

Respondent appeared by telephone from Texas and testified on his own behalf.

After review and consideration of the entire record in this matter, I now issue this Proposed Order.

ISSUES

- 1) Whether Cunningham violated OAR 584-020-0040(4)(n) relating to Gross Neglect of Duty in three alleged instances as set forth below and in the Notice.
- 2) Whether Respondent violated OAR 584-020-0040(4)(f) on or about November 16, 2000 when he told MS, a female eighth grade student, to "stand by him so it looked like he could still get all of the hot chicks."
- 3) Whether Respondent violated OAR 584-020-0040(4)(f) on or about November 30, 2000 when he told a group of sixth grade girls and a teacher that LL would miss him next trimester since LL would not be in his class, and that "she knows how to wrap me around her little finger with that smile... that when she talks she has to use her hands and shakes her little behind," making the girls and the teacher feel uncomfortable.
- 4) Whether Respondent violated OAR 584-020-0040(4)(f) in the fall of the 2000-01 school year when he told EB that he was "...going to slap her on the butt..." and to bend over, which she refused to do, and told EB "just because you are pretty doesn't mean you don't have to do the work."

EVIDENTIARY RULING

The Commission's Exhibits 1 through 16 were admitted into the record without objection.

FINDINGS OF FACT

- 1) Cunningham has been a teacher for approximately 23 years, including 11 years in El Paso, Texas and 12 years at Dayton Junior High School (Dayton). He was employed as a teacher in Dayton during the 2000-01 school year and taught mathematics and science. Cunningham also taught classes at the high school. (Testimony of Cunningham).
- 2) On October 12, 2000, Cunningham received Dayton's Employee Policy Handbook (handbook). The handbook contained a policy on Sexual Harassment, which was adopted in 1996 and revised in 2000. (Ex. 1).
- 3) On November 2, 2000, Cunningham attended a sexual harassment workshop. The workshop covered interactions between teachers and students. (Ex. 2; Lorenzen's testimony).
- 4) On November 16, 2000, Cunningham talked to MS, who was standing on the ramp next to his classroom. MS had talked to Cunningham before but did not know him very well. He said something to the effect of "why don't you come over here and stand by me so it looks like I

still have it – like I can get all of the hot chicks.”³ This comment made MS feel uncomfortable because he was a teacher and she interpreted this statement as sexual in nature. MS hung around Cunningham’s classroom door until her class was over. (Ex. 3-1; testimony of MS and Cunningham).

- 5) John Sullivan, the school counselor, reported the incident to Lorenzen, the school principal. Lorenzen interviewed MS and confirmed what had occurred. MS filed a formal complaint against Cunningham. Before she did so, she talked to a female teacher and her mother. She did not talk to other students. (Exs. 3-1, 4; testimony of MS, Lorenzen).
- 6) When Lorenzen asked Cunningham about the incident, he did not deny that he had made the comment but explained that he had done so to move her away from Ms. Dickinson’s classroom, from which she had earlier been removed. His intent was to prevent her from further disturbing the class, which was still in session. Cunningham did not think that his comment was “any big deal” and was surprised it was so serious. Lorenzen directed Cunningham to be more direct in his instructions to students, emphasized the need to avoid comments which could be interpreted as harassment and imposed a written reprimand on Cunningham for the incident. (Exs. 3-2, 5, 6; Lorenzen’s testimony).
- 7) On November 30, 2000, Green, another teacher at Dayton, was about to start her tutoring session in reading with a group of three female students, which included LL, a sixth grade female student and Lorenzen’s niece. LL was more mature physically than the other sixth grade female students. Cunningham came into the room and began talking to the students. Cunningham told LL that she would miss him next trimester since she would not be in his class. He said “she just knows how to wrap me around her little finger with that smile.” He went on to say that when LL talked she had to use her hands and shake her “little behind.”⁴ LL was embarrassed by Cunningham’s comments. She blushed and put her head down. Green felt uncomfortable because of what Cunningham had said about LL wrapping Cunningham around her finger and shaking her little behind. Green filed a complaint with the principal on December 1, 2000. (Ex. 7-1; testimony of Green and LL).
- 8) Green was unaware of the complaint filed by MS and did not routinely file complaints against teachers. She felt uncomfortable in doing so. (Testimony of Green, Lorenzen).
- 9) Cunningham had previously made comments to LL, like “oh, you look so cute” and “you should be a model or an actress.” These comments made her feel uncomfortable. (LL’s testimony).
- 10) Lorenzen talked to Cunningham about the complaint. Lorenzen reminded Cunningham to choose his words carefully when speaking to female students. (Ex. 7-2).

