BEFORE THE FAIR DISMISSAL APPEALS BOARD OF THE STATE OF OREGON

In The Matter of the Appeal of JENNIFER CROUCH, Appellant, v. SPRINGFIELD PUBLIC SCHOOLS, Respondent.	**Case No.:** FDA-17-02 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

OVERVIEW

In June 2017, Appellant, an eighth-grade language arts teacher, was dismissed by the Springfield School District ("the District"), after engaging in off-duty conduct that resulted in criminal charges of cocaine possession and driving under the influence of alcohol. She pleaded guilty on both counts and entered a diversion program authorized by the court. The District relied on three statutory grounds for dismissal: (1) conviction of a felony or crime; (2) immorality; (3) and cause that constitutes grounds for the revocation of her teaching license.[1]

Appellant appealed her dismissal to the Fair Dismissal Appeals Board ("FDAB") on July 1, 2017. A two-day hearing on the merits was conducted in Eugene, Oregon on November 29 and 30, 2017. Appellant was represented by Margaret Olney of Bennett, Harman, Morris & Kaplan, LLC, and the District was represented by Rebekah R. Jacobson of Garrett, Hemann, Robertson, P.C. The hearing was conducted before a three-member panel appointed from the FDAB, consisting of Kevin Cassidy, Duane Johnson, and Robert Sconce, assisted by panel counsel Yael Livny from the Oregon Department of Justice.

The panel finds that the District has not proven the facts necessary to sustain the dismissal. First, Appellant has not been "convicted" of a felony or crime because she entered a

[1] Only the Teachers Standards and Practices Commission ("TSPC") has the authority to revoke a teaching license; however, a District may dismiss a teacher based if the conduct could lead to license revocation under TSPC's rules. ORS 342.175, ORS 342.865(i).

diversion program for drug and alcohol rehabilitation. As a result, no criminal conviction appears on her record, and the court has stayed the criminal proceeding, pending her participation in the one-year program. Should she successfully complete the court diversion program, she will not have any criminal convictions on her record.

Second, there are insufficient facts to conclude that her teaching license will be revoked. Teachers who admit to engaging in off-duty criminal acts are often disciplined, but they are only stripped of their ability to teach if determined to be "grossly unfit" to perform the duties of a teacher or to have engaged in a "gross neglect of duty" relating to the profession. Here, Appellant's conduct leading to her dismissal occurred off-duty, and the panel is not persuaded that Appellant has lost the ability to be an effective teacher. Appellant offered live testimony from parents and also a student, who explained that they would not be concerned if she returned to the classroom after pursuing recovery.

Finally, the panel concludes that the District has not presented sufficient evidence to support a finding of immorality, as that term is defined under statute, prior FDAB cases, and state court precedent. An illegal act is not *per se* immoral, and the District lacked evidence to establish the necessary elements of immorality required by FDAB – namely, that Appellant acted "selfishly" and caused actual, tangible harm to others. The District's HR Director who recommended dismissal testified that he did not view driving under the influence as "selfish," and there are other teachers with D.U.I. charges who remain employed; instead, the immorality finding was based on Appellant's cocaine use. The District did not offer evidence showing how Appellant's cocaine use was selfish, to the "excessive" degree required by FDAB, or how it damaged anyone but Appellant herself. Moreover, Appellant presented evidence that her conduct was connected to a substance abuse disorder, for which she subsequently sought treatment.

In light of the District's failure to provide sufficient evidence to support any of the cited statutory grounds for dismissal, the panel reverses the District's dismissal decision.

