

**BEFORE THE FAIR DISMISSAL APPEALS BOARD
OF THE
STATE OF OREGON**

In the Matter of the Appeal of:

THERESA SEELEY,

Appellant,

v.

PORTLAND PUBLIC SCHOOLS,

District.

CASE No. 21-01

DISMISSAL ORDER

Theresa Seeley, Portland, Oregon, appeared *pro se*.

Michael Porter, Miller Nash LLP, Portland, Oregon, represented the District.

On February 6, 2021, the Appellant, appearing *pro se*, filed an appeal by submitting it to the Fair Dismissal Appeals Board (FDAB) through priority mail. On June 16, 2021, the District filed a motion to dismiss. The Appellant replied on June 30, 2021.

DISCUSSION

The District's motion challenges FDAB jurisdiction and seeks dismissal. Foremost, the District argues that the Appellant failed to provide the District proper notice by providing a copy of the appeal to the District when it was filed with the FDAB as required under ORS 342.905(1). For this reason, the District argues that the FDAB cannot exercise jurisdiction over an appeal or a contested case raised through ORS 342.905(1). The District also argues that the Appellant failed to comply with ORS 342.905(1) by not providing a "brief statement" of the reasons supporting the appeal because the appeal was 120 pages long.

The Appellant's reply to the District's motion asserts that she provided the District with a copy of the appeal in a timely fashion. Additionally, the Appellant clarified that only the first seven of the 120 pages comprised the brief statement of the reasons supporting the appeal.

Upon review of the Motion, Appellant's response, and the Appeal in this matter, the FDAB Panel assigned to review this case identified an additional jurisdictional issue for the

parties to address; whether the Appellant was in fact a teacher as defined under ORS 342.120 and referenced in ORS 342.905(1). Altogether, the issues that challenged FDAB jurisdiction asked whether the Appellant:

1. Held the position of a teacher as defined in ORS 342.120(7) and referenced under ORS 342.905(1).
2. Complied with the notice provision under ORS 342.905(1).
3. Complied with the brief statement provision under ORS 342.905(1).

A hearing addressing these three issues was held on August 4, 2021. The evidence, legal arguments, and the reasons granting the motion to dismiss are discussed below. The parties had an opportunity to present argument and submit evidence responsive to these questions. The record was held open after the hearing for 5 days for the Appellant to submit evidence responsive to these questions.

Determination on whether to grant the District's Motion turns on the interpretation and application of ORS 342.905(1), which states:

(1) If the district school board dismisses the teacher or does not extend the contract of the contract teacher, the teacher or the teacher's representative may appeal that decision to the Fair Dismissal Appeals Board established under ORS 342.930 by depositing by certified mail addressed to the Superintendent of Public Instruction and a copy to the superintendent of the school district:

(a) In the case of dismissal, within 10 days, as provided in ORS 174.120, after receipt of notice of the district school board's decision, notice of appeal with a brief statement giving the reasons for the appeal.

(b) In the case of a contract nonextension, within 15 days, as provided in ORS 174.120, after receipt of the written notice of nonextension of a contract, notice of appeal with a brief statement giving the reasons for the appeal.

Subsection (1) requires the appealing teachers to provide notice of the appeal to the school district. Subsections (1)(a) and (1)(b) address the time limitations for filing an appeal based respectively on whether the teacher was separated from service through a dismissal or from nonextension of a contract. Both subsections require a brief statement.

The FDAB has adopted the Administrative Procedures Act ("APA"). ORS 183.341 and OAR 586-001-0005. In an APA contested case process, all parties have a right to service of reasonable notice. ORS 183.415. In addition, notice must include a "short and plain statement of the matters asserted or charged." ORS 183.415(3)(d).

The jurisdiction of the FDAB is circumscribed by subject matter and due process limitations. If it lacks either, then it is improper for the FDAB to exercise jurisdiction over a case. For instance, the FDAB cannot exercise jurisdiction over appeals by those not properly

certified to teach by the Teacher Standards and Practices Commission. *Wagenblast v. Crook County School Dist.*, 75 Or.App. 568, 575 (1985). In *Wagenblast*, the FDAB lacked subject matter jurisdiction. Similarly, by the adopting the APA, the FDAB cannot exercise jurisdiction when a party does not receive proper or timely notice as required by due process.

A. The Appellant is a teacher under ORS 342.120(7) and ORS 342.905(1).

FDAB posed the question of the parties as to whether the Appellant was a teacher as defined in ORS 342.120(7) and referenced in ORS 342.905(1). The reason FDAB posed this question derived from references in the Appellant's own appeal that she was a school psychologist. In the same appeal, the Appellant identified herself as a teacher. With this ambiguity, the question leaned more heavily on determining her actual duties. Other than the pleadings submitted by the parties such evidence was not clearly in the record.

