 days. George Finch, TSPC's legal liaison, was unaware of a case where TSPC has issued a final order suspending a teacher's license for violation of testing procedures. (George Finch's testimony.)

(42) Licensee's counsel offered copies of a number of Stipulation of Facts and Final Orders of Reprimand issued by TSPC to teachers for using inappropriate language toward or around students, and a number of such final orders for teachers committing test protocol violations. (Exs. R13 through R19, and R26 through R32.)

CONCLUSIONS OF LAW

(1) Licensee engaged in gross neglect of duty under ORS 342.175(1)(b) by and OAR 584-020-2240(4)(n), as incorporated in OAR 584-020-0010(5) (use of professional judgment), OAR 584-020-0015(2)(a) (use of state and district adopted curriculum and goals), and OAR 584-020-0025(2)(e) (using district lawful and reasonable rules and regulations), by allowing students to use unauthorized materials to take an exam.

(2) Licensee engaged in gross neglect of duty under ORS 342.175(1)(b) and OAR 584-020-0040(4)(n), as incorporated in OAR 584-020-0010(5) (use of professional judgment), and OAR 584-020-0040(4)(c) (knowing falsification of any document or

knowing misrepresentation directly related to licensure, employment or professional duties), by leading a teacher to believe the materials had been approved by the assistant principal.

(3) Licensee engaged in gross neglect of duty under ORS 342.175(1)(b) and OAR 584-020-0040(4)(n), as incorporated in OAR 584-020-0010(5) (use of professional judgment), and OAR 584-020-0040(4)(o), as incorporated in OAR 584-020-0035(1)(c)(D) (maintain an appropriate professional student-teacher relationship by honoring appropriate adult boundaries with students in conduct and conversation at all times), by making inappropriate comments to students.

(4) Licensee's teaching license should be suspended for a period of 60 days.

OPINION

TSPC is seeking to discipline Licensee. TSPC has the burden of proof to establish its allegations. ORS 183.450(2) and (5); *Harris v. SAIF*, 292 Or 683 (1980). The allegations must be proven by a preponderance of the evidence. *Sobel v. Board of Pharmacy*, 130 Or App 374, 379 (1994), *rev den* 320 Or 588 (1995) (standard of proof under the Administrative Procedures Act is preponderance of evidence absent legislation adopting a different standard). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987).

TSPC is charged with the responsibility of disciplining teachers in Oregon. ORS 342.175 *et seq.* One basis for disciplining a teacher is gross neglect of duty. ORS 342.175(1)(b). TSPC has alleged that Licensee engaged in gross neglect of duty in three different ways.

OAR 584-020-0040(4) states:

Gross neglect of duty is any serious and material inattention to or breach of professional responsibilities. The following may be admissible as evidence of gross neglect of duty. Consideration may include but is not limited to:

* * * * *

(c) Knowing falsification of any document or knowing misrepresentation directly related to licensure, employment, or professional duties.

(n) Substantial deviation from professional standards of competency set forth in OAR 584-020-0010 through 584-020-0030;

(o) Substantial deviation from professional standards of ethics set forth in OAR 584-020-0035;

The "competent educator" demonstrates, among other things, a commitment to the "use of professional judgment." OAR 584-020-0010(5).

The "competent teacher" demonstrates, among other things, "use of state and district adopted curriculum and goals." OAR 584-020-0015(2)(a).

The "competent teacher" demonstrates skills in, among other things, "using district lawful and reasonable rules and regulations." OAR 584-020-0025(2)(e).

OAR 584-020-0035 addresses professional standards of ethics for educators. The rule provides, in relevant part:

The ethical educator is a person who accepts the requirements of membership in the teaching profession and acts at all times in ethical ways. In so doing the ethical educator considers the needs of the students, the district, and the profession.

(1) The ethical educator, in fulfilling obligations to the student, will:

* * * * *

(c) Maintain an appropriate professional student-teacher relationship by:

* * * * *

(D) Honoring appropriate adult boundaries with students in conduct and conversations at all times.

The allegations against Licensee are addressed in turn.

(1) Allowing students to use unauthorized resource materials on the exam.

As test administrators, teachers must strictly follow ODE and school district rules and procedures for administering standardized tests under the NCLB Act. Both the Woodburn School District's test administrator, and more specifically the onsite test coordinator at Licensee's school, trained Licensee on what resource materials students could use on the February 2009 OAKS writing test. Licensee allowed his students to use four resource materials that were prohibited under ODE rules and procedures.

Licensee contended at the hearing that Torres, the assistant principal at French Prairie, had approved the specific materials he used. Licensee's contention was not persuasive. Torres denied that Licensee asked her to approve the materials he used or that she approved them. Torres was knowledgeable as to what resource materials could be used on the February 2009 test. It is unlikely she would have approved resource materials that were clearly improper under ODE's rules and regulations.