PANEL RULINGS

In its closing brief, the District challenges one of the panel's evidentiary rulings during the District's cross-examination of Appellant. The panel sustained an objection on the basis of relevance by Appellant's counsel when District's counsel attempted to question Appellant as to

the frequency and amount of her drug use prior to March 3, 2017, the date of her arrest.[2] Specifically, the District sought to question Appellant about her drug use on a trip to *Burning Man*, an annual summer festival in Arizona, in Summer 2016. On direct examination, Appellant briefly testified about *Burning Man* and its value and meaning to her, after a District witness, Principal Mather, mentioned his "concern" relating to her attendance at that festival; on direct, Appellant also candidly testified about her childhood and past drug use, in general. While a witness may introduce subjects on direct examination that result in follow up on cross-examination, such testimony on cross examination remains subject to relevance and other evidentiary limitations. At hearing, the District sought details of particular drug use during a particular trip not for impeachment purposes,[3] but to establish Appellant's "level of drug use."

In sustaining the relevance objection, the panel reasoned that Appellant's past drug use, occurring almost a full year before Appellant's arrest and referenced nowhere in the District's dismissal recommendation to the Board, was not relevant to the panel's task: to determine whether the facts relied upon by the School Board on June 27, 2017, were true and substantiated. As stated in ORS 342.905(6):

> The Fair Dismissal Appeals Board panel shall determine whether the facts *relied upon to support the statutory grounds cited for dismissal* or nonextension are true and substantiated. If the panel finds these facts true and substantiated, it shall then consider whether such facts, in light of all the circumstances and additional facts developed at the hearing that are relevant to the statutory standards in ORS 342.865 (1), are adequate to justify the statutory grounds cited.

(Emphasis added.) Here, the District's dismissal recommendation that cited the facts relied upon by the Board, dated June 5, 2017, Exhibit D-12, does not contain any reference to historical drug use dating back seven months in time. While the District's letter contains allegations related to

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[2] TR 475. The panel uses the following citation methods: District exhibits and Appellant exhibits are referred to as D-# and A-#, respectively, with the relevant page number following when appropriate. The hearing transcript is referred to by "TR" and then the relevant page number(s) (*e.g.*, "TR 25").

[3] At hearing, the District did not identify the line of questioning about past drug use as potential impeachment. TR 487. In its closing brief, however, the District argues that specific prior drug use is relevant because Appellant told police she had been using cocaine for the "past two months." Appellant has already admitted to telling police about her cocaine use at the police station instead of the traffic stop. Additional evidence concerning whether or not she was using drugs and alcohol on a date seven months prior to her arrest, off-duty, is not relevant to the question of when she informed or to what extent she may have equivocated with police about her current cocaine habit – a question that was not before the Board when making their dismissal decision. D-12.

suspected drug use – the letter includes a description of drugs and drug paraphernalia found in her car (for which she was never charged) – nothing in the letter to the Board suggests that the District recommended dismissal based on potential off-duty drug use dating back months before Appellant's dismissal.

Relevant evidence is defined as that having "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ORS 40.150. Appellant's past, off-duty drug use does not make any fact of consequence more likely, since the panel recognizes that Appellant has engaged in prior illegal drug use. Appellant has admitted to purchasing, using, and carrying illegal drugs, including cocaine; she has freely disclosed a long-standing substance abuse disorder dating back to her teenage years. Whether she consumed illegal drugs on a certain prior day, and which drugs she may have consumed, does not make any fact of consequence more or less likely, since her past drug use did not form a basis for the Board's termination decision.[4]

FINDINGS OF FACT

Work History

1. The District hired Appellant in August 2013 to work at Briggs Middle School as a "contract teacher," as defined by ORS 342.815(3). Until her dismissal on June 22, 2017, she worked as a part-time language arts teacher, instructing approximately 90 middle school students daily.[5]

2. During her time at Briggs Middle School, Appellant received excellent evaluations from the principal, Jeff Mather, who noted her "sincere interest," "great attitude," "ability to connect with kids," and "encourage[ment] of critical thinking," among other qualities.[6]

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[4] The District refers to the statutory reference to "additional facts developed at the hearing," and identifies that the FDAB panel has been described as a "factfinder" in the case law. This misunderstands the FDAB's role, which is to determine whether the facts relied upon by the District are true and substantiated, and adequately support the cited grounds for dismissal. Here, prior drug use dating back in time was not relied upon by the Board in its termination, and prior drug use does not make her admitted drug use resulting in her March 3, 2017 arrest more or less likely; nor does her past off-duty drug use support a finding of immorality.