ORS 342.905(1) permits a teacher to appeal dismissal or nonextension of a contract. In pertinent part, ORS 342.120(7) defines "teacher" to include "all licensed employees in the public schools or employed by an education service district who have direct responsibility for instruction or coordination of educational programs and who are compensated for their services from public funds." In other words, being a licensed employee is not enough for an FDAB appeal, the licensed employee "must also have direct responsibility for instruction or coordination of educational programs." Nothing in the record indicates that the Appellant did not perform such duties.

The District's pre-hearing brief agreed the Appellant was licensed as a teacher and did not raise any issues regarding duties performed contrary to ORS 342.120(7). Likewise, the Appellant's pre-hearing brief reasserted her licensed status and did not describe duties contrary to those described in ORS 342.120(7). Since both parties appear to agree on this, the FDAB assumes, without deciding, that the Appellant fell under the definition of teacher in ORS 342.120(7) and could appeal under ORS 342.905(1).

B. The District did not receive proper notice as required in ORS 342.905(1).

The arguments for and against dismissal revolve around whether the District received *timely* and *sufficient* notice under ORS 342.905(1).

Brief statement requirement: ORS 342.905(1)(a) and (1)(b) both require the FDAB appeal include "a brief statement giving the reasons for the appeal." This is consistent with ORS 183.415(2)(d) which also requires the notice provided to the parties include a "short and plain statement of the matters asserted or charged."

The FDAB notes that the adjective "brief" is relative and even vague; it does not always become more precise when pertaining to legal filings. Reading ORS 342.905(1) harmoniously with ORS 183.415(2)(d) a brief appeal should also be "plain, natural, and ordinary."

The operative metric is whether the reasons for the appeal are clear enough to comprise sufficient notice to the district. This was articulated in *Murphy v. Oregon Medical Board*, 270

Or.App. 621, 631-632 (2015), in which the Court of Appeals reversed the Oregon Medical Board's order reprimanding the petitioner. As an APA case, the *Murphy* Court cited to ORS 183.415 as requiring notice that includes a "short and plain statement" but noted that the Board provided statutory references, without much explanation, as a basis for its order.¹ For this reason, the petitioner in *Murphy* was prejudiced by the Board's inadequate notice because the petitioner was unable to adequately prepare a defense.

A notice, or an appeal that says too little—that is too brief—risks providing insufficient notice of the "reasons for an appeal." On the other hand, an appeal that is too lengthy risks obscuring or burying the reasons for an appeal. However, when dealing with lengthy appeals, the question posed by the *Murphy* case is whether the length prejudiced the district by insufficient notice so that it could not adequately prepare its defense of the district's decision.

Oregon courts have scrutinized whether a failure to provide a statement of reason for an FDAB appeal is a "fatal jurisdictional defect." *Hood River County School District v. Fogle*, 30 Or.App. 699, 705 (1977). Initially, the Court of Appeals in *Hood River* reversed the FDAB for setting aside a school district's dismissal because the teacher failed to provide a statement of reasons for the appeal, and as improper notice to the district, this notice failure was "procedurally unsound." *Fogle*, at 704. However, the Court of Appeals later withdrew its opinion as erroneously tying the statement of reasons for an appeal as a jurisdictional requisite. *Fogle*, 31 Or.App. 659 (1977).

The history of the *Fogle* case indicates that at least in the case of lengthy briefs, the solution is not to dismiss for insufficient jurisdiction derived from improper notice. Rather, the appealing party should have an opportunity to make the reasons for appeal clear either through the discovery process or by amending the pleading itself. In this case, the Appellant agreed to modify her appeal from 120 pages to only the first 7 pages as the reasons for her appeal. This is a similar approach when a party must respond to motions to strike or make more definite and certain. Without addressing whether the Appellant's truncation of the appeal made the reasons for the appeal clear, the FDAB does not find a jurisdictional defect from the Appellant's failure to provide a brief statement under ORS 342.905(1).

Timely notice requirement. The Oregon Legislature authorized the FDAB to adopt rules under ORS 342.930(9) and the FDAB adopted the APA. Under the APA, notice rights are addressed in ORS 183.415. Specifically, subsection (2) requires providing "reasonable notice" to all parties by personal service, registered, or certified mail.

The FDAB notice requirements for teacher appeals are found in ORS 342.905(1) and clearly require filing by "certified mail addressed to the Superintendent of Public Instruction **and** a copy to the superintendent of the school district."² FDAB interprets the use of the word "and" in this sentence as conjunctive; meaning both should receive the appeal by certified mail. Subsection (1)(a) requires filing within 10 days of dismissal and subsection (1)(b) extends this to 15 days in the case of nonextended contracts. Interpreting subsections (1)(a) and (1)(b) in the

¹ *Murphy*, at 630.

