

**BEFORE THE
TEACHER STANDARDS AND PRACTICES COMMISSION
STATE OF OREGON**

IN THE MATTER OF:

TIM ALLEN STONE

) **FINAL ORDER INCORPORATING**
) **AMENDED PROPOSED ORDER**
)
) OAH Case No.: 1102597

This matter came before the Teacher Standards and Practices Commission during its public meeting on February 8, 2013. The Commission has considered the Amended Proposed Order along with written arguments and exceptions filed by Licensee on January 11, 2013.

The Commission does not find Licensee's exceptions persuasive, and hereby adopts the attached Amended Proposed Order as the Final Order.

Now therefore, a Public Reprimand is imposed upon the licensure of Tim Allen Stone.

It is so ordered this 14th day of February 2013.



Victoria Chamberlain, Executive Director,
Teacher Standards and Practices Commission

NOTICE: You are entitled to judicial review of this order. Judicial review may be obtained by filing a petition for review within 60 days of the service of this order. Judicial review is pursuant to the provision of ORS 183.482 to the Oregon Court of Appeals.

**BEFORE THE
TEACHER STANDARDS AND PRACTICES COMMISSION**

IN THE MATTER OF:

TIM STONE

) **AMENDED PROPOSED ORDER**
)
) OAH Case No. 1102597

HISTORY OF THE CASE

This matter came before the Commission during its regularly scheduled meeting of July 19, 2012. After considering the matter, the Commission adopts the Finding of Fact but rejects the ALJ's Conclusions of Law and Opinion. The Commission has also made additional Findings of Fact based on the evidence in the record as explained below.

On April 5, 2011, the Teacher Standards and Practices Commission (Commission) issued a Notice of Opportunity for Hearing (Notice) to Tim Stone (Respondent). On April 12, 2011, Respondent requested a hearing.

On November 25, 2011, the Commission referred the hearing request to the Office of Administrative Hearings (OAH). Administrative Law Judge (ALJ) Rick Barber was assigned to preside at hearing. A prehearing conference was held on February 1, 2012, and the hearing was set for May 10, 2012.

The hearing was held as scheduled on May 10, 2012, in Salem, Oregon. Respondent appeared, representing himself, and testified. The Commission was represented by Assistant Attorney General Raul Ramirez. Jeff VanLaanen, the Commission's Legal Liaison, also attended the hearing. The following witnesses testified: Respondent, Lisa Hilstad, Geraldine (Jeri) Rector, Robert Dais, and VanLaanen. The record closed on May 10, 2012.

ISSUES

1. Whether Respondent committed gross neglect of duty in three conversations involving his peers.
2. Whether, if he did commit gross neglect of duty, Respondent should be reprimanded by the Commission.

EVIDENTIARY RULINGS

Exhibits A1 through A11, offered by the Commission, and L1 and L2, offered by Respondent, were admitted into evidence. All were admitted without objection, except for Exhibit A11, a signed but unauthenticated statement from the complainant. Respondent's

objection to the admissibility of that document was overruled, and the weight to be given to the document is addressed below.

Procedural documents P1 through P7 were also identified for the record, and are included in the documentary record, but not the evidentiary record.

FINDINGS OF FACT

1. Respondent previously held a Transitional School Counselor License with the Commission. It expired on April 23, 2011. (Ex. A1). During the 2009-2010 school year, Respondent worked as an Instructional Assistant (IA) in a High Needs class at Hood River High School. His licensure was not necessary for that position. The teacher in the class was Becky Franks, and the other IAs besides Respondent were: Holly, Lisa Hilstad, Jeri Rector, and Lorana. (Test. of Respondent).

2. During one week in November 2009, a substitute named LF worked as an IA in the classroom along with Respondent, Lisa and Jeri. That was the only time she worked in the class. (Test. of Hilstad, Rector, Respondent).

3. Geraldine (Jeri) Rector was an instructional assistant with the Hood River School District until her retirement in 2010. In 2009 she was assigned to the High Needs class of the Hood River High School. One day in November 2009, the IAs were escorting the classroom to PE class at the other end of the building. As they approached the PE area, Lisa Hilstad made a comment that they had forgotten the medicine balls, motioning with her hands. As Ms. Hilstad turned around to go get the medicine balls, Mr. Stone made a comment comparing the balls to 'boobs'. Ms. Rector felt this was a crude and inappropriate comment. (Test. of Rector).