[5] Ex. A-3, p.1; Ex. D-14, p. 2; Test. of Mather, p. 159, 11. 13-19; TR 385.

[6] Ex. A-4.

3. Her personnel file contained one critical document, a letter from 2014 reminding Appellant of her obligation to get to work on time, as a result of being late on one occasion.[7]

4. Despite having an overall positive performance history as reflected in her personnel file, Principal Mather testified at hearing that he had concerns about Appellant's "reliability." According to Principal Mather, this concern was based on the letter from 2014 about being on time and also on the fact that Appellant obtained a restraining order against a former partner.[8] Principal Mather testified he did not appreciate having to warn other school staff members about the restraining order.

5. In addition to his stated concerns about the restraining order obtained by Appellant, Principal Mather questioned Appellant's reliability because she had chosen to attend an annual summer festival in Arizona called "Burning Man" during the summer break, and was not available to attend an in-person interview for another teaching job.

6. After learning that Appellant went to the Burning Man festival, Principal Mather suspected – but did not have proof – that she had been untruthful about using leave to attend her grandfather's funeral. According to Ms. Crouch, when she took leave to attend Burning Man she designated a portion of it as bereavement leave, because she performed a ritual with her grandfather's ashes at or around the festival.[9]

Medical Condition

7. Appellant suffers from a substance abuse disorder. She was not aware of having this disorder at the time of her arrest in March 2017.[10]

8. Appellant has used alcohol and recreational drugs to address anxiety, lack of focus, and emotional pain. She started experimenting with drugs and alcohol to regulate her thoughts and emotions, after surviving a childhood trauma.[11]

9. Appellant would only use drugs and alcohol on weekends or on personal time.[12]

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[7] Ex. D-18.
[8] TR 161-163.
[9] TR 164.
[10] TR 397, 433-441, 466.
[11] *Id.*
[12] *Id.*

10. In March 2017, when she was still using drugs and alcohol, Appellant did not know she suffered from Attention Deficit Hyperactivity Disorder ("ADHD") as well as issues related to trauma.[13]

11. As explained by a drug court counselor who treated Appellant, Appellant used alcohol and drugs to self-medicate. Appellant would use cocaine, for instance, to feel relaxed and focused. In some individuals, like Appellant, with neurological attention deficits like ADHD, cocaine can have effects similar to Adderall and other prescribed ADHD medications.[14]

Afternoon of March 3, 2013

12. On March 3, 2017, a Friday, Appellant concluded her school day and left Briggs Middle School between 3:00 p.m. and 3:30 p.m. driving her Toyota Prius.[15]

13. Appellant had recently experienced a painful and unexpected break-up with a partner, with whom she had been living. On March 3, she left school to drive to his house to pick up a carload of her personal belongings.[16]

14. Appellant was devastated by the break-up, and also experiencing job-related stress due to a high work-load at school – an issue she discussed with her union. On March 3, she felt anxious, unfocused, and in emotional pain.[17]

15. She remained at her ex-partner's house until about 5:00 p.m., hurriedly loading her car full of things and hoping to avoid him.[18] She then left his house and drove to a dealer's house, where she bought cocaine.[19]

16. Between 5:00 p.m. and 5:45 p.m., Appellant did two "bumps" of cocaine.[20]

17. At approximately 5:45 p.m., Appellant met with work colleagues at a bar for drinks. Between 5:45 p.m. and 7:30 p.m., she had two alcoholic drinks.[21]

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[13] TR 435-436, 439-440.
[14] TR 310-311, 317, 439-441.
[15] TR. 398, 489.
[16] TR 397.
[17] *Id.*, TR 385.
[18] TR 397-398, 489.
[19] *Id.*
[20] A "bump" is a small amount of powder cocaine that can be inhaled (snorted) through the nose quickly, for a quick and mild effect. By contrast, a "line" of cocaine is also snorted through the nose, but is a much larger quantity than a "bump. *See, e.g.,* https://www.urbandictionary.com keyword "bump."
[21] TR 491-492.