² Emphasis provided.

most harmonious light with subsection (1), the appealing party must provide a copy of the appeal to the district within 10 of a dismissal, or 15 days of a nonextension of contract. The copying of the district must occur by certified mail.

The timeline for a teacher to appeal is triggered only by formal notice of the school board's decision to the teacher in the manner prescribed by statute. *See, Post v. Salem-Keizer School Dist.*, 334 Or. 61, 66 (2002).³ Oregon courts have recognized that an FDAB appeal is properly filed when it is "delivered to the proper officer, and by him received to be kept on file." *See, Williams v. Cody*, 24 Or.App. 433, 436 (1976).⁴ In other words, the mere evidence of dispatch is insufficient, there must be some proof of receipt. This is consistent with the requirement for the use of certified mail.

The District's motion cites two cases; *Kelsey v Drushella-Klohk NCE*, 128 Or.App. 53 (1994) and *Mosley v. Sacred Heart Hosp.*, 113 Or.App. 234 (1992) as cases interpreting ORS 656.295(2), a notice statute interpreted by the Workers Compensation Board (WCB). Like the FDAB, the WCB also adopted the APA, and cases interpreting and applying ORS 656.295(2) are analogous to ORS 342.905(1).

Both *Kelsey* and *Mosley* involved a failure of the appealing party to provide notice to all parties within the timeframe required for the appeal. In *Kelsey*, the Court remanded the appeal to the WCB to dismiss the appeal. In *Mosley*, the Court affirmed the WCB in its dismissal of the appeal for failure to give notice to all the parties. Both cases are persuasive authority applying the APA notice requirements in this matter.

In sum, regardless of whether a teacher is separated from service with a district because they are dismissed or because their contract is not extended, the appealing teacher must deposit by certified mail the appeal to the Superintendent of Public Instruction and must provide a copy to the Superintendent of the school district. ORS 342.905(1). In other words, the district must be copied when the appeal is filed.

In a letter dated January 28, 2021, the Portland Public Schools notified the Appellant of its acceptance of the Superintendent's notice of intent to recommend dismissal. (Declaration of Genevieve Rough, Exhibit 2). The Appellant provided an appeal, along with attached documents, showing a photocopy of the priority mail sent to the FDAB by the Appellant, and is post-marked February 6, 2021.

The evidence in the record show that the District did not know, because they did not receive a copy of the appeal until May 13, 2021. The Appellant testified that she sent a copy of the appeal to the District. However, nothing in the record shows she provided a copy of her

³ In *Post*, the Oregon Supreme Court reversed and remanded the Court of Appeals agreement with the FDAB's order that the teacher's appeal for missing the 10-day deadline because the record was not clear as to whether the teacher was a contract teacher or a permanent teacher with different deadlines. *Post*, at 67. As such, *Post* did not involve providing proper notice to the district. See also, *Zollinger v. Frear*, 32 Or.App. 385, 391 (1978), in which the appeal time for school administrators starts to run, upon receiving actual notice.

⁴ See also, *Zollinger v. Warner*, 286 Or. 19, 26-28 (1979), discussing the filing deadlines, service, and notice requirements necessary for FDAB jurisdiction.

appeal within the 15 days she received the District’s notice dated January 28, 2021. The record was kept open for an additional 5 days after the hearing on August 4, 2021 for the Appellant to produce documentary evidence supporting her assertion that she provided a copy of the appeal to the District. The Appellant did not provide a copy of the notice of her appeal to the District within the statutory period.

The Appellant failed to comply with the notice provisions required by ORS 342.905(1) by failing to provide a copy of her notice of appeal to the District within the 15 days she received notice of the District’s acceptance of the decision to dismiss.

ORDER

The Appeal is dismissed.

DATED August 27, 2021

_____ *signed / confirmed electronically* _____
Bob Sconce, Panel Chair

DATED August 27, 2021

_____ *signed / confirmed electronically* _____
John Hartstock, Panel Member

DATED August 27, 2021

_____ *signed / confirmed electronically* _____
Victoria Purvine, Panel Member

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

CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2021, I served a true and correct copy of the ORDER ON THE MOTION TO DISMISS the method indicated below:

Michael Porter, Attorney at Law Miller Nash LLP 111 SW Fifth Avenue, Suite 3400 Portland, OR 97204 Email: mike.porter@millernash.com	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/>	HAND DELIVERY U.S. MAIL OVERNIGHT MAIL TELECOPY (FAX) ELECTRONICALLY
Theresa Seeley, Appellant 7025 NE Davis Street Portland, OR 97213 Email: treeyoga1964@gmail.com	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/>	HAND DELIVERY U.S. MAIL OVERNIGHT MAIL TELECOPY (FAX) ELECTRONICALLY

Respectfully submitted,

ELLEN F. ROSENBLUM
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