When Conley questioned Licensee on February 24, 2009, Licensee hedged his statements and acknowledged that the specific materials he used had not been approved by Torres.

Licensee's testimony at the hearing and other evidence indicate that Licensee did not pay attention to the training he received and to the Manual that set forth test procedures. I believed that he made some assumptions about what he could use as resource materials based on past experience and did not seem at the time to appreciate the importance of strictly following the current testing procedures.

Licensee's conduct in allowing his students to use resource materials that were not permitted demonstrated a lack of professional judgment, a failure to use state and school district and a failure to follow district rules and regulations, and constituted gross neglect of duty under ORS 342.175(1)(b) and OAR 584-020-0040(4)(n).

(2) Leading a teacher to believe that the materials had been approved.

TSPC accused Licensee of gross neglect of duty by leading another teacher to believe that the resource materials he used had been approved for use. The other teacher, Foster, saw Licensee on Friday, February 6, 2009 copying materials for use on the writing test to be given starting Monday, February 9, that he believed were not permissible. He told Licensee that he believed use of those materials was not allowed, and that Licensee should check with Torres.

The following Monday, Foster saw Licensee again. He asked Licensee if he had checked with Torres. Licensee told Foster he had checked with Torres and that the materials could be used. As a result of Licensee's statements, Foster allowed his students to use some or all of the same resource materials that were not allowable. In fact, Licensee had not gotten approval from Torres to use the resource materials. Licensee's misrepresentation to Foster led to even more students' test results being invalidated and to Foster being brought into the investigation of misconduct.

When questioned by Conley on February 24, 2009, Licensee said he "couldn't recall" telling Foster that Torres had approved the materials.

The evidence presented persuasively established that Licensee knowingly made a false statement to the teacher. His conduct caused that teacher to believe the resource materials Licensee was planning to use were allowable and caused that teacher to use them as well.

Licensee's conduct in misleading a teacher into believing the materials had been approved by the assistant principal was a knowing falsification directly related to professional duties. His conduct demonstrated a lack of professional judgment, and constituted gross neglect of duty under ORS 342.175(1)(b) and OAR 584-020-0040(4)(n).

(3) Making inappropriate comments to students.

A teacher is expected to maintain an appropriate professional teacher-student relationship by honoring adult boundaries with students in conduct and in conversation at all times. OAR 584-020-0035(1)(c)(D).

On numerous occasions during the 2008-2009 school year, Licensee failed to maintain that relationship and those boundaries in his conversations with a number of students. He used words around students that were inappropriate and unprofessional. As a matter of common sense, an experienced teacher would know he or she should not use the words Licensee used around students. Licensee also discussed sexual topics in ways that were inappropriate and unprofessional for a language arts teacher.

Licensee's comments and discussions embarrassed some students and made them feel uncomfortable to the point that complaints were made by students against Licensee.

Licensee's conduct in failing to maintain appropriate professional student-teacher relationship by honoring adult boundaries with students by his conversations and discussions violated TSPC laws regarding boundaries teachers are expected to honor and maintain with students, and constituted gross neglect of duty under ORS 342.175(1)(b) and OAR 584-020-0040(4)(n).

(4) Discipline.

TSPC may impose the following discipline:

- (a) Issue a public reprimand.
- (b) Place the person on probation for a period not to exceed four years and subject to such conditions as the commission considers necessary.
- (c) Suspend the license or registration of the teacher or administrator for a period not to exceed one year.
- (d) Revoke the license or registration of the teacher or administrator.

ORS 342.177(3).

TSPC may consider one or more of the following factors, as it deems appropriate, in its determination of what sanction or sanctions, if any, should be imposed upon a finding that an educator has violated any standard set forth in OAR 584-020-0040:

- (1) If the misconduct or violation is an isolated occurrence, part of a continuing pattern, or one of a series of incidents;
- (2) The likelihood of a recurrence of the misconduct or violation;

- (3) The educator's past performance;
- (4) The extent, severity, and imminence of any danger to students, other educators, or the public;
- (5) If the misconduct was open and notorious or had negative effects on the public image of the school;
- (6) The educator's state of mind at the time of the misconduct and afterwards;
- (7) The danger that students will imitate the educator's behavior or use it as a model;
- (8) The age and level of maturity of the students served by the educator;
- (9) Any extenuating circumstances or other factors bearing on the appropriate nature of disciplinary sanctions; or
- (10) To deter similar misconduct by the educator or other educators.

OAR 584-020-0045.

TSPC proposes to suspend Licensee's teaching license for 60 days. Licensee argues that the allegations, if proven, warrant no more than a public reprimand. A public reprimand is the lowest form of discipline authorized under ORS 342.177.