³ Cunningham disputed that he said “hot chicks” but thought he might have said “babe magnet.” (Testimony of Cunningham).

⁴ Cunningham testified that he was just teasing LL and did not see his comment as a problem. (Testimony of Cunningham).

- 11) In February 2001, EB's mother complained to Lorenzen that Cunningham was telling her daughter how good-looking she was. EB reported to her that she went up to Cunningham during class to ask for help and Cunningham told her that he was going "slap her on the butt" and to bend over, which she refused to do. He held his hand back as if to slap her and said "just because you are pretty doesn't mean that you don't have to do the work." EB thought he was saying that she had a nice butt and felt uncomfortable about the interaction. EB told her mother and her mother reported the incident to Lorenzen. (Ex. 8; testimony of EB).
- 12) Cunningham had previously made comments to EB that she was pretty. Those comments did not bother her until he started talking about "slapping her on the butt." Other female students in Cunningham's class started talking about Cunningham's comments about their appearance. (Testimony of LL and EB).
- 13) Spanking and other forms of corporal punishment are not authorized by the school district. (Lorenzen's testimony).
- 14) On February 23, 2001, Lorenzen wrote a memo to Cunningham warning him that sexual comments made to female students would not be tolerated. Cunningham was "shocked" and explained that he was only prompting EB to get the work done and his comment had been misinterpreted. Lorenzen reminded Cunningham that he needed to be more professional in his word choice and in his interactions with students. (Ex. 9; testimony of Lorenzen).
- 15) During this period of time, Cunningham told CC, another female student, that she had nice legs. CC told EB that she would never wear a skirt again in the seventh grade.⁵ Lorenzen talked to Cunningham about the incident. (Ex 11; testimony of Lorenzen and Cunningham).
- 16) KK reported to Lorenzen on March 14, 2001 that Cunningham had called her out of class while she was studying. He told her to bend over and that her mom had told him that he could spank her when she was bad. She refused to bend over and disputed his statement that her mom had given him permission to spank her. Cunningham then told KK to go back into the classroom. Lorenzen talked to Cunningham about the incident. (Ex. 12; testimony of Lorenzen, Cunningham).
- 17) On February 13, 2001, MP, a seventh grade female student, reported that Cunningham had pulled her out of his first period class and told her that he feared for her because her older brother CJ was "stupid and dangerous." CJ was a student in one of Cunningham's high school classes. Cunningham told MP that "this was our little secret," bought her a soda and told her not to tell anyone. Cunningham did not report his concerns to the principal or the school counselor. (Exs. 13, 16; testimony of Lorenzen).

⁵ Cunningham explained that when he made the comment CC was dressed up and looked very nice and he meant the comment as a compliment. (Testimony of Cunningham).

- 18) Cunningham admitted to Lorenzen that he had talked to MP about CJ. He told Lorenzen that when CJ came to pick up MP, she was not ready. CJ was furious and became verbally and physically aggressive. Cunningham told Lorenzen that he asked MP to keep their conversation confidential because he thought her stepmother was a "loose cannon." He also told Lorenzen that, because of a previous incident in Texas where a student had been beaten to death by an abusive boyfriend, he was concerned about MP's safety and he wanted to make sure he had done everything he could to prevent another tragic incident. MP told Cunningham that CJ treated her okay and Cunningham did not pursue it further. (Ex. 14; testimony of Cunningham).
- 19) On March 22, 2001, Cunningham resigned his teaching position at Dayton to return to Texas. (Ex. 15).
- 20) Lorenzen accepted Cunningham's resignation because the student's continuing complaints about him and his apparent lack of professional judgment were detrimental to the school. On March 23, 2001, Lorenzen notified the Commission about the investigations he conducted during the school year concerning inappropriate comments made by Cunningham, which resulted in written reprimands for violation of the school district's policy on Harassment/Sexual Harassment. (Ex. 16).
- 21) Cunningham attributed these incidents to personal style and the cultural differences between Oregon and Texas. (Testimony of Cunningham).