Evening of March 3rd and Arrest

18. After meeting with colleagues, Appellant picked up a friend and drove to see a movie in a shopping mall theater. She and her friend arrived at the theater around 7:50 p.m. Appellant bought a glass of wine at the concession stand and drank it in the theater.[22]

19. The film was "Get Out," a mature horror movie that tackles the theme of racism against African-Americans in the United States through satire. Appellant, her friend, and several other patrons near her were expressive and vocal in the theater in reaction to the movie.[23]

20. Part-way through the movie, at around 8:30 p.m., Appellant left the theater and bought her second glass of wine.[24] She also went to the theater bathroom where she did two more "bumps" of cocaine, before returning to her seat to finish the rest of the movie.[25]

21. At around 9:00 p.m., in the middle of the screening, a theater manager came to Appellant's row of seats. He had received a noise complaint from another patron seated near Appellant.[26] Appellant observed the theater managers advising a small group of African-American patrons that they were being loud and instructing them to step outside the theater.[27]

22. The theater manager did not direct either Appellant or her friend, both of whom were seated nearby and had engaged in similar behaviors, to likewise leave the theater.[28]

23. Appellant became upset because she believed that the theater manager was applying a different standard to the African-American patrons, who had been directed to leave, yet she and her friend, who had behaved similarly and are both white, were not called out.[29] She believed she had witnessed racial harassment by the theater manager towards the African-American patrons – which upset her, especially in light of the film's subject matter.[30]

24. At the hearing, the theater manager testified he had not given the African-American patrons a warning about noise before instructing them to leave their seats.[31] The theater manager acknowledged his usual practice is to give a warning first upon receiving a noise

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[22] TR 401-402, 492, D-1.
[23] *Id.*
[24] TR 404-405.
[25] *Id.*
[26] D-1, TR 50-53, 409-409.
[27] 401-407, 499.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] TR 71.

complaint, and could not remember any other occasion where he asked patrons to leave their seats without a prior warning.[32]

25. Appellant and her friend decided to leave their seats in reaction to what they had observed. They exited the theater and confronted the theater manager and mall security about the noise complaint and perceived targeting of African-American patrons.[33] The theater manager, upset at being accused of racism, told Appellant and her friend that they were drunk and should leave.[34]

26. A police officer performing mall security had been called to the scene by the theater, which is standard procedure when the theater anticipates a potential disruption.[35] He approached and observed Appellant acting agitated and inebriated while interacting with the theater manager.[36] As Appellant and her friend left the theater, the police officer told her not to drive if she had been drinking. Appellant told him they would call a taxi, and left with her friend.[37]

27. The District presented no evidence that any students of Appellant, or of Briggs Middle School in general, encountered or observed Appellant at the theater or at any other time that evening.[38]

28. Appellant and her friend went to her car, and called a taxi service. They learned it would take close to an hour for a taxi to arrive at the theater.[39]

29. Appellant and her friend remained in her car waiting for a taxi. Still very upset about the encounter in the theater, Appellant drafted a social media post about what she regarded as a race-based incident.[40] After 15 minutes of waiting, between about 9:30 p.m. and 9:45 p.m., Appellant decided she could drive herself and her friend home.[41] She did not feel impaired.[42]

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[32] *Id.*
[33] TR 66-71.
[34] TR *Id.*
[35] TR 51, 56, 78-79.
[36] D-3, TR 78-79.
[37] *Id.*
[38] TR 57, 64 (witnesses did not identify any specific student observers).
[39] TR 413-414.
[40] *Id.*
[41] *Id.*, TR 498.
[42] TR 498.