To support his position, Licensee relies on a number of final orders issued by TSPC in which a public reprimand was issued for inappropriate use of language or for test protocol violations, and on testimony from TSPC's legal liaison that he was not aware that TSPC has ever issued more than a public reprimand for a test protocol violation.

I have read the cases presented by Licensee and I believe they are distinguishable from his case. The cases presented by Licensee appear to deal with a single violation of TSPC law, either using inappropriate language or a test protocol violation. Licensee's case involved three separate violations, one of which involved a knowing misrepresentation to another teacher concerning a matter dealing with professional duties. Moreover, Licensee had prior written warnings from the school for past violations. The cases presented by Licensee do not appear to involve teachers with past violations in addition to the current violation.

After considering and weighing the evidence, and the factors in OAR 584-020-0045, I conclude that a written reprimand is not appropriate. Licensee's license should be suspended.

The factors in OAR 584-020-0045 are addressed in turn.

(1) If the misconduct or violation is an isolated occurrence, part of a continuing pattern, or one of a series of incidents.

The misconduct that led to this disciplinary proceeding was not an isolated occurrence. Licensee allowed students to use unauthorized resource materials to take an exam. He falsely told another teacher that the assistant principal had approved the materials, causing that teacher to use the unauthorized materials as well. Licensee's conduct in connection with the testing issue was closely related in time and subject matter, but violated different TSPC laws, and was a continuing pattern of misconduct.

Licensee's failure to honor appropriate boundaries with students occurred over the 2008-2009 school year. While that conduct was unrelated to the testing violation, the boundaries issue was part of a continuing pattern of Licensee's conduct in interacting with students over a period of time.

The three separate allegations against Licensee constituted a series of incidents and favors discipline more serious than a public reprimand.

(2) The likelihood of a recurrence of the misconduct or violation.

Licensee received a written reprimand from his school in March 2009 for the test protocol violation. He received a written reprimand from the school in November 2009 for failing to honor boundaries with students. Licensee has not received any discipline since November 2009.

Given the seriousness of the testing protocol violation, and the attention the investigation focused on Licensee, he will probably pay closer attention in the future to make certain that he follows correct test protocols, and ask his supervisors if he has any questions. There is no reason to believe that Licensee will commit a similar test protocol violation in the future.

The failure-to-honor-boundaries violation is different. Licensee's actions demonstrated a certain lack of professional maturity and a failure to exercise good professional judgment. His actions were similar to his failing to exercise good professional judgment that led to the written warnings from the school for his offering to sell DVDs to students' parents and to co-workers, and for his physical intervention with a student.

Given Licensee's history of prior written warnings for violations, there is a likelihood of a recurrence of misconduct or violations unless the discipline is more serious than a written warning, which has not deterred Licensee's actions in the past.

(3) The educator's past performance.

Licensee has received good evaluations during his career at French Prairie. His three-year probationary status ended and he became a contract teacher beginning with the 2009-2010 school year. He became a contract teacher after he received the warning in March 2009 for the testing protocol violation, and after he received the written warnings in May 2008 over the DVD and physical intervention matters. The administration at French Prairie obviously believed Licensee merited becoming a contract teacher, even with his prior warnings. However, the fact remains that Licensee received two written warnings prior to his conduct that led to the current violations.

Licensee's past performance demonstrates that another warning (public reprimand) is insufficient discipline for the current matter.

(4) The extent, severity, and imminence of any danger to students, other educators, or the public.

The test protocol violation caused 89 seventh grade students to have to retake the writing test. That no doubt created stress and anxiety for those students and their parents. Licensee falsely told a fellow teacher that the unauthorized resource materials had been approved by the assistant principal. The misrepresentation led that teacher to use the unauthorized resource materials in his class for the writing test. The other teacher then got dragged into the investigation and no doubt experienced anxiety and professional embarrassment as a result of Licensee's conduct.

The testing violations focused unfavorable public attention on French Prairie and raised the possibility that the school could be subject to administrative sanctions for poor student test scores as a result of the invalidated tests.

Licensee's actions forced French Prairie, the Woodburn School and ODE to devote time and resources to address and correct what Licensee had done.

There was no evidence that Licensee's failure to honor boundaries during the 2008-2009 school year caused any danger to students, other educators, or the public.

Overall, however, the consequences of Licensee's conduct were too serious to warrant only a public reprimand.

(5) If the misconduct was open and notorious or had negative effects on the public image of the school.

There was no evidence that Licensee intentionally committed the testing violation by allowing students to use unauthorized resource materials. However, his conduct caused 89 students tests to be invalidated and required those students to be retested. The episode drew unfavorable attention to the school and the school district.

Licensee's conduct demonstrates that discipline more serious than a public reprimand is warranted.