CONCLUSIONS OF LAW

- 1) Cunningham violated OAR 584-020-0040(4)(n) relating to Gross Neglect of Duty in at least three instances by his failure to use professional judgment in his interactions with female students and failure to use skill in supervising students as set forth below.
- 2) Cunningham violated OAR 584-020-0040(4)(f) on or about November 16, 2000 when he told MS, female eighth grade student, to stand by him "so it looked like he could still get all of the hot chicks."
- 3) Cunningham violated OAR 584-020-0040(4)(f) on or about November 30, 2000 when he told a group of sixth grade girls and a teacher, that LL would miss him next trimester since LL would not be in his class and that "she knows how to wrap me around her little finger with that smile... when she talks she has to use her hands and shakes her little behind," making LL and the teacher feel uncomfortable.
- 4) Cunningham violated OAR 584-020-0040(4)(f) in the fall of the 2000-01 school year when he said to EB that he was "... going to slap her on the butt..." and to bend over, which she refused to do, and told her that "just because you are pretty doesn't mean you don't have to do the work."

OPINION

Respondent challenges both the alleged violations of OAR 584-0020-0040(4)(n) and 584-020-0040(4)(f) and the proposed suspension for a minimum of 90 days followed by a period of probation. In that regard, the Commission has the burden of proving these allegations and that the proposed sanction is warranted by a preponderance of the evidence. *See* ORS 183.450(2) and (5); *Reguero v. Teachers Standards and Practices Commission*, 312 Or 402, 418 (1991) (burden is on the Commission in disciplinary action); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence).

Respondent conceded that the incidents set forth in the allegations occurred but disputed the wording of some of the statements and argued that those statements did not constitute "sexual conduct" in violation of OAR 584-020-0040(4)(f) and did not constitute a "substantial deviation from professional standards of competency" pursuant to OAR 584-020-0040(4)(n). Consequently, the issues are whether Respondent's statements constituted "sexual conduct" as defined by OAR 584-020-005(5) and a "substantial deviation from professional standards of competency" as set forth in OAR 584-020-0010 through 584-020-0030.

Sexual Conduct

OAR 584-020-0040(4) states in relevant part:

(4) 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:

* * * *

(f) Any sexual conduct with a student.

Additionally, OAR 584-020-0005 states in pertinent part:

(5) 'Sexual Conduct' includes

* * * *

(d) Verbal or physical conduct of a sexual nature when directed toward a student or when such conduct has the effect of unreasonably interfering with a student's educational performance or creates an intimidating, hostile or offensive educational environment.⁶

⁶ This parallels Dayton's policy on sexual harassment which provides in part that:

Sexual harassment of students * * * shall include, but is not limited to unwelcome

Based on the above definition, "sexual conduct" includes: (1) verbal conduct; (2) of a sexual nature; and (3) directed to a student.⁷ I find that Respondent engaged in verbal sexual conduct in at least three instances by making comments to female students about their appearance, which could be interpreted as sexual in nature. The record establishes that Respondent said to MS something to the effect of "why don't you come over here and stand by me so it looks like I still have it – like I can still get all of the hot chicks." There is some dispute with respect to whether MS entered or did not enter Respondent's classroom and whether he said "hot chicks" or "babe magnet." However, either term could be interpreted as a sexual comment. Moreover, there is no dispute that Respondent's comment made MS feel uncomfortable and that she interpreted his statement as sexual in nature.