30. The police officer, who had advised her not to drive and who had remained on the premises, observed Appellant driving in the theater parking lot.[43] The police officer radioed another officer, who was in proximity to the movie theater, about Appellant's potentially impaired condition based on his observations from his recent, direct interactions with her.[44]

31. Upon entering the lane of travel outside the theater parking lot, Appellant failed to use her turn signal as her lane merged with another lane.[45] The second police officer pulled her over.[46]

32. The police officer who pulled over Appellant observed signs of her being under the influence.[47] She performed poorly on field sobriety tests.[48] She told the officer she had drunk part of a glass of wine.[49] This was not an accurate representation of the amount of alcohol she had consumed that evening.[50] She did not tell the officer she had also used cocaine that evening.[51]

33. The police then searched Appellant's car, which was full of personal belongings from moving out of her ex-partner's house, and her purse.[52] In her purse, the officer found a small bag of cocaine and paraphernalia with cocaine residue.[53]

34. The officer also found pills in her purse. Appellant said the pills were a gift and she believed they were acid (LSD). In the glove box, the officer found marijuana.[54] Appellant also had a box of whipped cream canisters, which people sometimes use for a nitrous oxide high, in along with multiple empty canisters scattered throughout the car.[55]

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[43] D-3, TR 80-82.
[44] D-1, TR 81-82, 104.
[45] *Id.*
[46] D-2, TR 104-105.
[47] D-2, TR 104-106.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] D-2, TR 115.
[52] TR 108-109, 148-149, D-2.
[53] *Id.*
[54] *Id.*
[55] Appellant was not charged with LSD possession, nor using whipped cream canisters for a nitrous oxide high, nor with any marijuana-related offense.

35. Appellant was arrested and taken to the police station. She became upset and started crying, concerned about her teaching job.[56] She admitted to having habitually used cocaine for two months, and admitted to using cocaine that night at the movie theater.[57]

36. At the police station, she was given a breathalyzer test. At approximately 11:47 p.m., which was just over two hours after she left the theater in her vehicle, Appellant's blood alcohol level content was measured at 0.09 percent.[58] She was not 'tested' for cocaine, and the blood alcohol content does not indicate the presence of other drugs. However, she admitted to using cocaine that night.[59]

Criminal Charges and Disposition

37. Appellant was subsequently charged with a misdemeanor, Driving Under the Influence of Intoxicants ("DUII"), and a felony, Possession of Cocaine.[60]

38. The amount of powder cocaine in her possession was 6.6 grams, which is equivalent to about one and one-third of a teaspoon. At the time of her being charged with possession, this amount constituted a felony offense under state law. Subsequently, as of August 2017, the law was amended so that possessing this amount constituted a misdemeanor, not a felony.[61] Had this incident occurred after August, the amount of cocaine in Appellant's possession would have constituted a misdemeanor offense.[62]

39. In May 2017, Appellant entered pleas of guilty to felony Possession of Cocaine and misdemeanor Driving under the Influence of Intoxicants.[63]

40. Appellant subsequently entered a plea deal in criminal court.[64] Under the terms of her plea deal, which were in effect as of the date of the District's Recommendation and Dismissal decision, Appellant was not convicted of any crime.[65] Instead, her sentencing was

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[56] TR 115, D-2.
[57] *Id.*
[58] D-2, TR 111. While a blood alcohol content of 0.09 percent is 'just above' the legal limit of 0.08 percent, the panel notes that the breathalyzer was taken over two hours after her last drink at the theater. In any case, and by her own admission, she was an impaired driver.
[59] TR 115, D-2.
[60] D-4, D-8.
[61] A-6, TR 86, TR 268.
[62] *Id.*
[63] A-10, D-8, D-9. D-10.
[64] *Id.*
[65] *Id.*

delayed and, if she successfully completes a rigorous drug and alcohol treatment ("diversion") program, Appellant will not have any conviction entered on her record. If Appellant is not successful, she could have a conviction entered on her record – at some future date.[66]