4. After the incident above, the classroom was boarding a bus for a field trip. As they did so Ms. Rector, Ms. Franger and Mr. Stone were getting into a separate van. As they were seating, Mr. Stone made a comment about "this is the make-out seat". Ms. Franger then made a comment about moving seats. After Ms. Franger made a comment about moving, Mr. Stone made another statement but Ms. Rector did not remember what it was. When Mr. Stone made a comment about the make-out seat, he was sitting right next to Ms. Franger. (Test. of Rector)

5 In 2009 Lisa Hilstad was also an instructional assistant in the High Needs Class of the Hood River High School. One day in November 2009, the classroom was waiting for the Adaptive PE instructor to arrive. As they waited she and Ms. Rector were trying to figure out if they had forgotten the medicine balls or were supposed to bring them. During this discussion she motioned with her hands to symbolize the medicine balls. Mr. Stone chuckled and made some comments that made her feel uncomfortable. She did not recall the specific comment by Mr. Stone, but does recall that she and the other IAs felt uncomfortable because the comment was possibly a sexual innuendo. (Test. of Hilstad).¹

¹ The Commission has added Findings of Fact 3, 4, and 5. The Findings of Fact are based on evidence in the hearing record.

6. On November 18, 2009, LF wrote an email to Todd McCaulley, one of the administrators at the high school. It stated in part:

Hello Todd:

This is [LF]. I worked as a sub IA on Monday, Tuesday, Thursday and Friday of last week in the High Needs Department. For the most part, my experience at the school and with the department was positive, however, there were multiple times throughout the week when Tim Stone said things which made me feel very uncomfortable. As you may know, I went to the district office today, because I wasn't sure how to properly go about reporting the incidents.

* * * * *

I would like to state that I have not been physically or emotionally harmed by what was said. Rather, the situations were extremely uncomfortable and unprofessional. I hope my reporting this will prevent any incidences, with staff or students, from happening in the future.

* * * * *

Incident #1 – 11/9 or 11/10 (sorry, I didn't write this down earlier, so I am a bit fuzzy on the days)

[Jeri], Lisa, Tim and I were standing in the hall waiting for Mr. B to come and begin PE class. The kids were sitting around under the stairs and by the windows but were not in our circle of conversation. We were chatting and Lisa remembered that Mr. B had asked us to bring some medicine balls for PE. As she asked us, "Did we remember to bring the balls?" she moved her hands palms up and arms at a 90 degree angle in a motion that is normal when asking a question. Tim repeated her question, laughing more and exaggerated the motion with his hands and said, "Why did you do it like that? It looks the balls are boobs."

From what I could tell, the three of us ladies- [Jeri], Lisa and I- did not relate Lisa's questioning motions with breasts in any way. We shrugged off Tim's comment and continued with our conversation.

Incident #2- 11/10 or 11/12

We were at the school, about to head to the Old Columbia Gorge Highway for PE. All the kids were in one van, with Lisa as the driver and all the IAs were in another. All the seats in the IA van were taken except the back seat, in which Tim was already sitting. I got in the back seat and Tim said, "This is the make-out seat." I said, "I guess I'll have to move then." He said, "It's okay, we don't have to do anything."

Incident #3- 11/13

We were at the school, about to go to the pool for PE. All the kids were in the one van, with Lisa driving while Jerry would be driving her car with Tim, Mr. B and I as passengers. [Jeri] was in the drivers seat, and Mr. B. was in the back seat, behind her. Tim asked me, "Where do you want to sit?" I said, "I don't care. The front or back is okay." He said, "Go ahead and take the front." I said, "Okay, twist my arm." He said, kind of under his breath but loud enough for me to hear, "No, but I'll pull your hair."

(Ex. A3). On November 24, 2009, Director of Human Resources Robert Dais sent a letter to Respondent, advising him of the complaint against him and setting a December 1 meeting to interview him. (Ex. A4).

7. After the investigation, Dais issued a Letter of Reprimand to Respondent which stated in part:

* * * * *

Findings:

1. **Incident #1** – Yourself, two IAs, and LF were standing in the hall waiting for the teacher to start class. As you were talking, LF remembered the teacher had asked the staff to bring medicine balls for PE. An IA asked the question, "Did we remember to bring the balls?" *she moved her hands palms up and arms at a 90 degree angle in a motion that is normal when asking a question.* You repeated her question, laughing and in a more exaggerated motion with your hands said, "Why did you do it like that? It looks the balls are boobs."