The record also establishes that Respondent said in front of Green, LL and two other female student's that LL "just knows how to wrap me around her little finger with that smile" and that when LL talked she used her hands and shook her "little behind." At hearing, Respondent made much of the fact that he also said that LL would miss him and that this is a common exchange between students and their teachers. But that was not the part of his comment that Green and LL found objectionable. They objected to his comment that she could "wrap him around her little finger with that smile" and that she shook her "little behind." Both of those comments could be interpreted as comments about the student's appearance and sexuality, and could be, and were construed by Green as sexual in nature. Respondent attempted to excuse his comment, stating that he was only "teasing" LL. Respondent suggested that Green had misinterpreted and overreacted in reporting the incident because of her membership in a fundamentalist religious group. He also suggested that Green had filed complaints against other teachers. However, Lorenzen credibly testified that Green was an excellent teacher and did not routinely file complaints against other teachers. Consequently, I do not find either his excuse or his suggestions persuasive or supported by the record.

Finally, the record establishes that Respondent repeatedly told EB how pretty and good-looking she was and that when EB asked Respondent during class for help, Respondent told her that he was going "slap her on the butt." He held his hand back as if to slap her and said "just

sexual advances, requests for sexual favors and other verbal, nonverbal or physical conduct of a sexual nature when:

* * * *

3. The conduct or communication is so severe, persistent or pervasive that it has the purpose or effect of unreasonably interferes with a student's educational performance * * *; or creates an intimidating, offensive or hostile educational * * * environment.

Examples of sexual harassment may include, but not limited to * * * rating others as to appearance, sexual activity or performance. (Emphasis added).

⁷ Because the definition of "sexual conduct" is phrased in the alternative, I read the rule to require the Commission to prove that the individual's sexual conduct has the effect of unreasonably interfering with a student's educational performance or creates an intimidating, hostile or offensive educational environment only if it does not satisfy these three elements.

because you are pretty doesn't mean you don't have to do the work." Respondent's comments about her appearance made EB uncomfortable. EB thought he was saying that she had a nice butt and interpreted his comment as sexual in nature. Respondent argued that there was a group of female students engaged in some type of "whispering campaign" against him and that after the first incident, "it all just snowballed." However, he presented no evidence in this regard, other than his own suspicions.

TSPC has interpreted its own rule to include the type of statements made by Respondent. I am required to defer to an administrative agency's plausible interpretation of its own rule if the interpretation cannot be shown to be inconsistent with the wording of the rule itself, or with the rule's context, or any other source of law *Don't Waste Oregon Committee v. Energy Facility Siting Council*, 320 Or 132, 142 (1994).

Accordingly, I conclude that Respondent violated OAR 584-020-0040(4)(f) in making these statements to the three female middle school students. I note that had these statements been made to an adult female, they may still have been interpreted as sexist in nature. However, Respondent's statements to the three female students were particularly inappropriate because of their sensitivity to comments about their personal appearance and their tendency to interpret such comments as sexual in nature.

Substantial Deviation

I also conclude that these incidents constituted a substantial deviation from professional standards of competency as set forth in OAR 584-020-0010 through 584-020-0030. In that regard, OAR 584-020-0010(5) requires the competent teacher to use "professional judgment." I find that Respondent failed to use good professional judgment with respect to the three incidents set forth above and in the Notice. Although the use of the language Respondent used with the female students may be "just his style" or a product of cultural differences, his comments concerning the appearance of the students and his references to spanking them are clearly inappropriate in Oregon schools. After teaching in Oregon schools for a number of years, he should have known that they were inappropriate.

Furthermore, OAR 584-020-0020 states in relevant part:

(2) The competent teacher demonstrates:

* * * * *

(d) Skill in the supervision of students.

Respondent argued at hearing that he was just trying to motivate the students to do the work. If that was the case, his comments during the incidents set forth above demonstrate a complete failure to demonstrate skill in the supervision of students. A teacher does not motivate a female student by telling her that he is going to "slap her on the butt" and commenting that "just because you are pretty doesn't mean that you don't have to do the work." Accordingly, I find that Respondent's behavior in this regard also constitutes gross neglect of duty under OAR 584-020-

0010(5) and 584020-0020(d) because they demonstrate a failure to use professional judgment in his interactions with female students and a failure to use skill in supervising students.