Press Coverage and Reactions

41. By the day following, Saturday, Appellant's arrest, the local news media were running stories about it, identifying her as a teacher at Briggs Middle School.[67] Principal Mather learned about the arrest from the District.[68]

42. The following day, Sunday, Principal Mather and his assistant principal called all school staff members to inform them of Appellant's arrest.[69]

43. On Monday morning, Principal Mather emailed all Briggs Middle School parents that Appellant had been arrested and had been placed on paid administrative leave "pending the outcome of the criminal process."[70] The email also stated that the District "believes that all employees have a duty to serve as role models for the students of our community, and an expectation that employees display professional behavior and judgment. Behavior that does not reflect that responsibility will not be tolerated."[71]

44. Principal Mather received some phone calls from parents expressing concern over Appellant coming back and teaching their children.[72] Some parents asked him not to place their children with Appellant if she did come back to teach.[73] The District offered several letters critical of Appellant's actions from parents into evidence.[74]

45. Principal Mather testified that the media coverage, which continued over the summer, "stir[red] things up again," prompting several critical comments from parents.[75] In

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[66] D-8, D-10, TR 516. The question of whether or not the District could terminate Appellant at that future date is not before the panel.
[67] D-7.
[68] TR 164.
[69] TR 165.
[70] D-5.
[71] *Id.*
[72] TR 168, 174, 177-179.
[73] *Id.*
[74] D-6.
[75] As proof of parents' negative reactions, the District presented emails from parents to Principal Mather, expressing the belief that Ms. Crouch had shown bad judgment and reinstatement would send a negative message to children. The District did not present any live testimony from parents, so these sentiments could not be further developed or probed by the panel.

addition, he stated that individual teachers at Briggs Middle School expressed concern.[76] None of these teachers were identified by name at the hearing or called as witnesses by the District.

46. On June 2, 2017, Appellant attended a pre-termination meeting with the District's HR Director.[77] On June 5, 2017, then-Superintendent of the District, Susan Rieke-Smith, recommended to the District School Board that Appellant be dismissed based on three statutory grounds: conviction of a felony; immorality; and any cause which constitutes ground for the revocation of such contract teacher's teaching license.[78]

47. On June 26, 2017, the District School Board voted to dismiss Appellant based on the three statutory grounds cited above.[79]

48. By letter dated June 30, 2017 Appellant appealed to the Fair Dismissal Appeals Board from the District's decision to dismiss her from employment.

CONCLUSIONS OF LAW

1. The District is a "fair dismissal district" under the Accountability for Schools for the 21st Century Law.

2. Appellant is a "contract teacher" and entitled to a hearing before this panel.[80]

3. The factual allegation that Appellant bought, possessed, and consumed cocaine on March 3, 2017, while off-duty, is true and substantiated.[81]

4. The factual allegation that Appellant consumed alcohol and cocaine, and then drove a car while under the influence of intoxicants, is true and substantiated.

5. The factual allegation that Appellant drove a car while intoxicated, after a police officer had a conversation with her and directed her not to drive, is true and substantiated.

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[76] TR 180.
[77] D-11.
[78] Ms. Rieke-Smith did not testify at hearing, nor did any school board members. The District presented testimony of two school officials: Principal Mather, who did not have any direct role in the termination decision, and whose testimony involved concerns about Appellant pre-dating her arrest – namely, his concerns about her seeking assistance for a domestic violence situation, as well as her decision to attend Burning Man instead of remaining in Oregon to attend an interview in person. TR 161-164, 200. The District's only other school witness was Mr. Smolinsky, the Interim HR Director.
[79] D-14.
[80] *Id.*
[81] This and the remaining factual allegations address the facts cited in the District's Dismissal Recommendation to the Board, plus any additional facts developed at hearing related to the dismissal decision.