2. **Incident #2** – You, students, and special education staff were on the way to the Columbia Gorge Highway for a field trip. As you were sitting in the van waiting for staff to load, you made the comment to LF as she entered, "This is the make-out seat." LF responded, "I guess I'll have to move then." You then stated, "It's okay, we don't have to do anything."

3. **Incident #3** – As you were loading into the van to go to the swimming pool, you asked LF "Where do you want to sit?" LF responded, "I don't care. The front or the back is okay." You respond[ed] and said, "Go ahead and take the front." LF responded, "Okay, twist my arm." You then made the comment, in a voice loud enough for LF to hear, "No, but I'll pull your hair."

* * * * *

Conclusions

It is my conclusion these comments made to LF are sexual harassment which violates District Policy #6190, which states:

Sexual harassment of students and staff shall include, but is not limited to, unwelcome sexual advances, requests for sexual favors and other verbal, nonverbal or physical conduct of a sexual nature when:

1. The conduct or communication has the purpose or effect of demanding sexual favors in exchange for benefits;
2. Submission to or rejection of the conduct or communication is used as the basis for employment or assignment of staff;
3. The conduct or communication is so severe, persistent or pervasive that it has the purpose or effect of unreasonably interfering with an employee's ability to perform his/her job; or creates an intimidating, offensive or hostile educational or working environment.

Your comments to LF did in fact create an intimidating and offensive/hostile working environment.

(Ex. A6; emphasis in original). Respondent filed a level 1 grievance, which was denied by Mr. Dais. (Test. of Dais). Respondent also filed a level 2 grievance on the reprimand, but the reprimand was upheld by the school district superintendent. (Ex. A9). The district also contacted the Commission to advise that Respondent was being reprimanded, even though Respondent was not working under his license at the time. (Ex. A5).²

8. Lisa Hilstad was asked to provide a written statement about the medicine ball incident. On January 14, 2010, she wrote:

Regarding incident number 1 involving LF, Jeri Rector, Tim Stone and myself, we were waiting with our students for Mr. Buttacio to arrive for PE in the lower F floor. Jeri and I remembered we had forgotten the weighted therapy balls for PE. Jeri and I mentioned to each other, while I made a gesture symbolizing the weighted balls, that we had forgotten them. During this interaction Tim did chuckle and I don't remember the exact wording that followed regarding the gesture. Be adults and women we, even though we did feel uncomfortable about the interaction, Jeri, LF and I brushed the comments off and proceeded with the rest of our afternoon.

(Ex. A7).

9. On January 15, 2010, Jeri Rector also gave a written statement. She wrote:

In November (exact date?) of 2009 the class in D13 was heading to PE. The kids were grouped in the nook under the stairs in F Hall, the IAs ([LF], Tim, I – Lisa

² This Finding of Fact was supplemented to clarify that there was Level 1 and a Level 2 grievance filed by Respondent. The additional clarification is from testimony of Robert Dais in the hearing record.

was just coming into the group) were at the trophy case just before going into F Hall (To my knowledge, Pete was not present at that time). I realize we didn't have the weighted balls from the room that Pete had asked us to bring. As I'm talking and looking at Tim, I raise my hands in gesture as if I'm virtually holding the two balls and ask, "Did we get the balls for PE?" Tim Stone makes a comment about "boobs for balls" (don't remember the exact but those two words were used.) We ignored his comment in disgust, passed it off, about that time I turned around saw Lisa coming closer to the group, rolling her eyes (I didn't know if she rolled her eyes at his comment or the fact we forgot the balls). She turns around and goes back to the room.

(Ex. L2).

10. When the IAs would take students on outings, Hilstad would generally drive the vehicle with the students, either a small bus or a van. The other IAs would travel in a separate van. Rector and another IA named Holly were good friends. If Holly would sit in the front seat, Rector would sit behind her and jokingly pull her hair. (Test. of Rector). Respondent observed this happen on the trips. (Test. of Respondent).

CONCLUSIONS OF LAW

1. Respondent committed gross neglect of duty in three conversations involving his peers.
2. Respondent should be reprimanded by the Commission.

OPINION

The Commission contends that Licensee committed gross neglect of duty, and it has the burden to present evidence to prove its claim. ORS 183.450(2). It must prove its case 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. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987).