(6) The educator's state of mind at the time of the misconduct and afterwards.

The evidence surrounding Licensee's conduct in allowing students to use unauthorized resource materials demonstrated a level of carelessness and a failure to recognize the importance of following important instructions. At the beginning of his interview in the investigation of the testing violation, Licensee treated the matter more casually than he did toward the end of his interview, when he apparently realized the matter was more serious than he first thought and he realized he was in trouble.

His conduct in not honoring boundaries with students regarding his language also demonstrated a lack of professionalism and failure to use common sense.

Licensee's conduct, to falsely tell another teacher that the assistant principal had approved the resource materials, was more serious and represented an attempt to mislead a colleague about an important matter related to their professional duties.

Licensee's state of mind and attitude favor a more serious discipline than a public reprimand.

(7) The danger that students will imitate the educator's behavior or use it as a model.

No evidence was presented that students would imitate the violation or the misrepresentation incident. No evidence was presented that students actually used inappropriate language in school as a result of Licensee's use of inappropriate language.

This factor does not favor either a public reprimand or a license suspension.

(8) The age and level of maturity of the students served by the educator.

Seventh grade students are between 11 and 13 years old. Some students felt strongly enough about Licensee's use of language that they reported his conduct to school administrators after the school year had ended.

This factor does not favor either a public reprimand or a license suspension.

(9) Any extenuating circumstances or other factors bearing on the appropriate nature of disciplinary sanctions.

Licensee's false statement to another teacher that the unauthorized resource materials had been approved by the assistant principal led that teacher also to use the resource materials. As a result, the other teacher also got dragged into the investigation of the testing violation and had to deal with the issue.

During the investigation, and at the hearing, Licensee attempted in some ways to deflect responsibility for his actions and to minimize his conduct. At the hearing, he testified regarding the DVD incident that he only provided a list of movie titles that parents and co-workers could access themselves from the internet. His testimony was contradicted by an email he sent a co-worker when the incident occurred in which he explained he could get DVDs through his brother at a reduced price and get the DVDs to buyers a few days after he received the money from them.

Licensee's testimony and attitude demonstrate that discipline more serious than a public reprimand is appropriate.

(10) To deter similar misconduct by the educator or other educators.

Licensee has received written warnings from the school in the past for violations of professional standards. A license suspension for the present violations is more likely than a public reprimand to deter similar misconduct by Licensee in the future.

A license suspension will more likely impress upon other educators the importance of following correct procedures for giving standardized tests, and the seriousness of knowingly making false statements in connection with their professional duties. A license suspension, as opposed to a public reprimand, will more likely deter similar conduct by other educators in the future.

At the hearing, TSPC did not put on evidence why a 60-day suspension, as opposed to a shorter or a longer period, would be appropriate. A 60-day suspension represents less than 20 percent (60 days divided by 365 days) of the total time his license could be suspended under ORS 342.177(3)(c). Given all the evidence presented, I believe a 60-day suspension is appropriate.

ORDER

I proposed TSPC issue the following order:

Issue a 60-day suspension of Licensee Jose Jesus Sandoval's teaching license.

Ken L. Betterton

Senior Administrative Law Judge
Office of Administrative Hearings

EXCEPTIONS

The proposed order is the Administrative Law Judge's recommendation to the Teacher Standards and Practices Commission. If you disagree with any part of this proposed order, you may file written objections, called "exceptions," to the proposed order and present written argument in support of your exceptions. Written argument and exceptions must be filed **within fourteen (14) days after mailing of the proposed order** with the:

Teacher Standards and Practices Commission
250 Division Street, N.E.
Salem, Oregon 97301

The Commission need not allow oral argument. The Executive Director may permit oral argument in those cases in which the Director believes oral argument may be appropriate or helpful to the Commissioners in making a final determination. If oral argument is allowed, the Commission will inform you of the time and place for presenting oral argument.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

JOSE JESUS SANDOVAL,
Petitioner,

v.

TEACHER STANDARDS AND PRACTICES COMMISSION,
Respondent.

Office of Administrative Hearings
1102276

A150908

ORDER OF DISMISSAL AND APPELLATE JUDGMENT

Petitioner has moved to dismiss the above-entitled judicial review. The motion is granted.

Judicial Review dismissed.



6/14/2012
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RICK T. HASELTON
CHIEF JUDGE, COURT OF APPEALS

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent

☒ [X] No costs allowed

Appellate Judgment Effective Date: June 14, 2012 COURT OF APPEALS

c: Aruna A Masih
Denise G Fjordbeck
Teacher Standards and Practices Commission

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ORDER OF DISMISSAL AND APPELLATE JUDGMENT

REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section,
Supreme Court Building, 1163 State Street, Salem, OR 97301-2563