6. The factual allegation that Appellant believed she was in possession of two acid (LSD) pills is true and substantiated. However, no tests were performed to verify whether her belief was accurate and whether she actually possessed LSD.

7. The factual allegation that Appellant was directed by the theater manager to leave the premises is true and substantiated. The factual allegation that a theater manager and police officer observed Appellant acting in a "disorderly manner" at the movie theater, as described in the Dismissal Recommendation, is true and substantiated.

8. The factual allegation that Appellant was convicted of a crime is not true or substantiated.

9. The true and substantiated facts are not adequate to support the charge of conviction of a felony or crime, or immorality, or cause which constitutes a ground for the revocation of such contract teacher's teaching license, as grounds for dismissal.

10. Because this panel concludes that the true and substantiated facts are not adequate to support the grounds for dismissal relied upon by the District, it is unnecessary for this panel to consider whether the dismissal of Appellant was arbitrary, unreasonable or clearly an excessive remedy within the meaning of ORS 342.905(6).

DISCUSSION

I. Applicable Legal Standard.

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

> (a) Inefficiency;
> (b) Immorality;
> (c) Insubordination;
> (d) Neglect of duty, including duties specified by written rule;
> (e) Physical or mental incapacity;
> (f) Conviction of a felony or of a crime according to the provisions of ORS 342.143;
> (g) Inadequate performance;
> (h) Failure to comply with such reasonable requirements as the board may prescribe to show normal improvement and evidence of professional training and growth; or
> (i) Any cause which constitutes grounds for the revocation of such contract teacher's teaching license.

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

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

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

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

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

In this case, the panel reviewed the evidence and determined what facts relied upon by the District in its dismissal decision are true and substantiated. The panel then considered whether the true and substantiated facts constitute or are adequate to support the grounds for

dismissal, based on those cited by the District at the time of termination. Here, the District terminated Appellant pursuant to three grounds: ORS 342.856(b) – immorality; ORS 342.865(f) – conviction of a felony; and ORS 342.865(i) – any cause which constitutes grounds for the revocation of a contract teacher's teaching license by the Teachers Standards and Practices Commission ("TSPC").[82]

II. The Facts Relied upon by the District are Not All True and Substantiated.

The panel has determined that the District has proven some, but not all, of the facts it relied upon in making its statutory dismissal decision, and that the true and substantiated facts are not adequate to justify the three cited grounds for dismissal. As explained in more detail below, Appellant does not have a "conviction" of a felony or other crime, at least not as of the date of the Board's decision or the date of this hearing. Therefore, there is no factual basis for the ORS 342.865(f) statutory ground requiring a "conviction." Second, while it is true and substantiated fact that Appellant engaged in off-duty illegal acts (purchasing and using cocaine, and driving under the influence) and appearing intoxicated, which led to her arrest and charges, the District has not presented sufficient evidence that those acts were maliciously selfish and directly harmful to others – the elements to prove an immorality charge under FDAB law under board precedent. Finally, the District has not presented adequate facts to establish gross unfitness or gross neglect of duty that, as an educator, may result in revocation of Appellant's license.

III. The True and Substantiated Facts are Not Adequate to Justify the Statutory Grounds Cited by the District.

A. The charged facts are not adequate to justify dismissal for conviction of a felony or crime.

The panel concludes that the true and substantiated facts are not adequate to support dismissal on the statutory grounds of conviction of a felony or crime under ORS 342.865(f). As the parties point out in their closing briefs, there are no FDAB cases interpreting this subsection; a teacher who is convicted of a felony – which is disputed here – is barred from appealing her dismissal under FDAB rules. Here, there has been no entry of a conviction on Appellant's record. Appellant pleaded guilty to two crimes, yet her sentencing – *i.e.*, an order by a court that

[82] As far as the panel is aware, as of the date of this order, TSPC has not issued any decision or taken action regarding Appellant's teaching license.