The Commission alleges that Licensee committed gross neglect of duty in three statements made to LF and others. ORS 342.175, states in part:

Grounds for discipline; reinstatement. (1) The Teacher Standards and Practices Commission may suspend or revoke the license or registration of a teacher or administrator, discipline a teacher or administrator or suspend or revoke the right of any person to apply for a license or registration if the licensee, registrant or applicant has held a license or registration at any time within five years prior to issuance of the notice of charges under ORS 342.176 based on the following:

* * * * *

(b) Gross neglect of duty[.]

The Commission also relies upon the administrative rule, which states in part:

Grounds for Disciplinary Action

* * * * *

(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:

* * * * *

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

OAR 584-020-0040 (emphasis added). In addition, the Commission's notice incorporates by reference other rules in its allegations against Licensee. Each allegation is addressed below.

Jurisdictional Question. The ALJ raised a question about the Commission's jurisdiction in the case based on the fact that Licensee was working as an IA when the conduct occurred, as opposed to working as a teacher. The Commission agrees with this conclusion but disagrees with the ALJ that the issue 'is by no means clear'. A licensee is subject to Commission action provided that there is a nexus between the alleged conduct and the licensee's professional duties. *TSPC v. Bergerson*, 342 Or 301 (2007). In this case there was a clear nexus between Licensee's conduct and his professional duties. Licensee was working in a school and his conduct involved his interactions with colleagues and students. All the alleged conduct occurred while Licensee carried on his assigned responsibilities during school activities.

Written Statement of LF. At the hearing, the Commission offered Exhibit A11, a document authored by LF, the complainant in the case. The ALJ admitted the exhibit but concluded it had little weight under *Reguero v. Teacher Standards and Practices*, 312 Or 402, 418 (1991). The Commission disagrees with the ALJ's analysis of the exhibit with respect to *Reguero*, but the Commission finds that Exhibit A11 is not necessary to render its decision in this matter.

The Commission alleged three distinct acts by Respondent. The Commission rejects the ALJ's conclusion that the Commission's case was based solely on a pattern of conduct, making a violation dependent on the Commission establishing all the incidents together. The Commission's Notice of Opportunity for Hearing outlines the three distinct statements that Respondent is alleged to have made, but it does not call this a 'pattern'. The statements are alleged to violate the same rules because they *are* of a similar nature.

Incident #1. In the first incident, LF accused Respondent of making a comment to Lisa Hilstad, another IA, when she raised her arms, palms up, in questioning fashion, wondering whether they were supposed to bring balls to the gym. Respondent was accused of saying to Hilstand, "Why did you do it like that? It looks the balls are boobs." (Ex. A3). Respondent does not recall making the comment, stating he would not use the word "boobs" in that fashion.

There is substantial evidence in the record to establish that Respondent used the word 'boobs' in making a comparison to the medicine balls that the IAs had forgotten to bring. Aside from LF's initial statement to Mr. McCauley (Ex A3), Ms. Rector testified credibly that Respondent made a statement comparing the medicine balls to 'boobs'. Ms. Hilstad also testified credibly that while she did not remember the exact words used by Respondent, his statement was inappropriate and possibly a sexual innuendo.

Respondent denied saying the word 'boobs' at all but his testimony is not credible. At the hearing Respondent denied saying the word 'boobs' during this incident. He testified that he did not remember what he said but explained that it was possible he used the word 'tubes' instead. Respondent had never claimed that he had uttered the word 'tubes' instead of 'boobs' during the district investigation or the investigative interview conducted by Commission investigator Paul Cimino (Ex A10). Respondent's changed explanation makes his testimony on this issue unreliable and the Commission therefore does not rely on it.

The Commission also rejects the ALJ's reasoning that the evidence from LF, Hilstad and Rector were inconsistent. Hilstad did not remember the exact words by Respondent but remembered it was inappropriate. But LF's written statement to the district; Rector's testimony at hearing as well as Rector's written statement to district (Ex L2) are consistent that Respondent made comment comparing the medicine balls to 'boobs'. Rector and Hilstad had slightly different recollections of whether Rector or Hilstad referenced the medicine balls, but they both agreed that was something that they had discussed forgetting. The differences in how the event was recalled by Rector, LF and Hilstad do not show inconsistencies in what Respondent is alleged to have said or whether it was inappropriate, but rather reflect honest disclosures that they don't recall a verbatim transcript of the conversation.