Sanction warranted

ORS 342.175 (1) gives TSPC the authority to suspend or revoke the license of a teacher for gross neglect of duty. Additionally, subsection (5) states that:

“Violation of rules adopted by the commission relating to competent and ethical performance of professional duties shall be admissible as evidence of gross neglect of duty or gross unfitness.”

Pursuant to this statute, I have found that Respondent's' conduct violated OAR 584-020-0040 in three incidents and constituted gross neglect of duty. The Commission has proposed a suspension of a minimum of 90 days followed by a probationary period. In determining the appropriate sanction, I apply OAR 584-020-0045, which states:

The Commission 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.
- (3) 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 a disciplinary sanction.

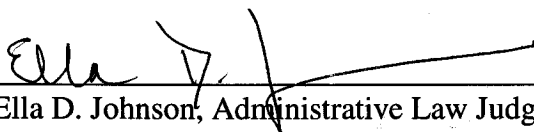
Respondent stated at hearing that he did not intend to ever come back to Oregon and the only reason he fought the sanction was that any sanction would be placed a national data base which may affect his career as a teacher in Texas. He felt that his comments were part of his personal style and reflected the cultural differences between Oregon and Texas. Even at the hearing, Respondent had no awareness that these comments about the students' appearance, when made to female students, were inappropriate.

Applying the factors set forth above, I conclude that a suspension for a period of 90 days followed by a probationary period of one year is warranted. In reaching this conclusion, I particularly note that these instances were part of a continuing pattern and a series of incidents which also included comments made to CC and KK and other female students and that the comments about the students' appearance were likely to recur because they are apparently part of Respondent's personal style in interacting with students. I also note that Respondent's misconduct was open and notorious and had a negative effect on the parents' image of the school. I particularly note Respondent's lack of awareness that his comments were inappropriate when made to female students and that they occurred immediately following a workshop on a sexual harassment and continued despite written complaints and repeated warnings by the school principal. Accordingly, I conclude that the Commission has met its burden in proving that Respondent violated OAR 584-020-0040(4)(f) and that these violations constituted Gross Neglect of Duty under OAR 584-020-0040(4)(n) warranting a 90 day suspension of Respondent's Oregon teaching license and a one year period of probation following the suspension.

PROPOSED ORDER

I propose that the Commission issue the following order: The teaching license of Fred Paul Cunningham is suspended for 90 days for violations of OAR 584-0020-0040(4)(f) and (n) to be followed by one year of probation.

Dated this 7th day of August 2002 at Salem, Oregon.


Ella D. Johnson, Administrative Law Judge
Hearing Officer Panel

EXCEPTIONS

The proposed order is the hearing officer'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
465 Commercial Street, NE
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 Commission in making a final determination. If oral argument is allowed, the Commission will inform you of the time and place for presenting oral argument.

CERTIFICATE OF SERVICE

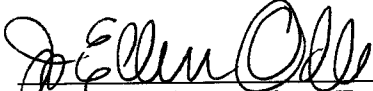
**RE: In the Matter of the Teaching License of:
John Paul Cunningham
For the Teacher Standards and Practices Committee
Hearing Officer Panel Case No.: 20013996**

I HEREBY CERTIFY that I have made service of copies of the foregoing **CORRECTED PROPOSED ORDER** upon the following parties by causing to be mailed in the United States Post Office at Salem, Oregon, on the 7th day of August, 2002, a certified true, exact and full copy thereof, enclosed in an envelope with postage thereon prepaid, addressed to:

VIA FIRST CLASS MAIL:

Fred Cunningham
203 Hillcrest Lane Apt A
Liberty Hill, TX 78642

Joe Gordon McKeever
Department of Justice
1162 Court Street NE
Salem OR 97301-4096



Ellen Odle, Hearings Technician
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