The Commission also rejects the ALJ's reasoning that Respondent did not utter the word 'boobs' because neither Rector nor Hilstad remember him saying that word prior to this incident. Once again, both Rector and Hilstad were honest in their testimony, but the fact that Respondent may not have used the word before has little probative value on whether he uttered it on this occasion.

Respondent's statement comparing the medicine balls to 'boobs' in the presence of the female IAs was not appropriate in the workplace, particularly given the fact that LF was new and was potentially more sensitive to these types of statements. Respondent's statement demonstrated that he failed to use professional judgment, and failed to recognize the worth and dignity of LF and the other IAs.

Based on the foregoing, the Commission finds that Respondent engaged in gross neglect of duty in violation of OAR 584-020-0040(4)(n) as it incorporates OAR 584-020-0010(1); OAR

584-020-0010(5); and OAR 584-020-0030(2)(b).

Incident #2. Respondent is accused of telling LF that the rear seat in the vehicle was the “make-out” seat, but she did not have to do anything in response to LF’s response that she would move. The Commission rejects the ALJ’s reasoning that this was not established and finds that Respondent did make the statements alleged. Aside from LF and Respondent, Rector was the only other person in the van. Rector testified credibly that she overheard respondent making a statement saying words to the effect that ‘this is the make-out seat’ when LF was sitting right next to him. Rector also testified that she heard LF respond by saying that she was moving. While respondent denies this allegation, the Commission finds his testimony not credible because of prior inconsistencies discussed above. Respondent brought up no reason (and the Commission does not find any) why Rector would testify to matters other than the truth.

The Commission does not agree with the ALJ’s explanation that Rector’s and LF’s explanations are inconsistent because there is a difference on what the ALJ perceived was ‘the make-out seat’. The specific seat in which the conversation took place is not at issue, and is not a material fact that tends to cast doubt on the credibility of Rector. The important facts are that Rector overheard the conversation clearly, corroborating LF’s written statement.

In this instance, Respondent’s statement about the make-out seat clearly took a sexual connotation directed at LF. The statements from respondent were inappropriate in a work place. Respondent’s conduct showed a complete lapse in judgment and disregard for LF’s dignity.

Based on the foregoing, the Commission finds that Respondent engaged in gross neglect of duty in violation of OAR 584-020-0040(4)(n) as it incorporates OAR 584-020-0010(1); OAR 584-020-0010(5); and OAR 584-020-0030(2)(b).

Incident #3. Finally, Respondent is accused of making the comment that he would pull LF’s hair. The Commission reasoned that there was little dispute that the comment was made by respondent but dismissed it because he reasoned that the statement was ‘innocent’ and that it LF misinterpreted it as sexual innuendo. The Commission rejects the ALJ’s reasoning as explained below.

The statement about pulling LF’s hair was made after two prior incidents where Respondent made inappropriate remarks in front of the female IAs. The statement had made the IAs feel uncomfortable. The ALJ reasoned that the statement was innocently made and that LF had misinterpreted it as sexual innuendo. The Commission will not speculate on whether LF misinterpreted this statement. What is important to consider is whether the statement was made, and whether the statement violated Respondent’s professional duties.

In the instant case, LF was new to working in this particular classroom environment. Respondent failed to recognize that a statement could potentially have sexual connotations and be interpreted in that manner. Mr. Dais explained that a statement of this nature in the work setting could be interpreted as a threat or harassment, but that coupled with the prior statements took on a flirtatious tone. LF was new to the classroom having been a substitute IA for less than a week. Given these facts, Respondent failed to use professional judgment in communicating

with his colleagues. In making a statement about pulling LF's hair, Respondent was also disrespectful and failed to recognize the worth and dignity of LF.

For these reasons, the Commission concludes that Respondent engaged in gross neglect of duty in violation of OAR 584-020-0040(4)(n) as it incorporates OAR 584-020-0010(1); OAR 584-020-0010(5); and OAR 584-020-0030(2)(b).

FINAL ORDER

Based on the foregoing, Respondent is hereby publicly reprimanded.

IT IS SO ORDERED THIS 20th day of December, 2012.

TEACHER STANDARDS AND PRACTICES COMMISSION

By 
Victoria Chamberlain, Executive Director

EXCEPTIONS

The amended proposed order is the Commission's proposed final order in this matter. If you disagree with any part of this amended 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 amended proposed order** with the:

Teacher Standards and Practices Commission
250 Division Street NE
Salem OR 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.